



## COMITE MARITIME INTERNATIONAL

### *CMI Meeting Notes for the 55<sup>th</sup> Commission Session on the Draft Convention on the International Effects of Judicial Sales of Ships*

*New York 27<sup>th</sup> June 2022*

3<sup>rd</sup> May 2022

#### *Scope*

On the 1<sup>st</sup> April 2022, the CMI received a communication from Mme Anna Joubin-Bret Secretary to the United Nations Commission on International Trade Law announcing that at its 40<sup>th</sup> Session, Working Group VI on Judicial Sale of Ships had prepared a Draft Convention on the International Effects of Judicial Sales of Ships and asked the Secretariat to revise the draft convention to reflect its deliberations and circulate the revised draft to all Governments and relevant international organisations for comment before consideration and possible approval of the draft by the Commission at its upcoming fifty fifth session. The same communication invited the recipients to submit comments on the draft which was circulated bearing identification number *A/CN.9/1108*.

The CMI IWG on Judicial Sales has considered the Draft Convention as well as the Report of Working Group VI on the work of its fortieth session in New York between the 7<sup>th</sup> and the 11<sup>th</sup> of February circulated by document number *A/CN.09/1095* to which the Draft Convention Document *A/CN.9/1108* refers.

As it had done following the publication of the First, Second, Third, Fourth and Fifth Revision of the Beijing Draft, the CMI IWG has considered that it could be of benefit to annotate and share some considerations through these meeting notes in preparation for the 55th Session of Commission on the 27<sup>th</sup> June 2022.

## Introduction

The CMI would at the outset like to express its profound gratitude to the Secretariat of UNCITRAL for having yet again, captured the deliberations that took place during the fortieth meeting of Working Group VI, so efficiently and effectively and in such a well structured manner resulting in the Draft Convention on the International Effects of Judicial Sales of Ships now before us. The CMI would also like to thank the Chair of Working Group VI, Prof. Dr. Beate Czerwenka, who chaired all of the 7 working sessions of Working Group VI including the 40<sup>th</sup> session in such an efficient manner that she was instrumental in enabling the Working Group to conclude its deliberations of the sixth revision of the Beijing Draft, resulting in a comprehensive deliberation and finalisation of the entire document.

However and in addition to the above, the CMI would also like to express its satisfaction at the fact that within circa 5 years from when the CMI first approached UNCITRAL with the *Beijing Draft*, we are today able to witness a very important milestone being the presentation of the Draft Convention on the International Effects of Judicial Sales of Ships for the deliberation and approval of the Commission.

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It is worth recalling that the CMI first started to work on a draft convention on Judicial sales in 2008. Under the Chairmanship of Prof. Henry Li, the members of the CMI International Working Group worked hard and deliberated at length with the draft being amended, refined and modified several times until it was presented to the CMI conference in Beijing in 2012, hence the name, to be finally approved by the General Assembly of the CMI in Hamburg in 2014. From then on the CMI worked to find the Draft Convention a home.

It was in preparation for the fiftieth session of the Commission in Vienna in July 2017, that the CMI submitted the Draft Convention with a proposal for possible future work on cross-border issues related to the judicial sale of ships. The CMI explained the difficulties which existed when the clean title obtained by a buyer in a judicial sale was not given proper effect in other jurisdictions, the dangers of further arrests for old debts, the uncertainties faced by registrars of ships and subsequent mortgagees, the cost and delays caused to international trade and the adverse effect on ship values (essential to seek to pay out creditors from the sale of the ship) created by such uncertainties. All of this poses the threat of a breakdown in the chain of international trade.

It was suggested by UNCITRAL to the CMI that it might seek to develop and advance the proposal by holding a Colloquium with the maritime industry to discuss the need for, as well as the content of the Beijing Draft. A Colloquium was indeed organised in Malta on the 27<sup>th</sup> February 2018 by the CMI and the Malta Maritime Law Association with the support of the Maltese government.

The Malta Colloquium was attended by over 180 delegates from over 50 countries representing banks and financiers, ship owners, ship repairers, crew, providers of provisions and bunkers, harbour authorities, flag registries, ITF, members of the Judiciary from various jurisdictions who deal with judicial sales, BIMCO, FONASBA and maritime lawyers who have had to deal with the very serious challenges presented by the economic consequences and the legal uncertainties caused when judicial sales of ships sold free and unencumbered are not given their full effect. There is a fear that uncertainties in this respect would depress expectations and values in foreclosure actions, having an adverse impact on ship lenders' willingness to lend, buyers' willingness to bid at auction and distributions to all recognized claimants following judicial sale. There was also an overwhelming case made by each and every one of these groups representing the different stakeholders of the maritime industry, encouraging the creation of an international instrument which would once and for all regulate this area and inject a degree of stability and certainty.

Broad consensus emerged from the Colloquium in support of an international instrument to remedy the problems arising from the lack of harmony among states in giving full effect to the free and unencumbered title acquired by purchasers of vessels in judicial sales held in other jurisdictions and that the work done by the CMI provided a useful starting point to further UNCITRAL work.

A full report of the Malta Colloquium followed and it was the Government of Switzerland who in March 2018 presented to UNCITRAL a proposal on *"Possible future work on cross-border issues related to judicial sale of ships,"* which included the outcome and conclusions of the Colloquium and requested UNCITRAL to undertake work to develop an international instrument on the effect of foreign judicial sale of ships.

The proposal of the Swiss Government represented by Prof. Alex von Ziegler and supported by CMI represented by the then President of CMI Stuart Hetherington and Ann Fenech, was one of a number of proposals presented to the fiftieth session of the Commission. Only 3 projects were accepted and the project on Judicial Sales – the Beijing Draft was one of them.

The project was given to Working Group VI and Working Group VI first met to discuss the Beijing Draft at its thirty fifth session in New York in May 2019.

Since May 2019 there have been 6 sessions leading to 6 revisions of the Beijing Draft and the CMI has worked tirelessly in advance of each and every session by reaching out to national maritime law associations, other NGO's and by preparing the CMI Notes ahead of each session in the hope that the Notes could assist delegations in focusing on certain issues which needed attention. It is also noteworthy that whilst a number of seasoned and experienced professionals had expressed the view that it would take several years before the Working Group would be in a position to finalise a Draft ready for deliberation by the Commission, in fact Working Group VI



has succeeded in reaching this stage over a short period of 3 years and this notwithstanding the fact that the Covid 19 Pandemic effectively stopped physical meetings for close to 2 years.

The CMI comprehends only too well the challenges faced by the Secretariat and the Chair, of communicating with delegations in the virtual format adopted in the last 4 sessions, particularly in the context of delegations coming from very different time zones. Indeed the work and efforts which have gone into this important work have been executed against the limitations presented by the pandemic and it is remarkable how notwithstanding the challenging circumstances such advances have been made with every meeting and have brought us to this important stage today.

Having considered the Draft Convention on the International Effects of Judicial Sales of Ships now before us as finally settled in New York in February 2022, the CMI can confirm that it is most satisfied with the Draft as it exists; the Draft meets all the objectives of the entire project which was and remains to ensure that:

- (a) when a purchaser of a ship in a validly held judicial sale,
- (b) held in accordance with the domestic law,
- (c) in full observance of the notification provisions of the convention,
- (d) for which a Certificate of judicial sale is issued confirming that the vessel was sold free and unencumbered,

such a sale is given its full effects by each State Party with the only exception being if giving effect to such a sale is manifestly contrary to the public policy of the State Party.

The CMI is convinced that the text of the Draft Convention, subject the following few minor suggestions provides the legal certainty that the CMI has sought to attain and the industry supported at the Malta Colloquium.

The CMI is of the firm opinion that the Secretariat has, following the deliberations during the 40<sup>th</sup> session, presented us with a final version which subject to a very few suggestions which do not affect the substance at all, should be presented to the Commission with no further amendments as to the substance of the text. The CMI is confirmed of this view particularly given the extent of the very extensive debates exchanged by all the delegations actively taking part in the sessions since May 2019 resulting in the very Draft before us being the fruit of these debates which came to a conclusion during the 40<sup>th</sup> session.

### *Suggestions of the CMI*

#### *A. Preamble*

As the delegates to the 40<sup>th</sup> session will recall, the entire draft was discussed and deliberated except for the Preamble. The narrative of the Preamble needed to be fine-tuned in line with the draft Convention as agreed and the Secretariat was requested to amend the existing Preamble for this purpose. As a result, and unlike the extensive debate on each article of the Draft Convention, there was no discussion of each and every paragraph in the Preamble.

The CMI has considered the Preamble as amended by the Secretariat and agrees with its content. There are just three recommendations which the CMI would like to make to assist in avoiding any misunderstanding and these are the followings:

Third paragraph third line.

1. It is being suggested that the words “secure and” are inserted between the words “to” and “enforce”. The CMI believes the insertion of the words “secure and” may well reflect the practice in a number of jurisdictions that judicial sales of ships also serve to secure (or conserve) claims against ships and/or shipowners.
2. It is also being suggested that the word “maritime” is removed and that the words “against ships and / or shipowners” are added at the end of the line. The CMI feels that these amendments are required to ensure that as has been expressed during the debates, State Parties whose law allows the sales of ships for claims other than maritime claims (such as a number of civil law countries) would not be confused by the wording in the Preamble.
3. It is also being suggested that the word “a” is inserted before the word “means” in line 4.

Thus CMI is suggesting that this third paragraph reads as follows:

*“Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used both in seagoing and inland navigation, as well as the function of judicial sales as a means to secure and enforce claims against ships and/or shipowners”*

Fifth paragraph fourth line.

4. In view of the fact that the word “charge” is defined and the definition includes “lien” but excludes “mortgages or hypothèques”, it is being suggested that the words “lien and” be deleted and the words “and mortgages or hypothèques” be inserted after the word “charge”.

The CMI is suggesting that the fifth paragraph reads as follows:

*“Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective sales to interested parties and give international effects to judicial sales of ships sold free and unencumbered of pre-existing charges and mortgages or hypothèques, as well as for ship registration purposes”*

**B. Text of the convention**

1. Article 3 para 1 (a). It is suggested that the word “was” be substituted by the word “is”.
2. Article 3 para 1 (b). It is suggested that the word “was” be substituted by the word “is”.
3. Article 4 para 3 (a). It is suggested that the word “register” be substituted by the word “registry” .
4. Article 7 para 5. It is being suggested that the word “in” in the first line be substituted by the word “of”. And, it is being further suggested that the words “of the” be inserted between the words “...registrar of” and “...other competent authority” in the first line.

Thus para. 5 would read: *“Paragraphs 1 and 2 do not apply if a court of the State of the registrar or of the other competent authority determines under article 10 that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.”*

**C. Square brackets**

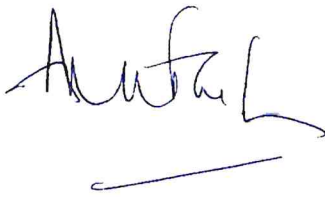
1. Article 17 para. 1. The CMI assumes that this is something that will be considered at the Commission session.
2. Article 19 para. 1. Subject to the debate during the meeting the CMI would agree to the removal of the square brackets.
3. Article 20. Subject to the debate during the meeting the CMI is in favour of removing all square brackets.
4. Article 21. With regard to the choice between months and days, this is a matter on which the Secretariat’s advice as to the usual terminology in such matters would be helpful.
5. Article 22 para. 1 and para. 2 . With regard to the choice between months and days, this is a matter on which the Secretariat’s advice as to the usual terminology in such matters would be helpful.



6. Article 22 para. 1 and para. 2. The CMI is in favour of removing the square brackets around the other wording.
7. Article 23. With regard to the choice between months and days, this is a matter on which the Secretariat's advice as to the usual terminology in such matters would be helpful.

### Conclusion

*In view of the fact that this document has been discussed and debated at great length and given that the Secretariat has generously given all delegations further time to consider the text up until the 6<sup>th</sup> May, the CMI would like to encourage all NMLAs to impress upon their national delegations to ensure that if they have any additional comments to make following this latest draft, that these are sent to the Secretariat in time by 6<sup>th</sup> May. This would assist in focusing the debate during the meeting, avoid digression and would be useful to other delegations who would be able to properly prepare their reactions, if any to the issues raised by the 6<sup>th</sup> May.*

A handwritten signature in blue ink, appearing to read 'Ann Fenech', with a horizontal line underneath.

Ann Fenech  
Co-Chair IWG on Judicial Sales  
CMI Co-Ordinator at Working Group V1 UNCITRAL