



# COMITE MARITIME INTERNATIONAL

## PRESIDENT

### Draft Instrument on the Judicial Sale of Ships

#### **Comité Maritime International (CMI)**

The CMI has been in existence since 1897 when it was formed by a number of far sighted representatives in both government and business who were dedicated to seeking to achieve uniformity in international law in relation to shipping. The object of the CMI, as enunciated in Article 1 of its Constitution, is:

"to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI.

The Consultative Members of the CMI include the Baltic and International Maritime Conference, the International Bar Association, the International Maritime Organization (IMO), the International Chamber of Shipping, the International Group of P&I Clubs, the International Union of Marine Insurance, and many others.

Many of the conventions that govern international shipping today had their origins in work done by the CMI on such topics as collisions, salvage, arrest, limitation of liability, and many others, but perhaps best known is in the area of liability where its work on the Hague Rules stood the test of time from 1923 to the late 1970s when the Hamburg Rules were prepared under the auspices of UNCTAD. Most recently it drafted for UNCITRAL what has become known as the Rotterdam Rules, which still await international ratification. The CMI is also the custodian of the York Antwerp Rules which govern the law relating to General Average.

#### **Background to the Judicial Sales project**

Following on a paper given by Professor Henry Li of China in 2007 which drew attention to problems arising around the world from the failure to give recognition to judgments in other

jurisdictions when ordering the sale of ships, the Executive Council of the CMI proposed that a working group conduct a preliminary study of the issues in relation to the Judicial Sale of Ships. That study drew to light a number of judicial pronouncements from various jurisdictions that highlighted difficulties that parties had experienced in having a foreign judicial sale of a ship recognised by another court. In one Canadian decision the court went so far as to say that the matter could only be repaired by an international instrument regulating the judicial sale of ships and their enforcement. The work of the group resulted in the draft Instrument, which is attached to this paper, being finalised and approved at the Assembly meeting of the CMI in Hamburg in 2014. It is often referred to as the "Beijing Draft", as it was at the Beijing Conference in 2012 that the great majority of the work leading to the finalisation of this draft was accomplished.

### **Recent Events**

Representatives of the CMI attended the recent meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments of the HCCH, held between 16 and 24 February 2017 at which a presentation was made on behalf of the CMI to suggest that the CMI's draft Instrument on the Judicial Sale of Ships could be accommodated within that work. It was decided, however, by that Commission, not to proceed down that route.

### **The IMO**

The CMI has worked with the IMO Legal Committee in the preparation of a number of international conventions over the years and in particular the IMO was involved in the development of the International Conventions on Maritime Liens and Mortgages, 1993 and the Arrest of Ships, 1999, both of which were the result of work done by the CMI. It was not surprising that an approach was made to the IMO Legal Committee in 2015 to add this work to its agenda.

An initial presentation was made to the IMO Legal Committee in 2015. Two sponsors were required for that work and in the lead up to the IMO Legal Committee meeting in 2016 China and South Korea agreed to sponsor this work.

The draft report of the IMO Legal Committee on the work of its 103rd Session, dated 10 June 2016, (LEG103/WP.1/Add.1) notes that the following views were expressed:

- "While most delegations felt that this was an important subject of interest to the Committee, some argued that the development of a new instrument on the Foreign Judicial Sales of Ships and their Recognition was a matter of private and commercial law and did, therefore, not fall within the remit of the Committee, in particular with a view to Articles 2 and 3 of the IMO Convention;
- It was also argued that the proposed output did not fit within the scope of Strategic Directions 1 and 12.2 and it also did not fall under the proposed High-level Action 1.3.3;

- Others, however, held that IMO's past involvement in similar legislative initiatives was a strong argument that this issue was in fact within the Organisation's scope and that the Legal Committee was the proper forum to discuss this issue further, also with a view to Article 1 of the IMO Convention;
- Many delegations who spoke were of the opinion that, if this issue was pursued at all, it should be done in cooperation with UNCTAD;
- Considering the question as to whether or not there was a compelling need for the development of a relevant instrument, the Legal Committee was divided as to whether the co-sponsors had provided enough evidence in this regard;
- Some delegations highlighted that they accepted foreign judicial sales of ships in their national legislation and that it entailed a lot of benefits, in particular because it provided certainty towards stakeholders;
- It was pointed out that this was also an important issue from the perspective of the port industry, as arrests of vessels can negatively affect the efficient port operations; and
- Some delegations felt that they needed further information as to whether this was, in fact, within the remit of the Organisation, and that further work needed to be done, before discussing this further at the next session."

In the event the IMO Legal Committee did not accept the proposal for the inclusion of this work to develop a new instrument on the Judicial Sales of Ships and their recognition. It was, however, left open for the matter to be raised again at a later date. It should also be noted that an informal approach was made by the Secretariat of the Legal Committee to UNCTAD and the response received was not favourable.

### **Judicial Sale of Ships**

Many legal systems recognize the Judicial sale of ships in another jurisdiction and that where a ship is sold by way of a Judicial sale, all claims that lie against that ship (in particular any maritime liens or mortgages) are extinguished and the purchaser acquires a clean title to the ship that is free of such claims.

However, each legal system has developed its own approach to the administration and conduct of such sales, and, from time to time, problems have been experienced in deleting the ship from its erstwhile register, in registering the ship in a new registry, and in the purchaser having to defend old claims that arose against or in respect of the ship prior to its Judicial sale.

Indeed, some jurisdictions flatly refuse to recognize any Judicial sale unless that sale was made through its own courts. There are numerous cases where such non-recognition has led to

considerable prejudice to the purchaser of a ship on a Judicial sale. Attached to the material produced to the IMO was a summary of a number of legal cases reported from around the world.

The Judicial sale of ships following their arrest is a common occurrence. It sometimes occurs prior to any judgment being obtained against a debtor. The alternative in many cases is for the ship arrested to remain idle until such time as the merits of the claim have been determined. During this time the ship loses value and cannot be utilized in the trade for which it was built and purchased.

It follows that, absent the securing of a claim in some manner or form, the prompt sale of an arrested ship is usually regarded as being the most beneficial outcome for all parties, including the claimants and the shipowners.

But such sales whether pre or post judgment, will only be supported, and proper values for ships fetched, if the prospective purchasers can be confident of receiving the vessel with a clean title, free of any encumbrances and capable of being deleted from its old registry and registered in a new register of the purchaser's choice. Thereafter the purchaser must also be able to trade the ship without it being subject to arrest in respect of any claim arising prior to its Judicial sale.

In the circumstances it was felt that a fairly simple, largely procedural, international instrument addressing the recognition of foreign Judicial sales would fill a gap left open by the International Convention on Maritime Liens and Mortgages, 1993, the International Convention Relating to the Arrest of Sea-Going Ships, 1952 and the International Convention on the Arrest of Ships, 1999.

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