The Malta Colloquium on Recognition of Judicial Sale of Ships: Valletta, 27 February 2018

Background to 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 objects 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 co-operate with other international organisations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI. Some of them are represented at this meeting. The CMI also has Consultative status with the IMO, UNCITRAL and UNCTAD and works together with all those organisations at various times in order to seek to achieve its objects of unifying maritime law around the world. It also has a number of organisations as Consultative members (including IMLI, BIMCO, and FONASBA).

The CMI has been responsible for drafting the following international Conventions which were agreed to at diplomatic conferences in Brussels, or the later versions as a result of a UN body's involvement:

1. Collision: 1910
2. Salvage: 1910, 1989
3. Limitation: 1924, 1927, 1976 and 1996
4. Unification of Certain Rules of Law Relating to Bills of Lading 1924 and Visby Protocol 1968
5. Liens and Mortgages: 1926, 1967
6. Arrest: 1952 and 1999

Coming closer to the present time the CMI drafted the CLC Convention for the IMO and the Rotterdam Rules for UNCITRAL for them to take them to international diplomatic conferences. It is the Custodian of the York Antwerp Rules.

The CMI has an annual Assembly meeting, similar to an AGM, it operates through its Executive Council, equivalent to its Board, and I have the honour to be its President. Ann Fenech and Alexander Von Ziegler who have assisted in organising this Colloquium are members of the Executive Council. Other members of the Executive Council are also present.

The CMI usually responds to problems which the clients of maritime lawyers or other international organisations refer to it as in need of our specialist assistance.

In other cases the CMI has taken the initiative because one or more of our colleagues has identified an issue in international law which it was thought the CMI could improve. One good example is that in relation to Unmanned Ships which is an issue which is only now coming to the attention of the international regulators although the CMI has been working on this issue for a couple of years. Another example is the topic before us today, Judicial Sales.

Judicial Sales

To put it simply for those who are not experienced or indeed have not encountered a Judicial sale scenario, let me just say that the common factual situation, which practitioners will be familiar with, is that a creditor of a shipowner arrests a shipowner's vessel and brings its claim in the jurisdiction in which the vessel is arrested. If a creditor obtains a judgment which is not met by the shipowner it can then ask the court to sell the ship, which it would usually do by way of a public auction process. We will hear more about the processes in the panel sessions.

This issue was first brought to the attention of CMI by Professor Henry Li of the China Maritime Law Association and a member of the Executive Council in 2007. He drew attention to the problems arising around the world from the failure in some jurisdictions to give recognition to judgments in other jurisdictions when the sale of ships had been ordered. In 2014 the International Working Group that was set up concluded its work with a draft Instrument. Since then the CMI has been seeking to persuade an international organisation to take the project on and bring it to an International Convention. We are hopeful that as a result of today's meeting UNCITRAL will agree to put it on its work agenda when it meets in July 2018.

It is a serious problem. Whilst there may not be many examples in any individual country where the system of Judicial sales has not progressed smoothly for the participants the fact is that there are a large number of Judicial sales taking place all around the world and they give rise to legal problems which cause delay, cost and expense to those who have participated in them. Data that was obtained by the CMI's International Working Group indicated that in the four year period between 2010 and 2014 more than 480 ships were sold by way of judicial sale each year in four Asian jurisdictions: the Republic of Korea, China, Singapore and Japan.

Who are the stakeholders in relation to Judicial sales?

1. Where a shipowner who is sued in admiralty and loses the case and cannot afford to pay the claim it is liable to have its ship sold by way of Judicial sale.

2. The financier of a ship, the mortgagee who may instigate the proceedings and the order for sale.

3. Unsecured creditors who may have instigated the proceedings and the order for sale (eg a Port Authority, tug operator, bunker supplier, cargo claimant, providore, stevedore, other ship owners, charterers and crew etc).

4. The Court (Judges).

5. The Flag State of the defaulting shipowner and/or intended Flag State of the purchaser at the Judicial sale.

What do they have in common? The interests of, at least, the first 3 of the above are to achieve the best sale price as possible.

The benefit to financiers of obtaining the Court's sanction of a private sale as a Judicial sale can be seen in the Singapore case of the "*Turtle Bay*" (2013) SGHC 165, where Belinda Ang Saw Ean J declined to make the order sought by the financier to order, in effect, that the private sale was a Judicial sale.

Annexed to this paper are:

(1) Extracts from judgments identifying the essence of Judicial sales.

(2) Case summaries of 12 leading cases around the world on Judicial sales.

(3) An article in Lloyds List Australia by a leading New Zealand academic.

The nature of the problem can be seen with reference to two of those cases and one other.

The "*Sam Dragon*"[1]

This involved a Judicial sale in Belgium. The plaintiff in the proceedings bought the ship at the Judicial sale and sought damages in Ireland against the defendant, the company which had provided a loan facility to the original owner in Korea and held a mortgage over the vessel prior to the sale. The plaintiff's claim related to additional charges and expenses it had incurred in registering its new acquisition in Hong Kong due to the defendant finance company's alleged failure to remove the entry of its mortgage on the prior Ships Register in Korea. The purchaser needed a deletion certificate from the former registry in order to register it in Hong Kong.

[1] "Sam Dragon" (2012) IEHC 240

The first complex question for the Irish court was: which law applied to this dispute? Did the law of Belgium apply to the arrest and sale proceedings there? What law applied to the removal of the entry in Korea? Was it Belgian or Korean? The Irish court held that the answer to the latter question was Korean but that the defendant was not obliged to delete the mortgage from the Korean register before it had received payment from the proceeds of sale and thus the plaintiff failed. We were not told in the judgment what happened thereafter and how long it took for the plaintiff to be able to re-flag its new acquisition. I am aware that many maritime lawyers in many jurisdictions around the world were involved in those proceedings. Obviously Irish lawyers were instructed in Ireland. Lawyers, however, from other jurisdictions including Belgium, Korea, and I suspect, Hong Kong, were retained to give expert evidence. It must have been a costly exercise.

Under Article 5 of the draft Convention which the CMI has prepared it is provided that at the request of the purchaser from a Judicial sale the Competent Authority (for example, the court) shall issue a Certificate (in the form annexed to the draft Instrument) recording the sale to the purchaser when a ship has been sold by way of Judicial sale and the conditions required by the law of the State of the Judicial sale and the instrument, have been complied with. I suggest that that would only happen once all the financial issues have been dealt with, ie payment has been made to secured and unsecured creditors, the priorities having been determined etc). If there has been any delay, as occurred in the Irish case, presumably the purchaser could agitate the court in which the sale has proceeded to have all payments made and the Certificate issued promptly.

Importantly by Article 6 of the draft Convention, on the production of the Certificate to the prior registry it is required to make the deletion.

Accordingly, there should be no justification in the prior registry for any delay in making the deletion once the Certificate has been produced to it.

Before going on to describe the next case to you I note that when the CMI has made approaches to the European Union we have been told that there is no problem in the European Union by reason if its reciprocity regime. With respect, that overlooks the fact that sales take place outside the EU, possibly to EU buyers, and even sales in the EU might not be recognised outside the EU.

The principle that the CMI has sought to uphold in its draft Instrument was enunciated most succinctly by Mr Justice Hewson in the United Kingdom High Court in the "*Acrux*"[2], when he said that the courts must recognise *"proper sales by competent Courts of Admiralty, or prize, abroad - it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"*.

[2] "*The Acrux*" (1962) 1 Lloyds Rep 405

The "*Galaxias*"[3]

This provides another example of the internationalisation of this issue and contains an exhortation by the Canadian judge for an international response to solve the problems that can occur.

The facts in this case were that a Greek ship had been arrested in Canada and a Judicial sale took place in that jurisdiction. The Minister of Merchant Marine in Greece refused to allow the deletion certificate to be issued until the claims of the Greek Seamen's Union had been satisfied.

The Sheriff commenced action against the purchaser in Canada seeking a declaration that the bill of sale conveyed title to the purchaser "free and clear of all encumbrances". The purchaser filed a defence and counter-claim with respect to costs and damages alleging that they were brought about by the failure to convey the ship by the Canadian court free of all encumbrances as it was unregisterable in the Greek registry.

The Court held that the Sheriff was entitled to the declaration and held as follows:

> "The purchaser will take free and clear of all encumbrances according to the laws of Canada and although it is clear that Canadian Courts desire and expect that the Courts and governments of other nations will respect its orders and judgments, particularly in the area of maritime law, this is not an area over which the Federal Court exercises control, nor is it appropriate that it attempt to do so…. I would like to add… that in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This does not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with."

Justice Rouleau then went on to comment on Judicial orders for the sales of ships which did not ensure the passing of "clean" title and he said:

> "However, admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from Court sales of vessels and render some ships completely unsaleable. The legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into court of purchase prices."

Further Judicial commentary can be seen in the *Emre II (1989)*[4] where Sheen J noted that the defendant had alleged that the Turkish authorities would not delete the registration of the ship if it

[3] The "Galaxias" (1988) LMLN No. 240 (p.2)

was sold by the English courts. His Lordship noted that the effect of such lack of comity would be to reduce the value of the ship, and that when the ship is advertised for sale it would have to be made clear to any potential purchaser that there may be some difficulty in having the vessel deleted from the Turkish register.

In another case of the "*Cerro Colorado*" (1993)[5] the same Judge said:

> "I can only express the hope that the Spanish court will, as a matter of comity, recognise the decrees made by this Court, which endeavour to give effect to the International Arrest Convention. From time to time every shipowner wants to borrow money from his bank and give as security a mortgage over his ship. The value of the security would be drastically reduced if when it came to be sold by the Court there was any doubt as to whether a purchaser from the Court would get a title free of encumbrances and debts."

Those statements are at the forefront of the collective mind of the CMI on this issue.

The "Phoenix"[6]

The question before the Court of Appeal of St Vincent and the Grenadines in the West indies was whether the financier BCEN-Eurobank which had entered into a loan with the owner in 1999 had had its registered mortgage in the St Vincent and Grenadine's ships register extinguished by subsequent Judicial sales by the Courts of both North Korea and China, and whether the Registrar had been entitled to deregister the ship as subsequent owners from both of the Judicial sales and private sales were not entitled to have the vessel registered in that jurisdiction.

The finance company was unsuccessful at both first instance and on appeal. Whilst the Court recognised the legal principles attributable to Judicial sales the sad history of what happened to this ship between 2003 and 2014 when the case concluded, provides further evidence of the need for international recognition of Judicial Sales and for uniform procedures to be introduced internationally so registrations can be deleted with less difficulty once a Judicial sale has taken place.

In conclusion can I mention, briefly, a case in my own jurisdiction.

F.V. "Pelamis No. 68"[7]

The vessel *F.V. "Pelamis No. 68"* was sold at a Judicial sale in Singapore to an Australian buyer. The sale took place on 22 September 2014 and the Australian buyer has still not been able to re-flag the fishing vessel in Australia. That is because section 17 of Australia's Shipping Registration Act 1981 contains the following:

---

[4] *The Emre II* (1989) 2 Lloyds Rep 182 at p.185

[5] "*Cerro Colorado*" (1993) 1 Lloyds Rep 58 at p.61

[6] (2014) 1 Lloyds Rep 449

[7] Federal Court of Australia No. NSD379/2017

"**No multiple registrations**

1. The Registrar must not:

(a) register a ship in the General Register if it is registered:

(i) in the International Register; or

(ii) under a law of a foreign country"

Since the commencement of the Australian proceedings in March 2017 the unfortunate Australian buyer has been seeking to have it deleted from the Taiwanese flag, apparently without any success.

The CMI draft Convention has sought to eliminate the likelihood of such difficulties by the provisions of Articles 5 and 6, to which I have referred.

Conclusion

I hope by outlining the circumstances of just four cases which have taken place in the last five years I have highlighted some of the problems that can occur as a result of Judicial sales. I should say that when the most recent case to which I have referred in Australia took place it caused our Admiralty judges to express horror to think that sales which they might order might cause similar problems to be visited on the purchaser. For that reason they organised a seminar in the Court to look at the whole area of Judicial sales last year and I have personally been the recipient of warm support from Judges in Australia for the work that the CMI has done. Sadly I have not received the same degree of support from those responsible for Australia's treaties who do not seem to understand the adverse repercussions that can occur (and to which Judges such as Rouleau J and Sheen J of the Canadian and English Courts have referred, and which I have quoted above).

I cannot emphasise sufficiently that the system of Judicial sales can only succeed and continue to work if purchasers and their financiers are confident that in acquiring vessels from Judicial sales the slate is wiped clean, they can reflag the vessel if they wish and they can trade the vessel without fear of having the debts of the prior owner revisited on it. Creditors, whether they are secured or unsecured (other shipowners, crew, port authorities, providores, agents, brokers, stevedores etc) will receive less from Judicial sales if confidence in the system disappears.

Stuart Hetherington
Valletta, Malta
27 February 2018

President of Comité Maritime International
Partner, Colin Biggers & Paisley, Sydney, Australia