**Comité Maritime International**

**Dublin Symposium 2013**

Report by the IWG on the proceedings of the CMI International Sub Committee on the Judicial Sale of Ships.

**Introduction**

The CMI International Sub Committee on the Judicial Sale of Ships convened on Saturday and Sunday, 28 and 29 September, 2013.

The following members of International Working Group (“IWG”) were present: Henry Li (China-chairman) Andrew Robinson (South Africa, Rapporteur) Lawrence Teh (Singapore), William Sharpe (Canada), Francis Nolan (USA), Frank Smeele (Netherlands), Benoit Goemans (Belgium), Louis Mbanefo (Nigeria).

The purpose of the meeting was to consider the presentations made by various National Maritime Law Associations (“NMLAs”) regarding the proposed Draft International Convention on the Recognition of Foreign Judicial Sale of Ships. This draft has become known as the Beijing Draft, and will be referred to as such for the purposes of this report.

The Beijing Draft, and a Commentary, were sent to the Presidents of the NMLA’s by the President on 25 March 2013 for further comment.

Members will recall that the Sub Committee was tasked to consider whether there was a need for some sort of instrument that would provide that:

1. a judicial sale in one state would be recognized in another;

2. the sale would pass clean title to the purchaser;

3. the purchaser would be able to require prompt de-registration of the ship sold from its current register and then either re-register the ship or register the ship elsewhere;

4. With only limited exceptions, the parties could only challenge the judicial sale in the jurisdiction where the sale took place.

In Beijing in October 2012 it was decided that the appropriate format of such an instrument would be a Convention.

**Written Submissions**

Written submissions were received from the following 12 national maritime law associations (in alphabetical order): Belgium, Canada, China, Croatia, France, Germany, Greece, Italy, Japan, Malta, Turkey, United Kingdom. Only three submissions were received before 30 July 2013 and six submissions were received just prior to the commencement of the Sub Committee meeting.

Present at the Sub committee’s deliberations were forty representatives from twenty four NMLAs.

**Procedure**

Each NMLA that had provided a written submission was provided with an opportunity to present its submissions verbally and the members present were then given time to respond to the submissions or to debate new issues arising out of the discussions relative to the presentation of the submissions.

Following an exchange of ideas, members were invited to make any further submissions or debate previously raised, or new, issues.

The IWG then conferred and provided a short summary of the main issues raised and how the IWG intended actioning those issues.

Further comment was invited, and certain additional matters for action by the committee were noted.

At this point it is necessary for the IWG to record its thanks and appreciation to all those NMLA’s that provided written submissions and to those who made presentations of those submissions. The IWG is equally grateful to the very wide ranging and candid debates made by those delegates that attended and contributed to the proceedings. Indeed, there was a palpable sense of unity of purpose and ambition amongst the delegates to reach consensus and to see that an appropriate wording be achieved.

It is simply impractical for this report to deal with all the submissions made, or to record the various debates on certain issues.

The purpose of this report is to record those broad issues upon which there was consensus that some action needed to be taken by the IWG.

There were, of course, many small changes that were proposed by many NMLAs and delegates, and these will be incorporated into the further draft without additional comment.

**Short Description of Beijing Draft**

The Beijing Draft consists of 9 main Articles. A copy of the Beijing Draft can be found at page 213 of the "Yearbook 2013, Beijing II, Documents of the Conference". A commentary on the Beijing Draft can be found at 270 of the said publication.

Article 1 provides for 22 Definitions;

Article 2 provides for the Scope of Application;

Article 3 provides for the giving of Notice of the Judicial Sale;

Article 4 provides for the Effect of the Judicial Sale;

Article 5 provides for the issue of a Certificate of the Judicial Sale;

Article 6 provides for the Deregistration and Registration of the Ship;

Article 7 provides for the Recognition of the Judicial Sale;

Article 8 provides for circumstances where the Recognition of the sale can be Suspended or Refused; and

Article 9 provides for the relation with other instruments that apply to the Recognition of Judicial Sales.

**Summary of main issues arising from Submissions and Discussion**

1. Name and Aim of Convention

Some NMLA’s submitted that the name of the convention, and its main aims, were not adequately expressed. For example, was the aim of the draft instrument to regulate judicial sales, or to regulate the recognition of judicial sales? Why did the instrument deal with certain substantive law issues? Should the instrument deal only with deregistration and registration issues?

**The IWG agreed that:**

A) the aim of the instrument could be more clearly set out in the recital to the Beijing Draft which would also contain an explanation as to why it was necessary, in order to give efficacy to any resultant convention, to deal with certain substantive law issues; and

B) the name of the instrument would not be changed.

2. Language

Whilst there was general acceptance that the working version of the Beijing Draft should be in English, there were certain phrases and concepts (such as Deficiency Amount and the form of the Art 5 Certificate) with which the IWG needed to take care in anticipation of future translations.

In addition, there were submissions to the effect that the language used was not that usually found in conventions, and that care needed to be taken in the next draft to correct this.

**The IWG agreed that:**

A) the next round of drafting would be sensitive to the fact that the ultimate instrument would need to be translated;

B) it would need to draft any Art 5 Certificate in such a way that the relevant information could be included in such a way that it followed a generic format;

C) it would need to reflect a style that was more "convention-like", without changing the substance of the instrument.

3. MLM '93

Several NMLAs raised the concern about a possible conflict between the Beijing Draft and the notice requirements of the Maritime Liens and Mortgages Convention of 1993 (“MLM ‘93”).

This was particularly so with regard to the question of the giving of notice to various parties under Art 3.

Several amendments to the Beijing Draft were proposed, none of which the IWG thought would work. One proposal was to prepare a protocol to MLM ’93 altering receipt of notice. As discussed below, the IWG has concluded that amended wording to the Beijing Draft would resolve this issue, but that consideration of an appropriate protocol to MLM ’93 may be given in the future.

**The IWG agreed that:**

The Beijing Draft would be amended to permit parties to sign subject to service conventions to which they had acceded and that consideration be given in the future to an appropriate Protocol to the MLM '93 Convention being drafted bringing the notice provisions of that Convention into line with what is agreed in the amendments to the Beijing Draft.

4. Definitions

It was suggested that there was no place for definitions in the Beijing Draft and that these should be removed. However, this proposal did not seem to attract any significant support, and all other submissions suggested changes of various types to the definitions, which suggested that there was overwhelming support for retaining the definitions.

A number of suggestions were made regarding amendments to various definitions. In the main the requested changes related to the definitions for Charge (the need to include a reference to Maritime Liens), Mortgage (should there be a distinction made between registered and unregistered mortgages), Clean Title (the need not to extinguish any mortgage, charge etc assumed by the Purchaser), Judicial Sale (referring to the acquiring of clean title); State Party (by its inclusion), Ship (should we cater for unregistered ships) and certain other more minor, stylistic changes.

**The IWG agreed that:**

A) it would retain the Definitions Article;

B) it would review all the submissions made regarding the definitions relevant to charges and mortgages and would make certain changes to them such that they worked consistently throughout the instrument;

C) it would not specifically address unregistered ships;

D) it would not specifically address unregistered mortgages;

E) it would address the numerous stylistic changes requested.

5. Article 3 - Issues of Notice

 Many submissions were made pointing out the inevitable difficulties that parties faced if they were to provide evidence not only that notice of the sale had been given, but also that it had been acknowledged or confirmed, or was served in circumstances where receipt could be deemed to have taken place. There were also concerns that the current Article did not follow the provisions of the Hague Convention of Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, 1965, or the service provisions contained in the MLM ’93.

However, Malta had made a submission that went some way to resolving these issues.

**The IWG agreed that:**

1. it would include an amended version of the Maltese proposal which would, firstly, not require that there be a confirmation of receipt of the notice (a MLM '93 requirement); and

 B) include a provision that the Article would not prevent a State Party from complying with any other previously acceded to international conventions or instruments binding the contracting states.

6. Article 4 - effect of judicial sale

There was some concern regarding what law was applicable to the transference of clean title. The assumption was that this referred to the law applicable as determined by the State where the judicial sale took place.

**The IWG agreed that**:

No changes were needed.

7. Article 5 - Certificate of judicial sale

There was a general consensus that some form of example of a certificate be included as an annexure. The question then was whether the form was to be absolute and could not be altered in any way, or whether it should simply set out the information that should be included in such a certificate.

**The IWG agreed that:**

A) it would include a suitable form along the lines contained in Annexure V as determined by Arts 54 and 58 of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction, Recognition and Enforcement of judgments in Civil and Commercial matters (“Brussels I”);

B) the form would set out in a suitable manner what information the Certificate should contain, but that the form would not be mandatory as to format or exclusive as to other information or references.

8. Art 6 - Deregistration and Registration

It was suggested that this Article include a reference to "or Subsequent Purchaser" wherever the word "Purchaser" appears.

**The IWG agreed that:**

It would do so.

9. Art 7 - Recognition of Judicial Sale

It was suggested that there was no need to include any reference to competent court wherever that phrase appeared in the text.

There was also a clear view that a time period of 3 months provided for in Art 7(5) within which a party could challenge the judicial sale was far too long. Two suggestions were put forward - that the period be reduced to 7 days, or that Art 7(5) be removed altogether, leaving time limits for appeals from sale orders to the domestic law of the sale jurisdiction, with the present, two stage procedural protection for foreign recognition in Article 8 (2) (a) being retained.

**The IWG agreed that:**

A) it would delete references to "competent" where appropriate;

B) it would delete Art 7(5) from the Beijing Draft.

10. Art 8 - suspension of sale - public policy

There were concerns that the "contrary to public policy" test was too easily overcome, and that a Court could only refuse to recognize the sale if to do so would be "manifestly" contrary to public policy.

**The IWG agreed that:**

It would include the word "manifestly" in Art 8(3).

11. General

The IWG recognized that:

A) the submissions strongly recommended that any draft be taken to the ship owning and ship financing industries for comment;

B) international, regional and local authorities would need to be informed of the existence of the draft - and that this was to be left to the local NMLA's to facilitate;

C) a draft explanatory memorandum would be prepared to accompany the next draft.

**Further Action**

1. The IWG will endeavor to prepare a Final Report before 29 October 2013, which report will include
2. A Final Draft Instrument in a suitable form that would include a draft Article 5 Certificate;
3. A suitable commentary on the Final Draft Instrument;
4. An historical review of this project.
5. The NMLAs will be encouraged to:
6. Engage with and obtain feedback from the ship owning and ship financing industries;
7. Liaise with relevant regional, national and local administrations in order to inform them of the progress the Draft Instrument;
8. Respond with any further comments by no later than 31 January 2014.
9. The IWG will request that, immediately prior to the Hamburg Conference in June 2014, a day and a half be reserved to allow for
10. A presentation of the IWG’s work and final discussion on the international instrument.
11. A clause by clause review of the final instrument.
12. The NMLAs will be asked to vote on the Draft Instrument in the Plenary Session of the Hamburg Conference. A day will be required to achieve this.

30 September, 2013