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## ANY OTHER BUSINESS

### Submitted by the Comité Maritime International (CMI) and the United Nations Office of Legal Affairs

#### SUMMARY

*Executive summary:* On 7 December 2022, the General Assembly of the United Nations adopted the Convention on the International Effects of Judicial Sales of Ships. The purpose of this document is to provide background to the important discussion related to this new Convention, and highlight the importance of the ratification of this Convention by States and organizations.

*Strategic direction, if applicable:* Not applicable

*Output:* OW 8

*Action to be taken:* 28

*Related documents:* LEG 107/16/1 and LEG 107/18/2 (paragraph 17.6)

#### The problem

1 There have been and there are instances of ships being sold in judicial sales free and unencumbered to bona fide purchasers paying good money only to have their voyages interrupted and ships arrested later by the vessel's previous creditors; instances where registries are reluctant to delete vessels sold in judicial sales and/or mortgages, or hypothecs or privileges of vessels sold in judicial sales; all of this leading to huge uncertainty and rather chaotic situations for new owners and new financiers lending money for the purchase of these vessels, who would have extended financing on the understanding that they would be financing vessels which would be free and unencumbered, only to find themselves having to deal with previous mortgagees. All of this has a very substantial impact on the smooth operation of international trade. It leads to such vessels being arrested, voyages interrupted, charterers left high and dry, cargo owners experiencing delays in the receipt of their cargoes, financiers of vessels having to face the scenario of previous creditors laying claim to the new financiers' security. All of this leads to the serious disruptions in maritime venture and international trade.

2 The problem is not a figment in the minds of over-enthusiastic maritime lawyers. There have been several cases where the free and unencumbered title of vessels sold in judicial sales was not given the proper effect by various jurisdictions, flag States, or vessel's old creditors.

## **The solution**

3 The solution to the problem was "drafted" by CMI in the form of the Draft International Convention on Foreign Judicial sales of Ships and their recognition, known as the "Beijing Draft". A working group of CMI chaired by Professor Henry Li worked tirelessly to produce the Beijing Draft. The Beijing Draft was finalized in Hamburg in 2014 and, from then on, started the task of finding the Beijing Draft a home.

4 CMI first approached the IMO Legal Committee in 2015 and 2016. Presentations were made but ultimately the Committee did not accept the proposal for the inclusion of this work on its agenda. It was left open for the matter to be raised again at a later date. The views expressed by delegates at the time varied from some stating that, whilst this was an important subject, they considered it to be a matter of private and commercial law, which they felt did not fall within the remit of the Committee.

5 After the IMO Legal Committee had declined to take on this project, CMI approached the Hague Conference on Private International Law (HCCH), which was working on what eventually became the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Opinions were expressed by some delegations at that time to the effect that such a topic may be better suited for UNCITRAL.

## **Approaches to UNICTRAL**

6 In view of the response from IMO and HCCH, in 2017 CMI submitted to UNCITRAL a proposal for possible future work on cross-border issues related to the judicial sale of ships, requesting UNCITRAL to add this topic to its work programme. UNCITRAL considered that proposal at its fiftieth session (Vienna, 3 to 21 July 2017), when it noted its importance and which drew attention to problems arising around the world from the failure to give the proper effect to judicial sales of vessels sold free and unencumbered. It was agreed that further information would be useful and suggested that CMI might seek to advance the proposal by holding a Colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course.

## **The Malta Colloquium**

7 The Government of Malta, through its Ministry for Transport, Infrastructure and Capital Projects, in collaboration with CMI and the Malta Maritime Law Association, co-hosted a Colloquium on 27 February 2018 at the Chamber of Commerce in Valletta, Malta. Panellists and attendees examined the problems associated with the failure to give full effect to the free and unencumbered title in vessels sold in judicial sales as well as possible solutions.

8 The Colloquium had 174 participants, including delegates from 60 countries. Delegates represented Governments, including Governments of flag States; the judiciary; the legal community; a number of specific industries, such as shipowners, banks/financiers, shipbrokers, ship repairers, shipbuilders, bunker suppliers, port and harbour authorities, charterers, tug operators, and ship agents; and a number of International Organizations, such as the Institute of Chartered Shipbrokers (ICS), BIMCO and the International Transport Workers Federation (ITF). The participants shared how their industries and States were impacted by the lack of harmony among States in recognizing the judicial sale of a ship in another jurisdiction. Several maritime stake holders, including shipowners, financiers, registrars of ships, bunker suppliers, ship builders, crew representatives, and harbour authorities spoke out in favour of ensuring that when a judicial sale was held resulting in the free and unencumbered transfer of the vessel into the hands of a new purchaser, that that free and unencumbered title was to be given full effect leading to certainty and peace of mind, not

only for the purchaser but also for the creditors of the vessel in whose interest it was to maximize the price of the ship sold in a judicial sale to ensure their best chances of getting paid. There was general consensus that any uncertainty to title would affect the sale price to the detriment of the vessel's existing creditors.

9 A prominent shipowner representative identified four of the most important considerations in relation to judicial sales: (1) legal certainty; (2) maximization of the asset value; (3) availability of ship finance; and (4) ease of registration after the sale has taken place. It was stated that the failure to resolve these considerations distorted the ship sale market and caused asset value destruction to the detriment of the industry as a whole. If greater certainty in the recognition process could be attained, it was thought to lead to a higher valuation in assets, in both auction and sale values, which would in turn result in greater availability of finance. It was added that there was an interest of all involved in maritime trade (including cargo interests, trade-financing banks, insurers, and others) that the vessel employed not be stopped by unnecessary arrests instituted by former creditors or owners, despite the fact that the vessel had been sold by judicial sale. It was noted that any transit interruption would be a nuisance to trade and shipping and would create costs and damages. There was a clear statement by the shipowners that the situation needed to be clarified by way of an international instrument and that the points drafted by CMI could resolve the issue in a simple and pragmatic way.

10 The support of many banks, regardless of their location, for an international regime to mitigate risk was emphasized. A leading ship financier, who shared the views of 11 major banks from his jurisdiction, agreed with the need for certainty and highlighted the substantial value of the assets at issue. From the perspective of lenders, it was felt that shipping markets are volatile. In light of these uncertainties, it was said that banks attempt to circumvent the problems by searching for amicable solutions, creating additional costs. Without a reliable international basis for recognition of judicial sales of vessels, it was stated that buyers would need to be satisfied with risks when obtaining the title, which would drive down the sale price.

11 The registrar of the Maltese Flag, which has been the largest flag in Europe for a number of years, described the uncertainties that arise from a foreign judicial sale. It was noted that most registries are national systems and he explained the difficulties which do arise at times with the deletion of a ship from a register if it had been sold in a foreign jurisdiction. It was stated that circumstances would be greatly improved for all parties by the issuance of an internationally recognized certificate of judicial sale by the State in which a sale takes place.

12 Legal practitioners from common law, civil law, and mixed systems cited numerous cases, particularly cases of abuse of the process of ship arrest, in jurisdictions around the globe to highlight the lacuna in international legislation in regard to the recognition of a judicial sale by a foreign court. There was a clear consensus that the number of proceedings created unnecessary costs and frictions, thereby further devaluing assets in the commercial world. From their practical experience representing clients from all aspects of the industry, participants shared the same request of filling the legal gap and enabling a friction-free transition from the former registry to the new registry, and to the new shipowner, freeing the sold vessel from all encumbrances she may have had prior to the judicial sale.

### **Possible solutions and feasibility**

13 The Colloquium established that the main issues and obstacles witnessed in the trade and maritime environment were:

- .1 the lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer, leading to problems being experienced in the de-registration process in the country of the former flag;

- .2 the obstacles in relation to the recognition of the effects of the judicial sale in respect of the clearance of all former encumbrances and liens;
- .3 the increase of transactional costs in cases of friction in the enforcement of the ship's sale and the risk of costly proceedings and payments just for nuisance value by old creditors attempting to arrest vessels after the judicial sale;
- .4 factoring of those risks when evaluating the level of bidding in judicial sales, causing a loss on the recoverable assets to the detriment of all creditors (such as crew, financiers, cargoes, ports, agents, bunker suppliers, barge operators, etc.) of the old shipowner resulting from a less favourable judicial sale due to the lack of certainty in respect of its recognition by courts and authorities; and
- .5 reduced sales proceeds leading to a downwards trend on the brokers' vessel evaluation and thereby causing a general loss of vessel values in the entire market.

14 Among the delegates and panellists, there was consensus that all parties were affected negatively by the gap in legal certainty, that the gap could be filled from a legal perspective by providing an instrument on recognition of the effects of judicial sales of ships and that the draft instrument that had been prepared by CMI would provide a helpful reference if work were to be taken up on this topic by UNCITRAL. It was noted that UNCITRAL was the appropriate forum to resolve issues involving pernicious effects on cross-border trade and that the working methods of UNCITRAL, which permit close involvement of international industry organizations, would also facilitate the conclusion of an instrument that would be broadly supported across industries. Based on the outcome of the discussions during the Colloquium and based on the support of all represented industries, the Government of Switzerland proposed that UNCITRAL consider taking up work on an international instrument to resolve cross-border issues on the recognition of judicial sales of ships.

#### **Acceptance by the Project at UNCITRAL**

15 The results of the Colloquium as well as the CMI Beijing Draft were presented by Switzerland as a "Proposal of the Government of Switzerland for possible future work on cross-border issues related to the judicial sale of ships" at the fifty-first session of UNCITRAL in June of 2018. UNCITRAL noted that the issue addressed in the proposal "had the potential to affect many areas of international trade and commerce not only the shipping industry". The topic was referred to Working Group V1 and Prof. Beate Czerwenka (Germany) was elected Chair of Working Group VI. The Working Group considered the draft convention over six sessions from its thirty-fifth session in New York between 13 and 17 May 2019, to its fortieth session also in New York between 7 and 11 February 2022.

16 At its fortieth session, the Working Group completed its article-by-article review of the substantive provisions of the fifth revision of the draft convention and approved a final draft for submission to the Commission. During this period of deliberation by Working Group VI, the national maritime law associations, members of CMI, encouraged their Governments to request the attendance of maritime law experts as part of State delegations to assist the State delegates in the deliberation of this highly specialized Convention. CMI also provided in advance of each subsequent sessions a set of Meeting Notes in which important issues were highlighted, offering possible solutions.

17 On 30 June 2022 in New York, the fifty-fifth session of the Commission, UNCITRAL, adopted by consensus a decision and recommendation to the United Nations General Assembly by virtue of which it submitted the draft convention on the international effects of

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judicial sales of ships recommending its adoption by the General Assembly at its seventy-seventh session and seeking authorization to convene a signing ceremony as soon as practicable in 2023 and recommending further that the Convention be known as the "Beijing Convention on Judicial Sales of Ships".

18 Subsequent to the above and on 8 December 2022, the United Nations Information Service Vienna announced that "The United Nations General Assembly adopted the United Nations Convention on the International Effects of Judicial Sales of Ships on 7 December 2022. The General Assembly authorized a signing ceremony for the Convention to be held as soon as practicable in 2023 in Beijing and recommended the Convention be known as the "Beijing Convention on the Judicial Sale of Ships". It went on to say that "In most States courts have the authority to order the sale of a ship to satisfy a claim that is brought against the ship or shipowner. Such a claim is typically brought to foreclose a ship mortgage (in the event of default in repayment) or to enforce a maritime lien against the ship. The judicial sale procedure is typically preceded by the arrest of the ship. While the international community has achieved significant progress in harmonizing rule on the arrest of ships, much less progress has been achieved in harmonizing rule on the judicial sale of ships, which remain subject to widely varying domestic laws. The Beijing Convention will enhance legal certainty by creating a uniform regime for the international effects of judicial sales of ships."

### **The Convention**

19 The Convention has 23 Articles. Its central provision is contained in article 6 which states: "A Judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser." Various criteria need to be satisfied for the Convention to apply and for a judicial sale to have international effects, notably compliance with the notification criteria contained in article 4 and the issuance of a certificate of judicial sale by the court where the judicial sale takes place in accordance with article 5.

20 Article 4 provides that while the judicial sale needs to take place in accordance with the law of the State of judicial sale, a notice of judicial sale must be given to the registry of ships or bareboat registry where the vessel is registered or bare boat charter registered, mortgagees, registered hypothecs or other registered charges, holders of maritime liens which would have presented a claim before the same court and the owners of the ship and any bare boat charterers.

21 Article 5 provides that upon completion of a judicial sale which confers clean title to the ship, and which was conducted in accordance with both the law of the State of judicial sale and the Convention, the court or other public authority conducting the sale will issue a certificate of judicial sale to the purchaser. This certificate will state that the vessel was sold free and unencumbered in accordance with the law of the State of judicial sale and the criteria provided in the convention.

22 The Convention also provides that both the notice of judicial sale and the certificate of judicial sale are to be transmitted to the repository mentioned in article 10. The repository is IMO which will provide a module in its already existing Global Integrated Shipping Information System (GISIS) platform to host the repository. This enables any person to access the digital IMO GISIS platform to see whether any vessel is about to be sold in a judicial sale and whether such a ship has in fact been sold and a certificate issued. This is of great benefit to creditors of ships who have an interest in pursuing the proceeds of a sale and who may wish to partake in any ranking of creditors procedures which may take place following the sale of such ships.

23 IMO participated actively in the sessions of Working Group VI with numerous useful interventions. Most importantly in the context of article 10, IMO accepted to become the repository. At its 107th session, the Legal Committee invited the IMO Secretariat to make the necessary arrangements to host the proposed repository as an additional GISIS module. The readiness of IMO to perform this crucial function reassured delegations at UNCITRAL Working Group VI that the new Convention would have an operational support from the start. CMI is very grateful to IMO for this very important contribution to the Convention and is convinced it will be an important contributor to the success of the Convention.

24 Article 7 provides that at the request of a purchaser who produces a certificate of judicial sale, a registrar of ships is obliged to delete the vessel, or effect a transfer of ownership, and is obliged to delete any pre-existing mortgages, hypothecs or registered charges. Article 8 provides that an application for an arrest of a ship for a claim pre-existing the sale free and unencumbered shall be refused on the production of the certificate of judicial sale by the new owner of the vessel and that if the vessel is arrested in ex parte proceedings that vessel is to be immediately released on the production of a certificate of judicial sale.

25 In order to have further certainty, the Convention provides in article 9 that it is the court of the State of judicial sale which has exclusive jurisdiction to hear a claim or application to avoid the judicial sale and no other court of any other State. There are only two exceptions to this rule. The court of the State of registration may decide that giving effect to the Convention is against its public policy, and similarly the court of the State where the vessel is subsequently arrested may also decide that not arresting such a vessel or releasing from arrest such a vessel would be in breach of its public policy.

26 Article 21 provides that the Convention will enter into force 180 days after the date of the deposit of the third instrument of ratification, acceptance, approval or accession.

### **Conclusion**

27 The UN General Assembly at its seventy-seventh session authorized the signing ceremony to take place in Beijing at a suitable time in 2023. CMI and UNCITRAL would like to thank IMO for its contribution to this Convention which is important to maritime trade providing certainty to the industry's protagonists whether they are owners, financiers, crew or others.

### **Action requested of the Committee**

28 CMI and UNCITRAL would like to invite all delegations to actively encourage their States and organizations to fully support this Convention by proceeding with its ratification.

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