

Comité Maritime Internacional
International Working Group on the Judicial Sale of Ships
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Presentation on the First Set of Questions
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(1) Introduction

Mr. Henry Li, Chairman of the International Working Group on the Judicial Sale of Ships has been so kind so as to entrust me with addressing the honourable participants of the CMI Colloquium in this beautiful city of Buenos Aires, on the first set of questions of the CMI questionnaire which was distributed amongst the Associations of Maritime Law of the different countries o the subject.

The CMI decided to put together an International Working Group on the Judicial Sale of Ships given the importance of the subject, and especially that while the arrest of vessels is mentioned, governed or regulated in a number of international conventions it was felt that the issue judicial sale is much less clearly regulated.

(2) Questions

The purpose of the Working Group was to examine the issues related to judicial sales of ships and specifically the question of the recognition of the foreign judicial sale and whether it is appropriate to materialize some sort of international instrument on the subject under the impulse of the CMI to set a frame for the work of the International Working Group a

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questionnaire was made and circulated to the Member Associations in the month of May 2010, the purpose of the same being for the International Working Group to gather as much information as possible on the subject. The questionnaire was divided in five different questions which will be addressed by my honourable colleagues of the IWG.

The first of these questions as a group relate mainly to the concept of judicial sale; that is to say whether the legislation of each of the different countries to which the questionnaire was circulated contain a definition of the term.

The question of definitions in law, that is to say, the technique whereby a legal instrument defines a specific institution, action or concept has in itself been a matter of discussion in the legal science. For some, it is a helpful tool to ensure that society to which laws are directed understands the actual scope and effective reach of the matter being defined. To others, however, and I must say that at heart in my country it is the more modern view, it puts a limit to the reach and effect of the area a legal instrument purports to regulate, generating the risk that situations which the legislative intent sought to govern remain excluded to the extent that they do not fit with sufficient accuracy within the definition. So many scholars are for a more permissive approach and to leave definitions to Court decisions and authors. Personally, I am, and have always been, of the belief that whereas the legal instruments cannot become a mere catalogue of definitions, the key issues, elements or factors that the legal instrument addresses are better served and a more precise application of the legal instrument is achieved through definitions.

Generally, the International Conventions on Maritime Law do not define the term *judicial sale*. The Convention on Maritime Liens and Claims of 1967 and the International Convention of Maritime Liens and Mortgages of 1993 use the term for sale but as explained by Henry Li in his paper presented in the CMI meeting in Athens on judicial sale of ships, the term

forced sale is clearly one that cannot be considered an exact equivalent to the term *judicial sale* insofar as there may be situations in which a forced sale is not a judicial sale as such but a sale imposed on the owner of the ship by circumstances of financial hardship or necessity or in procedures unrelated to judicial activity such as the case of a sale imposed by a governmental authority of a non-judicial nature.

The group of questions on the CMI questionnaire related to the term judicial sale included (a) firstly the concept of judicial sale and whether there is a definition in the different legislations of the countries to which the questionnaire was circulated; (b) secondly for what purpose may a judicial sale be initiated or conducted; (c) a third question was in what circumstances that sale could be initiated or conducted; (d) fourthly, whether a judicial sale is necessarily conducted by or under the control of the Court and (e) finally, whether the judicial sale can only take place via the method of an auction or if there are others as well.

(3) Answers in General

Answers were received by Argentina, Belgium, Brazil, Canada, China, Croatia, Denmark, Dominican Republic, France, Germany, Italy, Malta, Nigeria, Norway, Singapore, South Africa, Spain, Sweden, United States, Venezuela, meaning countries representing Europe, Asia Africa and the Americas, so the answers to this questionnaire reflect a wide range of legal systems, of different backgrounds which can also be categorized as members of two styles of legal systems, to be sure the *common law* on the one hand and the *continental law* or *written system* on the other. It is remarkable that notwithstanding the different continents from which answers were received and at the same time the different legal systems that govern each of these countries, the substance and bottom line of the answers were in each case very similar. To me, this relates to an effect for which the CMI has to be given credit, namely, the internationalization and

unification of the maritime law of today in different countries of the world that was achieved through the last century.

All of the answers received coincided in that the internal legislations do not define the notion of *judicial sale* through an express concept. It was therefore a clear common ground that in the legislation of the different countries the term of judicial sale is not expressly defined by a definition of law. Some countries, like Italy, provide for a notion of *forced sale* and include the term within that notion.

At the same time however while in none of the countries that replied the term of *judicial sale* is defined in all of them the judicial sale of a vessel, that is to say, a sale conducted in strict relationship with the judicial procedure, is governed by special provisions either of maritime law or within the context of civil procedure rules of a general nature or in respect to any other assets in a way in which while not expressly defined there are two or three sets of elements that can be identified as the common thread of the same. In some countries, like the United States there are different types of judicial sales, some by the State Court, some by Federal Courts; but at the end there is a unifying element which is the fact that the sale conducted with a direct relationship with a Court and in a Court-related procedure.

So this lack of an express definition in the different legislations of the countries that replied, is in no way a reason to think that the matter is not governed in an advanced way in each. Much to the contrary, in all of them, the judicial sale of a ship -understood as the sale of the same in relation to judicial procedures as provided by the legislation- is governed and regulated in sufficient detail. Nevertheless, the very existential purpose of the CMI is in unification of rules with the ultimate goal of unifying maritime law globally.

The lack of a notion or express definition would appear to lead to that if the conclusion of the efforts of the International Working Group is the

need for an instrument on the subject, an express definition of the judicial sale gathering the common elements of what the legal profession understands as judicial sale would be convenient.

To me, from the different answers the main element is that a judicial sale of ships is a type of forced sale in which a Court, whether maritime or not, whether specialized or not, whether state or federal, conducts a procedure that ends up with a sale of the vessel under strict supervision and coordination.

(4) Remaining Contents of First Question

The second and third sub-questions, in question one are closely related. They refer to what purpose and under what circumstances and conditions could a judicial sale be initiated or conducted.

As with the general orientation and the basic direction of the answer in respect to whether the term judicial sale was defined or not, the answers for the different jurisdictions were very similar. Some national legislations provide for quasi-immunity in the sense that they determine that the arrest of the vessel can only take place when there is a maritime lien or credit of some nature, a mortgage or hypothec.

In most jurisdictions the sale relates to the enforcement of a judgment or arbitral award or for security in respect thereof. Also in most countries the purpose of the judicial sale may be the enforcement a maritime lien or mortgage providing basis for the arrest of the vessel or (importantly when there are no actions *in rem* as it is the case in Argentina) in an *in personam* action against the owner of the vessel. Furthermore, in most jurisdictions, it is also possible to conduct a judicial for the satisfaction of a creditor's claim insofar as that creditor holds some sort of an executive title which in some cases includes a variety of documents such as for

example in Denmark where it includes debt instruments, pledges, bills of exchange, notarized documents etc...

So, generally it can be said to be common ground that while some jurisdictions allow to sell the vessel as a result and consequence of Court procedures for the satisfaction of a special type of secured credit, i.e. a lien or mortgage, in others the sale of a vessel as a result of judicial procedures is also possible for other creditor's rights insofar as those creditor's rights are either contained in an executive title such as for example a notarized document of debt, a promissory note or draft, or some other title or credit that has been shown through the evidence presented in Court as sufficient for the creditor to be considered to have a right to satisfy his debt with the sale of assets from the defendant.

In a number of jurisdictions, for example, France, the Dominican Republic and Venezuela, to mention just three, a judicial sale is only possible when the procedures in respect of the lien, mortgage or such other type of credit have concluded with judgment or an award. But in others cases, say for example Nigeria, Singapore the United States and Canada the judicial sale is possible *pendent litis* that is to say in the context of the i.e. at the start of procedures or irrespective of whether a judgment has been reached, when there is a clear right, to prevent deterioration, increased costs or in a combination of factors. That is also the case when there is a mortgage and the mortgage agreement provides for a direct repossession pre-judgment sale.

(5) Last Group

The last of the first set of questions relate to whether a judicial sale must always be conducted under supervision of a court and if an auction is the only method of judicial sale.

The majority of the answers went in the direction that a judicial sale is always under the supervision of a Court although in some countries such as the US, Canada, the Dominican Republic, Norway or Nigeria, a Court Marshall, Sheriff, Assistant or Private Vendeur has a predominant role.

On the other hand, the auction is the widespread and common method. In some countries like mine, Venezuela, it is the exclusive one for a judicial sale. But a majority of countries allow variations thereof on the sales that are technically private in nature insofar as either directed by a broker or carried out by private parties or by private treaty amongst them but always as a matter of principle as well within the supervision of the Court.

(6) Conclusions

By way of conclusion therefore, the notion of a judicial sale, the reasons for the same, the circumstances in which it must be effected and the methods through which it is concluded are:

1. Governed in most legislations in either the maritime or procedural legislation.
2. Governed in a way in which there is a set of rules in respect of the judicial sale but not express definition thereof.
3. Possible for the purposes of enforcing a judgment, award, settlement or title related to a maritime lien, mortgage or hypothec, in personam actions or indeed other types of credit.
4. Usually effected directly by the Court or where not directly by the Court by direct supervision of the same or one of its officers, such as a Marshall.
5. Normally effected through an auction but also through related methods such as a private sale or through a broker but in terms and conditions that must be appropriately approved by the judicial entity under whose authority it has been imposed.