JUDICIAL SALES OF SHIPS – A ROCKY ROAD TO UNIFICATION

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The purpose of this paper is to point out the main goal of unification with regard to the international recognition of legal effects that arise upon the judicial sales of ships. The paper seeks to briefly outline the most significant provisions of the CMI draft of the International Convention on Foreign Judicial Sales of Ships and their Recognition, summarise the CMI's efforts in trying to find an appropriate forum to serve as a vehicle to transform this draft into an international convention, and provide a summary of the drafting work carried out so far by UNCITRAL.

Keywords: *CMI; IMO; UNCITRAL; draft Convention; judicial sale of ships; recognition.*

1. INTRODUCTION

The judicial sale of ships represents one of the most effective mechanisms of enforcing maritime claims.[1] At the same time, it is usually the last resort in enforcing them. Creditors (including many mortgagee banks) are by and large reluctant to have ships judicially sold, and prefer to let ships pay out their debts from the revenues earned in regular operation. There are various reasons for such an attitude, including the following: the purchase price received through

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1 See Baatz, Yvonne, *Maritime Law*, 3rd edn., Informa Law, Routledge, New York, 2014, p. 486.

judicial sale is usually below the market price of the ship; judicial sale proceedings sometimes take a long time, increasing the costs and decreasing the ship's value; the order of priority in the distribution of the proceeds of sale largely depends on the jurisdiction within which the judicial sale takes place; the purchaser of the ship cannot be absolutely certain that the legal effects of the judicial sale will be recognised internationally.

After a ship is judicially sold to the best bidder and the proceeds of sale are paid into the court, two important aspects come into play. One has to do with the distribution of the proceeds of sale. The creditors' claims that used to be secured by various security interests over the ship are now transferred to the proceeds of sale sitting in the court's (or admiralty marshal's) account. Legal regimes vary with regard to the order of priority, and this includes various important issues, such as: which categories of claims take priority over claims secured by a ship mortgage; which order of priority applies within the same category of claims (if the proceeds are insufficient to pay out all the claims within that category); which claims are protected by maritime liens; which choice-of-law rules will the court apply to ascertain the maritime-lien status of certain claims; are maritime liens an issue of substance or procedure?[2] Some of these issues are dealt with by the three international conventions promulgated so far on maritime liens and mortgages.[3] This aspect is not (at least not directly) the topic of this paper.

The second important aspect that comes into play after the ship has been judicially sold is whether and under what conditions the legal effects of the judicial sale in one country will be recognised in other countries round the world. This, indeed, is the topic of this paper.

Part 2 of this paper outlines the legal effects of judicial sale and how they are manifested. Part 3 points to the reasons why unification is needed in this field. Part 4 summarises the CMI's efforts in preparing the draft unification instrument on the international recognition of judicial sales of ships. Part 5 outlines the most significant provisions of the Final Draft of the International Convention on Foreign Judicial Sales of Ships and their Recognition, prepared by the CMI

[2] For conflict-of-laws issues relating to maritime liens, mortgages and claims, see: Tetley, William, *International Conflict of Laws – Common, Civil and Maritime,* BLAIS, Montreal, 1994, pp. 533-587. For an excellent treatise on maritime liens and mortgages, see: Tetley, William, *Maritime Liens and Claims,* BLAIS, Montreal, 1998.

[3] More precisely, International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926; International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967 (hereinafter: the 1967 MLMC), and International Convention on Maritime Liens and Mortgages, Geneva, 6 May 1993 (hereinafter: the 1993 MLMC).

(the "Final Draft"), without any intention of providing any in-depth analysis of those provisions. Part 6 summarises the CMI's activities in promoting the Final Draft amongst various international organisations. Part 7 summarises the drafting activities conducted so far by UNCITRAL's Working Group.

2. WHAT ARE THE LEGAL EFFECTS OF JUDICIAL SALES AND HOW ARE THEY MANIFESTED?

2.1. Legal effects of judicial sales – what are they?

Judicial sale provides the purchaser with a title in the ship, enforceable against the whole world. Although the title to the ship is not transferred on the purchaser by the owner, but by the court (or the court's agent), judicial sale is a valid method of rendering the purchaser the new owner of the ship, extinguishing the ownership of the previous owner.[4]

In addition, judicial sale (unlike private sale) provides the purchaser with a "clean" title in the ship, rendering the ship free of all liens and mortgages pertaining to the ship prior to the judicial sale (except those voluntarily assumed by the purchaser).[5] The logic behind this is that the pre-judicial sale claims now detach from the ship and attach to the proceeds of the sale paid in by the purchaser, while the ship continues her "life" on a new footing, free and clean of "old" debts. In addition to various limitation of liability regimes operating in maritime law, this can be seen as yet another, albeit hidden one: the pre-judicial sale claims are extinguished in relation to the ship and transferred to the proceeds of sale whether or not these are sufficient to satisfy all the relevant claimants. This is the reason why the order of priority in the distribution of the proceeds is often such a crucial and sensitive topic.

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[4] In Croatia, for example, after the best bidder has been selected as the purchaser of the ship, the court will issue a so-called "adjudication decree" (Article 893, para. 1 of the Croatian Maritime Code, *Official Gazette*, nos. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15, 17/19; hereinafter: the CMC). After the selected purchaser has paid the purchase price into the court account, the court will cause the ship to be physically delivered to the purchaser, and will order that the purchaser be entered in the ship register as the new owner of the ship and that the previous owner, as well as all existing registered encumbrances (except those assumed by the purchaser), be deleted from the register (Article 893, para. 8 of the CMC).

[5] As in the previous footnote. A brief comparative survey, based on the replies by national maritime law associations to the CMI's questionnaires, can be found in: Mbanefo, Louis N., Commentary on Answers to the Third Group of Questions, available at: https://comitemaritime.org/work/judicial-sale-of-ships/ (23 April 2019).

Both these legal effects are extremely important, because they create legal certainty for the purchaser that he has obtained a clean title to the ship and that the ship is "immune" from any attack by the lienors, mortgagees and other claimants, whose claims and security instruments pre-date the judicial sale.[6] Such legal certainty is one of the crucial elements in formulating the price that the purchaser will be ready to pay for the ship in a judicial sale.[7] It follows that these legal effects benefit not only the purchaser of the ship, but also the judicial sale claimants.[8]

2.2. Legal effects of judicial sales – how are they manifested?

The purchaser of the ship as the new owner may wish to keep the ship in her current register and just have the new ownership registered there, or to de-register the ship from her current register and have her registered elsewhere in the new owner's name. The first scenario involves only one ship register, and the second involves two. In both scenarios, ship registrars should recognise the judicial sale purchaser as the new owner of the ship and follow his requests (disregarding any requests by the previous owner). If the ship register is located in the same country in which the judicial sale took place, this is usually not a problem, and the ship registrar recognises the purchaser as the new owner of the ship upon production of a copy of the court document certifying that the ship has been adjudicated to him. However, if the relevant ship registers are located outside the country in which the judicial sale took place, such recognition is often more complicated and requires certain formalities (such as recognition of the judicial sale document in the country where the ship register is located).

In addition, after the ship starts operating under the ownership of the purchaser, there may be creditors whose claims pre-date the judicial sale, and who

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6 Without it, "no one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries" (Brown, D. J. in the *"Trenton"*, 4 F. 657 (1880) at p. 663).

7 Without a clean title being guaranteed, "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" (Justice Rouleau in the *"Galaxias"* (1988) LMLN, No. 240, p. 2.

8 "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" (Sheen J. in the "*Cerro Colorado*" [1993] 1 Lloyd's Rep. 58 at p. 61.

may attempt to arrest or even judicially sell the ship to secure and/or enforce those claims. They may do so either because they are unaware that the ship has been judicially sold (rendering her free of all pre-judicial sale encumbrances), or because they tend to disregard or even oppose the effects of the judicial sale (perhaps because they are dissatisfied with the amount of payment received in the distribution of the proceeds). The courts seised of such actions should, of course, dismiss them, recognising that the ship is now free of all such encumbrances and claims.

3. WHY IS UNIFICATION NEEDED?

3.1. Recognition currently based on comity

The legal effects of the judicial sale of ships are usually recognised internationally. Such recognition is very often not based on any piece of national or international legislation, but on the principle of *comity*.[9] Briefly, this principle assumes that the courts of one country should recognise court decisions issued in another country as a token of recognition and appreciation by one country of the other country's institutions. While this principle works well in most parts of the world, one cannot be certain that it will continue to do so, and that it will operate in every corner of the world. Comity involves informal and voluntary recognition, and lacks an element of legal requirement or obligation.[10] The world is becoming increasingly regulated and chaotic at the same time, and it may be dangerous to leave such an important and financially significant issue without a written law and let it be based merely on a legal principle, however noble it may be. After all, if comity alone sufficed, there would be no need for international conventions on recognition of foreign judgments.

[9] For more on comity as a basis for the recognition of the legal effects of judicial sale of ships, see: Tetley, *Maritime Liens and Claims, op. cit.*, pp. 1095-1097.

[10] According to the Merriam-Webster Dictionary, comity is defined as "the informal and voluntary recognition by courts of one jurisdiction of the laws and judicial decisions of another" (https://www.merriam-webster.com/dictionary/comity). "Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws" (*Somportex v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 at p. 440 (3 Cir. 1971), as cited in Tetley, *Maritime Liens and Claims*, *op. cit.*, p. 1096.

3.2. Recognition sometimes denied or hampered in practice

There are a number of reported cases in which judicial sales were denied recognition in other countries, either by ship registrars or by the courts, or in which recognition was severely hampered. Such cases increase the feeling of insecurity (lack of legal security) amongst the intended purchasers of ships as to the integrity of the judicial sale and the "clean title" guarantee. This may have an impact on the purchase prices offered in judicial sales around the world, thereby creating an adverse effect on judicial sale claimants.[11]

3.3. International conventions on maritime liens and mortgages do not successfully address the matter

Two out of three international conventions on maritime liens and mortgages deal with the recognition of the legal effects of the judicial sales of ships. The 1993 MLMC regulates the form and contents of a notice of forced sale, which sets an important precondition for recognition of the effects of judicial sale.[12] More importantly, in Article 12, this Convention deals directly with the legal effects of judicial sale as well as the international recognition of these effects. Article 12, para. 1 provides:

> In the event of the forced sale of the vessel in a State Party, all registered mortgages, "hypothèques" or charges, except those assumed by the purchaser with the consent of the holders, and all liens and other encumbrances of whatsoever nature, shall cease to attach to the vessel, provided that:
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> a) at the time of the sale, the vessel is in the area of the jurisdiction of such State; and
> b) the sale has been effected in accordance with the law of the said State and the provisions of article 11 and this article.

Article 12, para. 5 directly deals with recognition of the legal effects of judicial sale and provides as follows:

> When a vessel registered in a State Party has been the object of a forced sale in any State Party, the competent authority shall, at the request of the purchaser, issue a certificate to the effect that the vessel is sold free of all registered mortgages, "hypothèques" or charges, except those assumed by the purchaser, and

[11] Useful summaries of cases in which recognition of judicial sales was denied or hampered may be found in Tetley, *Maritime Liens and Claims*, *op. cit.*, pp. 1109-110. Also: Li, Henry Hai, A Brief Discussion on Judicial Sale of Ships, *CMI Yearbook 2009*, Athens II, Documents of the Conference, pp. 347-351.

[12] See Article 11 of the 1993 MLMC.

of all liens and other encumbrances, provided that the requirements set out in paragraph 1 (a) and (b) have been complied with. Upon production of such certificate, the registrar shall be bound to delete all registered mortgages, "hypothèques" or charges except those assumed by the purchaser, and to register the vessel in the name of the purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be.

Similar provisions can be found in the 1967 MLMC.[13]

Therefore, a question may arise whether it is really necessary to have a separate unification instrument dealing solely with the international recognition of the legal effects of judicial sale.

The answer should be in the affirmative. First, the 1967 MLMC and 1993 MLMC deal only with some aspects of recognition (i.e. recognition of the effects by the registrar of the vessel judicially sold), and are silent on other important aspects dealt with by the CMI's draft unification instrument on the recognition of judicial sale (such as the precise contents of the notice of judicial sale; the precise contents of the certificate of judicial sale; the recognition of the legal effects of judicial sale by courts of other countries; jurisdiction for legal proceedings challenging the judicial sale; circumstances in which recognition may be suspended or refused).[14]

Second, and perhaps more importantly, neither of the said two Liens and Mortgages Conventions has met with wider international acceptance, and probably never will.[15] The reasons have little to do with the legal effects of judicial sale and their recognition, but probably with deep conceptual differences amongst various legal systems in relation to the notion of maritime liens and the claims secured by a maritime lien.

Therefore, instead of being "held hostage" to the (relatively unsuccessful) conventions on maritime liens and mortgages, international recognition of the legal effects of judicial sales should become the topic of a separate unification instrument.[16]

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[13] See Article 11, paras. 1 and 3 of the 1967 MLMC.

[14] See Part 5 below.

[15] The 1967 MLMC has never entered into force (see: http://diplomatie.belgium.be/sites/default/files/downloads/i16.pdf). The 1993 MLMC entered into force on 5 September 2004, but has not attracted support from a greater number of maritime States (see: United Nations Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&clang=_en (23 April 2019)).

[16] For further discussion on why the 1993 Liens and Mortgages Convention is not sufficient to regulate the international recognition of judicial sales of ships, see: Sharpe, William M.,

4. PREPARATION OF A UNIFICATION INSTRUMENT

4.1. Incentive and International Working Group

The incentive for creating a unification instrument on this topic came about in 2007. In May 2007, at a meeting of the CMI Executive Council (hereinafter: EXCO) in Dubrovnik, it was suggested that a preliminary study on the judicial sales of ships should be conducted with the aim of selecting future topics and projects of the CMI. At the CMI Athens Conference in 2008,[17] following a discussion on this matter, it was agreed that, with EXCO approval, a working group on the judicial sales of ships (hereinafter: IWG) would be set up to explore the issues related to judicial sales of ships, with an emphasis on two issues: international recognition of foreign judicial sales of ships, and the necessity of enacting an international instrument on this subject.[18]

In 2009, the IWG started work on a questionnaire for national maritime law associations (hereinafter: NMLAs). In May 2010, the CMI Questionnaire drafted by the IWG, with some interventions from EXCO, was circulated to the NMLAs for comments and answers. The questionnaire contained 30 questions and was divided into five parts: the concept of judicial sales of ships; the key procedural elements of judicial sales of ships; the effects of judicial sales of ships; recognition of the legal effects of foreign judicial sales of ships; and the necessity and feasibility to have an international instrument on the recognition of foreign judicial sales of ships. Replies were received from 23 NMLAs. These were discussed at the CMI Colloquium in Buenos Aires in October 2010.[19]

Towards an International Instrument for Recognition of Judicial Sales of Ships – Policy Aspects, *CMI Yearbook 2013*, at pp. 170-171.

[17] At the CMI Athens Conference, Henry Hai Li observed that unlike the arrest of ships, the judicial sale of ships had not met with appropriate attention by the international community and thus paved the way for more-than-a-decade-long discussion on this matter. Li, Henry Hai, A Brief Discussion on Judicial Sale of Ships, *op. cit.*, p. 342.

[18] Report of the International Working Group on the Preparation of the Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships for Consideration by the Delegates to the CMI Conference: Hamburg 2014, pp. 1-2, available at: https://comitemaritime.org/wp-content/uploads/2018/05/Beijing-Draft-approved-at-plenary.docx (12 March 2019).

[19] For more on the questionnaire, see: Li, Henry Hai, A Brief Introduction to the Topic on Recognition of Foreign Judicial Sales of Ships, available at: https://comitemaritime.org/wp-content/uploads/2018/05/A-Brief-Introduction-to-the-Topic-by-Henry-Hai-Li.pdf (18 March 2019).

4.2. First Draft and Second Draft

After the Buenos Aires Colloquium, the IWG, having been granted a mandate by EXCO, continued its work and produced a draft document called "Draft Instrument on the Recognition of Foreign Judicial Sales of Ships" (the "First Draft"), which was circulated to the NMLAs in August 2011.

The First Draft was amended in accordance with the suggestions put forward at the international sub-committee (hereinafter: ISC) meeting held in Oslo in September 2011. At the meeting, several points were agreed. First, the instrument should set minimal necessary requirements for the judicial sale of ships, as well as its effects. The purchaser should be granted protection, so that the judicial sale of ships is an effective means of enforcing claims and judgments. As a consequence of judicial sale, the ship should not be subject to arrest for claims arising prior to the sale. The legal effects of judicial sale should be recognised by all State Parties, unless there are grounds for exception, which should also be prescribed in the instrument. Conditions for challenging judicial sale should be expressly prescribed in the instrument. Jurisdiction for deciding whether a judicial sale has been lawfully carried out should lie with the courts of the State in which the sale was carried out. Finally, it was agreed that there should not be any conflict with other international conventions, such as the MLMCs of 1926, 1967, 1993 and the Arrest Conventions of 1952 and 1999.[20]

In May 2012, the Second Draft and a commentary from the IWG was circulated to the NMLAs with the aim of gathering comments and proposals. The plan was to collect feedback from the NMLAs and prepare for the CMI Conference in Beijing.[21] Minor language adjustments were introduced to the First Draft regarding definitions and the scope of application, while the part on recognition was amended with the aim of limiting the grounds for refusal of recognition.[22]

4.3. Beijing Draft and the Final Draft

During the CMI's Beijing Conference in October 2012, the Second Draft was discussed in detail. After taking into account comments made during the dis-

[20] Report of the International Working Group on the Preparation of the Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships for Consideration by the Delegates to the CMI Conference: Hamburg 2014, *op. cit.*, pp. 12-13.

[21] *Ibid*, p. 14.

[22] Bleyen, Lief, *Judicial Sales of Ships, A Comparative Study*, Springer, Cham, 2016, p. 161.

cussion, the IWG presented "A Proposed Draft International Convention on Recognition of the Foreign Judicial Sales of Ships", known as the "Beijing Draft", for voting. Since some NMLA delegates wanted an opportunity to comment on the draft and some others did not have mandates for voting on this topic, they requested that the Beijing Draft be circulated to the NMLAs. The Beijing Draft was circulated to the NMLAs in March 2013 together with the IWG's comments, with the aim of receiving comments from the NMLAs well in advance of the ISC meeting in Dublin in 2013.[23]

The discussion continued at the ISC meeting in Dublin in September 2013. It was agreed that the IWG would prepare a final report on this project, by including the final wording of the proposed draft convention and a commentary, so that the final draft could be discussed and voted on at the CMI Conference in Hamburg in 2014.

At the CMI Hamburg Conference held in June 2014, the Beijing Draft was further amended. On 17 June 2014, the CMI Assembly adopted a resolution by which the text of the "Draft International Convention on Foreign Judicial Sales of Ships and their Recognition" (the "Final Draft") was approved.[24]

5. MAIN FEATURES OF THE FINAL DRAFT

Article 1 of the Final Draft contains definitions of the relevant terms. "Judicial Sale" is defined as "any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the purchaser and the proceeds of the sale are made available to the creditors" (item 8). "Competent Authority" means "any Person, Court or authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title" (item 4). "Clean Title" means "a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser" (item 3). "Charge" includes "any charge, Maritime Lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the Ship" (item 2). "Maritime Lien" means "any claim recognized

[23] Report of the International Working Group on the Preparation of the Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships for Consideration by the Delegates to the CMI Conference: Hamburg 2014, *op. cit.*, p. 18.

[24] The Final Draft is available at: https://comitemaritime.org/work/judicial-sale-of-ships/ (23 April 2019) under "Recent Developments".

as a maritime lien or privilege maritime on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale" (item 9). "Mortgage/Hypothèque" means "any mortgage/hypothèque effected on a Ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale" (item 10). "Registered Charge" means "any charge entered in the registry of the Ship that is the subject of the Judicial Sale" (item 15).

As for the scope of application, Article 2 prescribes that the Convention shall apply "to the conditions in which a Judicial Sale taking place in one state shall be sufficient for recognition in another state". The scope of application is thus not limited solely to judicial sales occurring in States that are parties to the Convention. Nevertheless, Article 9 allows the State Parties to restrict the application of the Convention to recognition of judicial sales conducted in one of the State Parties.

Article 3 of the Final Draft deals with the notice of judicial sale. Such notice should be given at least 30 days prior to the judicial sale to the following categories of persons: the registrar of the ship's register in the State of registration; all holders of any registered mortgages, hypothèques or registered charges (if those are recorded in a ship registry in the State of registration open to public inspection); holders of any maritime liens of which the competent authority has been notified; and the owner of the ship.[25] Article 3 also contains provisions on the contents of such notice (paragraph 3), and the form and method of dispatching the notice (paragraphs 4, 6 and 7).

Legal effects of the judicial sale are prescribed in Article 4 of the Final Draft. Once the ship has been judicially sold, any title to and all rights and interests in the ship which existed prior to the judicial sale shall be extinguished, and any mortgage/hypothèque or charge, except as assumed by the purchaser, shall cease to attach to the ship. The purchaser acquires the clean title to the ship. For these effects to take place, two conditions have to be satisfied: first, the ship has to be physically present in the jurisdiction of the State of judicial sale at the time of the judicial sale; and, second, the judicial sale has to be conducted in accordance with the national laws of the State of judicial sale and the provisions of the Convention.

Article 5 of the Final Draft deals with the certificate of judicial sale. After a ship has been judicially sold, the purchaser may request the competent authority to issue a certificate recording that: (a) the ship has been sold to the purchaser

[25] Article 3, para. 1.

in accordance with the law of the State of judicial sale and the provisions of the Convention free of any mortgage/hypothèque or charge (except as assumed by the purchaser); and (b) any title to and all rights and interests existing in the ship prior to its judicial sale are extinguished.[26] Article 5 also provides the minimum particulars to be contained in the certificate of judicial sale.[27] A form of the certificate is attached as an Annex to the Final Draft.

Articles 6 and 7 provide for how the effects of judicial sale shall be recognised internationally. A certificate of judicial sale represents conclusive evidence that judicial sale has taken place and has the legal effects provided for in Article 4,[28] except where there is proof of circumstances under which recognition may be refused or suspended.[29] Upon production of such a certificate, the registrar of the ship's registry where the ship was registered prior to the judicial sale shall delete any registered mortgage/hypothèque or registered charge (except those assumed by the purchaser) and either register the ship in the name of the purchaser or delete the ship from the register and issue a certificate of deregistration, as the purchaser may direct.[30] The court of a State Party shall also recognise a judicial sale as having the effects set out in Article 4,[31] and, where a ship is sought to be arrested or was arrested prior to the judicial sale, the court shall dismiss, set aside or reject the application for arrest or shall release the ship from arrest upon production of a certificate of judicial sale.[32]

Article 7 also deals with certain aspects of challenging the judicial sale, that is to say, the international jurisdiction in the proceedings to challenge the judicial sale, and the authority to take action challenging the judicial sale. The judicial sale may be challenged only before the court of the State of judicial sale,[33] and only by an interested person.[34]

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[26] Article 5, para. 1.

[27] Article 5, para. 2.

[28] Article 7, para. 5.

[29] As to which, see Article 8.

[30] Article 6, para. 1.

[31] Article 7, para. 1.

[32] Article 7, para. 2. The court shall not be under such duty if the arresting party is an interested person (meaning the owner of a ship immediately prior to the judicial sale or the holder of a registered mortgage/hypothèque or registered charge attaching to the ship immediately prior to the judicial sale – see Article 1, item 7) and furnishes proof as to existence of any circumstances justifying suspension or refusal of recognition (as provided for in Article 8).

[33] Article 7, para. 3.

[34] Article 7, para. 4.

Article 8 governs the circumstances in which recognition may be suspended or refused. Recognition of a judicial sale may be refused: if the interested person proves that at the time of the judicial sale the ship was not physically present within the jurisdiction of the State of judicial sale;[35] or if the interested person proves that the court in the State of judicial sale has nullified the judicial sale and its effects;[36] or if the court in a State Party in which recognition is sought finds that the recognition would be manifestly contrary to the public policy of the State of recognition.[37] Recognition may be suspended if the legal proceedings to challenge the judicial sale have been commenced and the competent court in the State of judicial sale has suspended the effects of the judicial sale pending a final decision on the challenge.[38]

6. PROMOTING THE FINAL DRAFT

6.1. IMO

The CMI is not an inter-governmental organisation and on its own cannot adopt international conventions. Taking into consideration the CMI's collaboration with the IMO regarding the 1993 MLMC, in January 2015 the IWG was asked to prepare an information paper for submission to the IMO Legal Committee (hereinafter: LEG) for the inclusion of this topic on the agenda of the LEG 102nd Session, which took place in April 2015. While LEG did not in principle oppose the contents of the Final Draft, further work was required to demonstrate the compelling need for a new convention and whether LEG was indeed the proper forum for further action. LEG invited the CMI and interested Member States to submit further and better particulars to LEG's next session.[39] China and the Republic of Korea agreed to co-sponsor the project. Therefore, an information paper was submitted by China, the Republic of Korea and the CMI to LEG for its 103rd Session, eloquently explaining "the rationale for, and an outline of, a draft international convention on the foreign judicial sales of ships and their recognition", including the compelling need for such a unification instrument,

[35] Article 8, para. 1, sub-para. 1.

[36] Article 8, para. 2, sub-para. b).

[37] Article 8, para. 3.

[38] Article 7, para. 2, sub-para a).

[39] Legal Committee, 102nd session, 14-16 April 2015, available at: http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-102nd-session.aspx (12 March 2019).

as well as how it fits into the scope of the IMO's objective.[40] In spite of this, at its 103rd Session, LEG decided that the proposal would not be further pursued for the time being.[41] The reasons behind such a decision were various: the issue was considered to be a matter of private and commercial law and thus not falling within LEG's scope of work; the work-load of delegations; the possible negative effect on the port industry.[42]

6.2. UNCITRAL

After the IMO had declined its support in promoting the Final Draft, the CMI approached the Hague Conference for Private International Law (hereinafter: the HCCH). In February 2017, CMI representatives attended a meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments, where they presented the Final Draft with the aim of incorporating it into the work on recognition and enforcement of foreign judgments. This was not accepted, and therefore CMI was invited to present an information paper to the Council of HCCH in March 2017, so that consideration could be given at the HCCH Council meeting in 2018 on whether to add this project to its work programme as a new stand-alone topic. Nevertheless, it was concluded that such an "esoteric and industry-specific" topic would be more appropriate for UNCITRAL.[43]

The CMI, which had experience of working with UNCITRAL on the 2008 Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), requested UNCITRAL to include this matter into its work programme. At the 50th session of UNCITRAL, held in Vienna in July 2017, UNCITRAL supported the proposal, sought additional information, and suggested that the CMI hold a Colloquium for the purpose of providing additional information to UNCITRAL.

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40 The Proposed draft International Convention on Foreign Judicial Sales 2016, available at: https://comitemaritime.org/work/judicial-sale-of-ships/

41 Legal Committee, 103rd session, 8-10 June 2016, available at: http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-103rd-session.aspx (12 March 2019).

42 Proposal of the Comité Maritime International (CMI) for possible future work on cross-border issues related to the judicial sale of ships, p. 5, available at: https://comitemaritime.org/wp-content/uploads/2018/05/Document-5.pdf (1 March 2019).

43 *Ibid*, pp. 5-6.

The CMI Colloquium was held in Malta in February 2018 and the issue of judicial sales of ships was unanimously recognised as crucial for the proper functioning of international trade.[44] There were 174 participants at the Colloquium, including delegates from 60 countries.[45] All sectors of the shipping industry were represented at the Colloquium. A Proposal for UNCITRAL was prepared by the Government of Malta (which subsequently withdrew its proposal upon the intervention of the European Commission) and Switzerland, and was submitted to UNCITRAL along with the report from the Malta Colloquium. At its 51st session, held in New York in June/July 2018, UNCITRAL decided that the judicial sales of ships should be added to the work programme.[46]

The matter was assigned to Working Group VI. At its thirty-fifth session, held in New York from 13 to 17 May 2019, the Working Group commenced work on the preparation of a draft instrument on the judicial sale of ships on the basis of the CMI proposal, taking into account the outcomes and conclusions of the Colloquium.[47]

7. UNCITRAL – WORK IN PROGRESS

At its three sessions held so far,[48] the UNCITRAL Working Group has made significant progress in developing a concept of the Convention to enhance the prospects of the final instrument gaining sufficient ratifications to enter into force, and serve the shipping industry.

The areas in which important breakthroughs have been achieved towards increasing the chances of ratification are: (i) the possible role of the repository, and (ii) limitation of the grounds for refusal of the certificate of sale (issued by the State of judicial sale).

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44 Report on the Malta Colloquium, available at: https://comitemaritime.org/report-on-malta-colloquium/ (1 March 2019).

45 Proposal of the Government of Switzerland for possible future work on cross-border issues related to the judicial sale of ships, United Nations Commission on International Trade Law Working Group VI (Judicial Sale of Ships), p. 8, available at: https://undocs.org/pdf?symbol=en/A/CN.9/WG.VI/WP.81 (13 April 2021).

46 United Nations Commission on International Trade Law, Working Group VI (Judicial Sale of Ships), Thirty-fifth session, New York, 13-17 May 2019, Annotated provisional agenda, available at: https://undocs.org/en/A/CN.9/WG.VI/WP.80, para. 10.

47 *Ibid*, para. 11.

48 35th session, 13-17 May 2019, New York; 36th session, 18-22 November 2019, Vienna; 37th session, 14-18 December 2020, Vienna (online).

7.1. Notification

The process of notification seems to be the quintessential feature of the Convention. The current Draft (as amended by the December 2020 session) provides in Article 4 that "prior to a judicial sale of a ship, a notice of the sale shall be given" to a number of interested parties listed therein (such as holders of any mortgage or registered charge; holders of any maritime lien; the owner of the ship, and so forth). The notice "shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in the model contained in Appendix".

It is to be noted that: (i) the content of the notice and the list of notifying parties are not governed by the national law of the State of judicial sale, but are rather prescribed by the Convention, which (in that regard) supersedes the national law; and that (ii) the notice shall be given "in accordance with the law" of the State of judicial sale. It means that the method of delivering the notice to each notifying party, and confirmation or verification of delivery/receipt (if required) shall be governed by the national law (of the State of judicial sale).

The crucial question concerns who has ultimate control of the process of notification, i.e. who is going to judge/decide whether the notification has been done according to the requirements set out in the Convention? The Convention provides that it will be the courts of the State of judicial sale under their exclusive jurisdiction. This raises the question of whether the State of recognition may refuse to recognise the judicial sale if the notice is not given to all notifying parties listed in the Convention, or if the notice does not contain the information required therein.

The Draft Convention contains an article on repository of notices and certificates (Art. 12), providing only that it will be kept by "the Secretary-General of the United Nations or an institution named by UNCITRAL". At the December 2019 session of the Working Group, the idea for a more specifically defined digital repository gained support. Some delegations went a step further by suggesting that the repository should not be just an auxiliary aid tool without any legal significance, but that postings of notices on the repository platform should have legal implications.

In the period between the November 2019 and December 2020 sessions, a tentative arrangement with the IMO was agreed for a digital platform, named the *Global Integrated Shipping Information System* – GISIS, which would be used as the repository.

The forthcoming deliberations in the Working Group will have to decide on the legal effects of the postings of notices on the repository's GISIS platform. A question arises about whether notification via the repository would supersede or replace individual notifications in the sense that the State of recognition should be entitled to refuse recognition of the certificate of judicial sale on the grounds of improper notifications only in cases concerning failure of notification through the repository. Otherwise, if the repository were properly notified, the competence for deciding all issues with regard to individual notices sent to the notifying parties' mailing addresses would be exclusively vested in the courts of the State of judicial sale. This solution is advocated by some delegations to the Working Group. According to their proposal, the repository should be the only relevant method of notification that would concern the State of recognition.

Nevertheless, if this solution is not accepted (and repository notifications are left without legal effect), then it will be for the courts of the State Parties (i.e. the State of judicial sale – hearing the notification complaints; or the State of recognition – hearing the public order complaints) to decide, depending on the circumstances of each case (on a case-by-case basis), on the effects and consequences of the GISIS notification in situations where an individual notice failed to be sent to or failed to reach a notifying party.

Under the current draft, there is no prescribed sanction for failure to notify the repository, and the courts of the States of recognition might or might not qualify such a failure as a breach of their respective public order. On the other hand, because "the courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid or suspend the effects of a judicial sale of a ship conducted in another State Party",[49] the courts of the State of recognition would have no control over the notification process in the State of judicial sale, but arguably could decline the recognition, provided an interested party demonstrates that notification irregularities, not rectifiable before the courts of the State of judicial sale, violate the public order of the State of recognition.

Notifications might be quite complicated and are governed by domestic laws. The idea is to take full advantage of digital information technology, nowadays easily accessible at all locations, on all kinds of devices, and strike a reasonable balance between the right of a creditor to receive a notice (concerning its interests) and the *caveat creditor* principle, which does not seem to be too big a burden in the era of digital information.

[49] Article 9 of the current draft Convention.

7.2. Refusal of recognition

At the December 2020 session, the Working Group moved towards reducing the grounds for refusal. The sentiment prevailed that the State of registration or any other State of recognition and enforcement should rely on the certificate of judicial sale, and that only certificates "manifestly contrary to the public policy" should be rejected. In practical terms, if the breach of the law of the State of judicial sale (the governing law of the judicial sale) was so severe and unreasonably unrectifiable within its legal system, then there would be a good arguable case that the Certificate is contrary to the *Ordre Public* of the other State Party. The cases would be heard and decided by the courts of the State of recognition and execution.

Of course, the Certificate would not be recognised if it was suspended or avoided (Article 10) in the State of judicial sale. The suggestion is that notification of suspension or avoidance be sent to the repository.

The rejection grounds of "fraud [committed by the purchaser]" and lack of physical presence of the ship "within the jurisdiction of the State of judicial sale at the time of the sale" were taken out, together with the closed list of parties entitled to claim breach of the public policy, and this is now a matter of domestic law. The ground based on "fraud [committed by the purchaser]" was superfluous, because any fraud – whoever it may be committed by, i.e. the purchaser itself or somebody else (a creditor, ex-owner) – that affected the judicial sale would anyhow be against the public policy. In particular, there is no need to apostrophise the purchaser – as it could cause doubt whether the fraud committed by any other person would be irrelevant under the Convention, as would be suggested by *argumentum a contrario*.

Nevertheless, it is not clear what would happen if the ship was "not physically within the jurisdiction of the State of judicial sale at the time of the sale". This condition was removed from the rejection grounds, but if retained in Art. 4 (or elsewhere) for the application of *the Convention*, the following question would arise: in which jurisdiction would the interested party be allowed to raise this objection? Only in the State of judicial sale or in the State of recognition as well? In the latter case, only on the grounds of public policy, i.e. violation of the Convention, which forms part of domestic law? A possible solution is to allow rejection if the court in a State Party determines that (a) the sale violated the Convention [which would mean that the ship was not physically present in the State of judicial sale, and the notifications were not made through the repository], or (b) the effect would be contrary to the public policy of that other State Party.

Further, it was decided that the Convention should not list the parties entitled to start proceedings for rejection of recognition. The matter is left to domestic law.

Generally, the changes made by the Working Group to the CMI's original proposal could be depicted as an effort to strike the right balance between the International Comity (recognition of foreign decisions) on the one hand, and Sovereign Control (the right of a State to control foreign decisions) on the other. In that sense, a practical solution might be to define and prescribe the legal consequences of notification through the repository (GISIS), which would contribute to achieving a reasonable balance in protecting the various interests involved: those of the States and the individual parties alike. According to the Working Group's proposal, Article 10 of the Convention would provide that a judicial sale of a ship would not have effect in a State Party (other than in the State of judicial sale), if a court in that other State Party determines that:

a) Article 3 and/or Article 12 of the Convention have been violated (i.e. the ship was not physically present in the State of judicial sale and/or the notifications were not made through the Repository); or

b) such effect would be contrary to the public policy of that other State Party.

Even though remarkable progress in respect of establishing the repository has been made with the IMO, at the moment the main obstacle in assigning any legal effect to publicising notices and other deeds via the repository seems to lie in the IMO's reluctance to undertake any legal obligation and liability for the functioning of the repository (i.e. running the GISIS platform). Therefore, the Convention is still being drafted under the assumption that the repository "would perform a 'passive' function of publishing notice and certificates"; that it should not "replace the actual delivery of the notice to each person listed" in the appropriate article of the Convention, save publishing the notices by press announcement; that "the repository should perform purely an informative function, and therefore that the publication of notices and certificates should have no particular legal effect".

However, the process of ratification might take quite some time, possibly years, and, in the meantime, issues concerning establishing, administrating and funding the repository might be resolved. Therefore, it will be tactically convenient to introduce subparagraph (a) (as quoted above) in the current Draft, and make its coming into force conditional on (i) setting up a fully functional repository, and (ii) giving notice thereof to the State Parties by the depositary of the Convention (the Secretary-General of the UN).

Such an approach (that the Croatian delegation will propose to the Working Group) would motivate and intensify efforts in upgrading the capacity of the repository to meet the expected task, and would avoid the need for amending the Convention at a later date, if and when the proper repository is established. Otherwise, adopting the Convention in the current form would freeze desirable development relating to the role of the repository for a considerable period of time.

7.3. Outstanding issues

There are other outstanding issues such as: the inclusion of bareboat charter that survives the sale in the definition of "Charge"; the definition of "Ship" – as any ship or other vessel registered in a public register; the status of public claims and commercial claims made by public bodies or entities; the scope of application – to any particular certificate conferring clean title, regardless of whether or not the States could in principle issue qualified certificates; the simplicity of drafting, etc. However, analysis of these issues would be beyond the purpose of this article.

8. CONCLUSION

The CMI's work on the draft unification instrument relating to the recognition of the legal effects of the judicial sales of ships has lasted more than a decade, and has included great effort by national maritime law associations and eager individuals. The history of this work can be roughly divided into two phases. The first phase includes the activities within the CMI from the first incentive during the Dubrovnik Colloquium in 2007 to the adoption of the Final Draft unification instrument at the 2014 Hamburg Conference. This phase can be described as one of enthusiasm, with numerous presentations, papers, questionnaires, replies to the questionnaires, analyses of the replies, followed by several draft instruments and numerous comments on those drafts. The final outcome (embodied in the form of a Final Draft International Convention on Foreign Judicial Sales of Ships and their Recognition) arrived in an atmosphere of friendly discussion amongst experts. The second phase includes the CMI's activities in promoting the Final Draft amongst international entities so as to turn the Final Draft into an international convention. This is where the CMI has encountered problems.

The CMI is a non-governmental and non-lobbying organisation. The CMI's authority comes from its tradition and its track record in the unification of private maritime law. The CMI's impartiality derives from its structure and organi-

sation (as an international association of national maritime law associations). So, when the CMI speaks, it is the voice of the maritime law profession from all over the world, spoken by some of the best maritime lawyers (both practitioners and academics) around the globe. It is therefore most inconvenient (and this is a gross understatement) that, after having invested a tremendous amount of time and effort in producing a draft unification instrument, the CMI is having to convince various international organisations to take up the CMI's work for further procedure.

In this light, it is difficult to understand the attitude shown by the IMO Legal Committee in deciding not to put the recognition of judicial sales of vessels in its work programme. Such a decision cannot validly be justified by a lack of "compelling need" for a unification instrument in this field. If the international community of maritime lawyers gathered under the auspices of the CMI have agreed that a compelling need does exist, it cannot be seriously argued that this is not the case. Neither can such a decision by the IMO Legal Committee be justified by the theory that recognition of judicial sales is "outside the IMO's mission". As discussed above, uniform rules on the international recognition of judicial sales would not only increase the legal certainty of purchasers of vessels and their financers, but would also improve the financial outcome of judicial sales, thus enhancing the financial position of various claimants in judicial sale proceedings, which means that such international recognition would generally contribute to the shipping industry. It cannot be seriously argued that this is outside the scope of the IMO's mission.[50] Moreover, recognition of judicial sales is not a strictly private-law matter, because it has to do, *inter alia*, with the registration and deregistration of ships, which is a matter of administrative (and, therefore, public) law. In addition, the IMO's involvement in various other private-law matters (such as the CLC regime, the carriage of passengers and their luggage, the limitation of liability for maritime claims, salvage, maritime liens and mortgages, as well as the arrest of ships) disproves the possible theory that the IMO's activities are limited solely to matters of public maritime law.

[50] For an eloquent discussion of how recognition of judicial sales fits within the IMO's mission and on the existence of "compelling need", see the Proposal to add a new Output to develop a new Instrument on Foreign Judicial Sales of Ships and their Recognition, submitted by China, the Republic of Korea and the Comité Maritime International (CMI) in the preparation of LEG's 103rd session, available at: https://comitemaritime.org/wp-content/uploads/2018/05/The-Proposed-Draft-International-Convention-on-Foreign-Judicial-Sales-2016.pdf (23 April 2019). See also Li, Henry Hai, A Brief Introduction of the Recent Development of the Beijing Draft, available at: https://comitemaritime.org/wp-content/uploads/2018/05/Henry-Li-A-Brief-Introduction-of-the-Recent-Development-of-the-Beijing-Draft.doc (23 April 2019).

Not long before the CMI approached the IMO Legal Committee on the topic of the recognition of judicial sales, a question was posed as to whether the IMO Legal Committee should be "more suspicious of any proposal initiating a new instrument which is delivered to the Committee complete with a draft convention attached". The reason for such doubt was that such a draft "will, at best, reflect the national law of the proposing state or states only".[51] While such a suspicion is generally justified, there is no room to be similarly suspicious when a unification instrument is proposed by the CMI, because unification instruments drafted within the CMI do not reflect the national law of any particular State. Moreover, the draft unification instrument in the field of the recognition of judicial sales wisely avoids promoting elements of any national law. On the contrary, it makes recognition conditional on the adherence of the judicial sale to the national law of the State of judicial sale, whatever that national law may provide (with the proviso that the judicial sale should, in addition to the requirements of the respective national law, adhere to the requirements of the Convention). The Final Draft also avoids the slippery ground of providing universal definitions of "Mortgages/Hypothèques" and "Maritime Liens", but provides that these terms will include everything that is considered as such under the law applicable under the conflict-of-law rules of the State of judicial sale.

It is very good that UNCITRAL has recognised the potential benefits of a unification instrument in this field, and taken this matter on board. Unlike in the CMI phase, the drafting now involves official bodies of participating states. This has provided a new, fresh perspective, and will hopefully help create a unification instrument that is well thought out from as many angles as possible. This does come at a price, though: the Final Draft prepared by the CMI has been deconstructed and analysed word by word almost from the beginning. The main reason is the need to strike the right balance between, on the one hand, the necessity to recognise foreign judicial sales swiftly and efficiently, and, on the other hand, the sovereign right of national states to control foreign court decisions (on the ground of the Convention conditions or public order).

In addition, there is a chance of establishing an international notification platform which, in the opinion of the authors of this paper, should be embraced by the Working Group. Such a notification platform might avoid issues such as: which law governs the notification (the law of the State of judicial sale, or ulti-

[51] See Griggs, Patrick, Comité Maritime International and the Legal Committee – Working Together, a paper presented at the 100th session of IMO LEG in April 2013, *CMI News Letter*, No. 1-2, January-August 2013, p. 3, available at: https://comitemaritime.org/wp-content/uploads/2018/05/Comite-Maritime-International-and-the-Legal-Committee-working-together-2.pdf (23 April 2019).

mately the law of the State of recognition); which courts have jurisdiction over the notification process (for individual notifications and for notification over the international notification platform); when can a State reject recognition of a foreign judicial sale decision on the grounds of improper notification? The issues that require further elaboration include: the legal implications of GISIS publication/notification; the extent to which the *caveat creditor* principle might be introduced (due to the easy availability of the data on individual ships published on the IMO digital platforms).

It is sincerely hoped that UNCITRAL will soon carry this project through to a successful conclusion. It is also to be hoped that the IMO Legal Committee will in the future show more responsiveness to the unification projects prepared and proposed by the CMI.

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Sažetak:

SUDSKA PRODAJA BRODOVA – STRMOVIT PUT DO UNIFIKACIJE

Svrha je ovog rada ukazati na glavni cilj koji se želi postići unifikacijom pravila o međunarodnom priznavanju pravnih učinaka koji proizlaze iz sudske prodaje brodova. Ukratko, rad predstavlja najvažnije odredbe CMI-jeva nacrta Međunarodne konvencije o sudskim prodajama brodova u inozemstvu i njihovu priznanju, izlaže CMI-jeve napore pri pokušaju pronalaska odgovarajućeg foruma putem kojeg bi se nacrt pretvorio u međunarodnu konvenciju te sažima dosadašnji rad UNCITRAL-a na nacrtu Konvencije.

***Ključne riječi**: CMI; IMO; UNCITRAL; nacrt Konvencije; sudska prodaja broda; priznanje.*