

DRAFT CONVENTION ON THE INTERNATIONAL EFFECTS OF THE JUDICIAL SALE OF SHIPS*

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1. INTRODUCTION

I felt privileged and honoured to have been invited to participate at the International Maritime & Transport Law Course held in Dubrovnik between the 6th and the 11th of September 2021.

I accepted with great pleasure and considered it a most appropriate opportunity to share some views and thoughts on what, as a maritime law practitioner, I believe to be one of the most exciting pieces of international law, the drafting of which we are all currently witnessing. It was also the perfect opportunity to inform the audience of the progress that Working Group VI of UNCITRAL, delegated to consider the Beijing Draft on Judicial Sales, was making.

I am referring to what we now refer to as the “**Draft Convention on the International Effects of Judicial Sale of Ships.**” I say “now” because the decision to start referring to the draft international instrument being considered by Working Group VI of UNCITRAL by this specific name was only agreed upon during the 40th session held in February of this year, and therefore after the course in Dubrovnik.

When after the Dubrovnik course I was asked to prepare an article on what I had shared during my presentation, I also accepted, in the knowledge that from September 2021 to the present day there have been two further sessions of Working Group VI, the 39th Session held in Vienna in October 2021 and the 40th Session held in New York in February 2022.

The progress registered in the 39th and 40th sessions has been remarkable leading to the finalisation of the Draft Convention by the Working Group VI which in turn lead to the next very important step of the Draft being sent to the Commission.

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The Commission will be considering this draft convention between the 27th and the 30th of June 2022 and if it is approved, that would mean that the Draft Convention will then go on to the General Assembly of the United Nations for adoption. For those of us who live and breathe international maritime law on a daily basis, this is a hugely important and exciting moment.

It is worth recalling that the Comité Maritime International (CMI) first started to work on a draft convention on Judicial sales in 2008. The CMI decided to tackle the negative effects on international maritime trade when states fail to give effect to the free and unencumbered title of a purchaser when such a purchaser buys a vessel with clean title in a judicial sale.

In the unfortunate circumstance when an owner of a vessel finds himself in default repeatedly unable to pay his debts, frequently the only end to the matter is the judicial sale of the vessel. In these unfortunate circumstances what one aims at and hopes for is a properly held judicial sale of a vessel where the vessel will attract the best possible price which is the only hope for creditors to get paid. Clearly and quite obviously a purchaser will only be remotely interested in bidding for a distressed ship in a judicial sale if that purchaser buys the vessel free and unencumbered from its previous debts. No potential buyer is even going to think about buying a vessel in a judicial sale and spending good money if he is not going to get a free and unencumbered title. The norm in most parts of the world is for vessels to be sold in judicial sales with clean title and the creditors would then get paid out of the proceeds of the sale. The higher the price the better the chances of the creditors getting paid with the additional chance for the original owner to also get something out of the judicial sale of his own vessel.

Taking this one step further, when a successful purchaser in a judicial sale purchases the ship very frequently the purchase price is paid into the court of judicial sale and the vessel is transferred, in accordance with the law of the state of judicial sale, in full ownership to the buyer free and unencumbered.

The buyer then proceeds to the flag state of the vessel and may either choose to ask the flag state to transfer the vessel to his name if indeed the new buyer satisfies all the procedural criteria of the law of the state of registry, or he may seek to obtain a deletion certificate and register the vessel in another jurisdiction. Very frequently as well, the buyer would have secured finance to purchase the vessel and therefore the new financier would seek to register a mortgage against the newly purchased vessel in the knowledge that since the vessel would have been sold free and unencumbered with any previous mortgagee looking towards the proceeds of the sale for the satisfaction of the mortgage, that mortgage would be the only mortgage registered against the ship.

It is therefore of equal paramount importance for any financier of a vessel purchased in a judicial sale for the vessel to be transferred to the buyer free and unencumbered so that the new financier can assure himself that his mortgage would be the first mortgage to be registered following the purchase, with any pre-existing mortgagees making a claim against the proceeds of the sale.

All of the above is normally standard fare and broadly speaking it is frequently reflected in the domestic law of a number of countries.

However, there have been cases where registrars have refused to recognise the clean title of the purchaser in a judicial sale leading to problems with the issuing of deletion certificates, or with new registrations. There have been cases where totally unscrupulous claimants in bad faith have knowingly and illegitimately arrested vessels following judicial sales when in the hands of new owners in the knowledge that those vessels were sold free and unencumbered and when illegitimately arresting such vessels is an easier option than getting paid out of the proceeds of the vessel.

When this occurs, and it has occurred, there is immediately a break down in the maritime legal order. There is the introduction of uncertainty and lack of clarity in international trade, and it spells bad news for the orderly conduct of maritime trade.

The failure to give effect to properly conducted judicial sales first and foremost causes severe challenges to the new *bona fide* purchaser who suddenly finds himself defending the claims of the previous owners; it serves to cause uncertainty to ship financiers who need to ensure that their security is certain; it provides confusion to registrars of ships who must have the clarity of following an orderly process; it causes significant financial losses to charterers and owners of cargoes on board vessels which are illegitimately arrested in such circumstances. Above all, it only serves to generate vast amounts of unnecessary litigation resulting in not an insignificant amount of loss of time and money for all concerned.

2. THE BEIJING DRAFT

The Beijing Draft of the Comité Maritime International was thus designed specifically to answer this international demand for clarity and certainty.

Under the Chairmanship of Prof. Henry Li, the members of the CMI International Working Group worked hard and deliberated at length with the draft being amended, refined and modified several times until it was presented to the CMI conference in Beijing in 2012, hence the name, to be finally approved by

the General Assembly of the CMI in Hamburg in 2014. From then on, the CMI worked to find the Draft Convention a home.

The CMI first approached the IMO however there does not appear to have been any appetite for it.

It was in preparation for the fiftieth session of the Commission in Vienna in July 2017, that the CMI submitted the Beijing Draft Convention with a proposal for possible future work on cross-border issues related to the judicial sale of ships. The CMI explained the difficulties which existed when the clean title obtained by a buyer in a judicial sale was not given proper effect in other jurisdictions, the dangers of further arrests for old debts, the uncertainties faced by registrars of ships and subsequent mortgagees, the cost and delays caused to international trade and the adverse effect on ship values (essential to paying out creditors from the sale of the ship) created by such uncertainties. The CMI explained how all of this posed the threat of a breakdown in the chain of international trade.

It was suggested by UNCITRAL to the CMI that it might seek to develop and advance the proposal by holding a Colloquium with the maritime industry to discuss the need for, as well as the content of the Beijing Draft. A Colloquium was indeed organised in Malta on the 27th of February 2018 by the CMI and the Malta Maritime Law Association with the support of the Maltese Government.

The Malta Colloquium was attended by over 180 delegates from over 50 countries representing banks and financiers, ship owners, ship repairers, crew, providers of provisions and bunkers, harbour authorities, flag registries, ITF, members of the Judiciary from various jurisdictions who deal with judicial sales, BIMCO, FONASBA and maritime lawyers who have had to deal with the very serious challenges presented by the economic consequences and the legal uncertainties caused when judicial sales of ships sold free and unencumbered are not given their full effect. There was a fear that uncertainties in this respect would depress expectations and values in sales, have an adverse impact on ship lenders' willingness to lend, buyers' willingness to bid at auction and distributions to all recognized claimants following judicial sale. There was also an overwhelming case made by each and every one of these groups representing the different stakeholders of the maritime industry, encouraging the creation of an international instrument which would once and for all regulate this area and inject a degree of stability and certainty.

A broad consensus emerged from the Colloquium in support of an international instrument to remedy the problems arising from the lack of harmony among states in giving full effect to the free and unencumbered title acquired by purchasers of vessels in judicial sales held in other jurisdictions and that the work done by the CMI provided a useful starting point to further UNCITRAL work.

A full report of the Malta Colloquium followed and it was the Government of Switzerland who in March 2018 presented to UNCITRAL a proposal on “**Possible future work on cross-border issues related to judicial sale of ships**,” which included the outcome and conclusions of the Colloquium and which requested UNCITRAL to undertake work to develop an international instrument on the effect of foreign judicial sale of ships.

The proposal of the Swiss Government represented by Prof. Alexander von Ziegler and supported by CMI represented by the then President of CMI Stuart Hetherington and Ann Fenech, was one of a number of proposals presented to the fiftieth session of the Commission. Only 3 projects were accepted and the project on Judicial Sales – the Beijing Draft was one of them.

The project was given to Working Group VI and Working Group VI first met to discuss the Beijing Draft at its thirty fifth session in New York in May 2019.

Since May 2019 there have been 6 sessions leading to 6 revisions of the Beijing Draft and the CMI has worked tirelessly in advance of each and every session by reaching out to national maritime law associations, other NGO’s and by preparing the CMI Notes ahead of each session in the hope that the Notes could assist delegations in focusing on certain issues which needed attention. It is also noteworthy that whilst a number of seasoned and experienced professionals had expressed the view that it would take several years before the Working Group would be in a position to finalise a draft ready for presentation to the Commission, in fact Working Group VI has succeeded in reaching this stage over a short period of 3 years and this notwithstanding the fact that the Covid 19 Pandemic effectively stopped physical meetings for close to 2 years.

The CMI comprehends only too well the challenges faced by the UNCITRAL Secretariat and the Chair of Working Group VI, of communicating with delegations in the virtual format adopted in the last 4 sessions, particularly in the context of delegations coming from very different time zones. Indeed the work and efforts which have gone into this important work have been executed against the limitations presented by the pandemic and it is remarkable how notwithstanding the challenging circumstances such advances have been made with every meeting and have brought us to this important stage today.

It was with a great degree of satisfaction to the Comité Maritime International that the 40th session of Working Group VI of UNCITRAL meeting in New York between the 7th and 11th of February 2022 concluded its deliberations on what started off as the CMI Beijing Draft and agreed that the document under review would be called **Draft Convention on the International Effects of Judicial Sale of Ships**.

The entire process during these deliberations brought together a vast number of ideas and recommendations expressed by member and observer states to UNCITRAL as well as by important NGOs forming part of the maritime sector. Suffice it to say that BIMCO and ICS participated wholeheartedly in each of the sessions held by this working group. The CMI was at the complete disposal of the Working Group to offer insight into the background of each and every article and to offer practical perspectives for the consideration of the Working Group.

Drawing conclusions from the comments made by literally several dozens of speakers at each session was not an easy task which needed the strength and discipline of the Chair of the Working Group – Dr. Beate Czerwenka. Furthermore extracting from the several dozens of comments, observations and conclusions narrative and text which would satisfy all was only possible because of the expertise and experience of the UNCITRAL Secretariat which would provide the revised texts following each meeting together with the very valuable reports and explanatory notes.

The Secretariat has circulated the Draft as agreed at the 40th Session of Working Group V1 to all delegations and has requested their comments thereon by the 6th of May.

The CMI has, as it has always done following every draft, prepared and circulated the CMI Notes to assist in the deliberations at the Commission session and has sent these Notes to the Secretariat by the stated deadline. However, the difference between the previous CMI Meeting Notes and this latest set is that it has been made clear in the CMI Notes that this latest draft before us needs no further substantial amendments and that there are only a few matters which need slight clarification. The CMI expressed the view that the Draft Convention is “ready to go” and has encouraged its member maritime law associations to work towards ensuring its acceptance at the 50th Session of the Commission in June of this year.

3. THE DRAFT CONVENTION AS PRESENTED TO THE COMMISSION

The Draft Convention as it has been presented to the Commission is made up of 24 articles and amongst the more substantive ones are the following:

Article 1 contains the very clear purpose of the convention and states: **“This Convention governs the effects of a judicial sale of a ship that confers clean title on the purchaser.”**

The intention here is clear. The Convention does NOT regulate those sales where no clean title is given to the purchaser. The Convention is only concerned with ensuring that, when a purchaser purchases a vessel “clean and unencumbered”, then that clean title is given proper effect amongst State parties. If a purchaser purchases a vessel which is NOT being sold free and unencumbered, it is outside the scope of the Convention.

Article 2 is the Definition clause which is a reduced version of the original Beijing Draft. “**Judicial Sale**” is defined as any sale of a ship:

“(i) Which is ordered approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court...; and

(ii) For which the proceeds of sale are made available to the creditors.”

Article 3 contains the Scope of Application. From this article, it is clear that the Convention will only apply to a judicial sale of a ship if the judicial sale was conducted in a State party and the ship was physically within the territory of the State of Judicial Sale at the time of the sale.

Article 4 contains the all-important notice provision which was an article to which much time and energy was dedicated by Working Group V1 in its deliberations. This provision clearly states that the certificate of judicial sale provided for in Article 5 will only be issued if notice of the judicial sale is given prior to the judicial sale to the registry of ships where the ship is registered and if applicable the bareboat charter registry, the holders of mortgages or hypothèques, holders of maritime liens provided they would have notified the court conducting the sale of the claim secured by the maritime lien, the owners of the ship, the bareboat charterers of the ship.

The notice of judicial sale also needs to be published by an announcement in the press and most importantly it is to be transmitted to the repository referred to in Article 11 of the Convention.

It is worth noting that the “**Repository**” is a creation post the Beijing Draft and the result of deliberations and exchanges during the sessions at the Working Group. A number of delegations had reservations about the effectiveness of notice provisions as they stood and therefore it was thought that the creation of a repository which would receive both the notice of judicial sale as well as a copy of the certificates of judicial sale would be desirable. There then followed a discussion on which organisation could fulfil this role given that the additional desire was that for the idea of the repository to provide maximum benefit and utility, it would have to be a repository accessible by all, available on a 24/7 basis and secure.

The obvious choice was the IMO. The IMO already has the Global Integrated Shipping Information System referred to as the GISIS platform. Information on the GISIS platform is sent by authorised state representatives, whilst retrieval of information can be done by anyone on a 24/7 basis.

The creation of a Repository and the IMO possibly acting as such a Repository was broached during the 36th meeting of Working Group V1 held in Vienna in December 2019 which was the last meeting held in person prior to the outbreak of the Pandemic.

The idea of the IMO acting as a repository started to gather traction and the matter was put up for discussion at the Legal Committee of the IMO in its December 2020 meeting.

The CMI as an observer at the meeting expressed the wish and view that the IMO GISIS platform was the ideal platform for the purposes of the Repository under the Convention and the idea garnered support amongst the members of the Legal Committee foremost amongst which was Croatia. As a result, the Legal Committee resolved as follows:

“The IMO Secretariat has to make the necessary arrangements to host the repository as an additional GISIS module and report back to the IMO legal Committee at its next session scheduled for July 2021.”

Subsequent to this Mr. Fred Kenney, Director of Legal and External Affairs at the IMO then addressed the 39th session of Working Group V1 and the delegates had the opportunity of hearing exactly how the GISIS platform works, who would be permitted to provide the information, how the public can access the information and a number of other important details.

This has given much comfort to those delegations who were anxious about the efficacy of the notification process. The service of the notice, as well as the certificate of judicial sale on the repository, essentially means that any person can with a simple click of a button find out whether a ship it is pursuing or has an interest in is about to be sold in a judicial sale and where.

Article 5 lays down the provisions related to the certificate of judicial sale. Needless to say, this article is of utmost importance and was the focus of much debate. Sub-article 1 lays down that upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law, and the requirements of the Convention, the court or public authority that ordered, approved or confirmed the judicial sale or other competent authority of the State of judicial sale, in accordance with its regulations and procedures, must issue a certificate of judicial sale to the purchaser.

Appendix 11 to the Convention provides a model for the certificate containing the most important details amongst which that the vessel was sold in accordance with the requirements of the law of the state of judicial sale and the requirements of the Convention and a statement that the purchaser has acquired clean title to the ship.

Sub-article 2 provides that the certificate of judicial sale is to be promptly transmitted to the repository for publication. Thus, we see how the repository will have both the notice of judicial sale as well as the certificate of judicial sale.

Article 6 contains the entire *raison d'être* of the Convention. Through this article we see a “coming together” of a number of other articles in the convention by virtue of its reference to the certificate of judicial sale. The article 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 conferring clean title to the ship on the purchaser.**”

Article 7 is about the action that can and should be taken by the registrar. This article is the article which will give registrars much comfort in enabling them to act clearly and decisively following judicial sales. It provides that at the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale the registrar or other competent authority of a State party shall, and in accordance with its regulations and procedures but without prejudice to Article 6, delete any mortgage or hypothèque, delete the ship from the register and issue a certificate of deletion, register the ship in the name of the purchaser or subsequent purchaser, update the register with any other relevant particulars in the certificate of judicial sale.

This article addresses a number of important issues amongst which are the following:

1. It deals with situations where following a judicial sale to the purchaser, the purchaser, for entirely internal or corporate reasons may following the judicial sale transfer the ownership to another corporate entity and it would be that subsequent entity which would first register the vessel following the sale. Thus, the Convention had to provide not only for the purchaser in the judicial sale but the subsequent purchaser.

2. It deals with situations where a ship may not be registered in a traditional registry administered by a registrar but by another competent authority in a State party.

3. It also deals with the fact that the new purchaser would still be expected to satisfy the normal statutory registration requirements and criteria but without

prejudice to the overarching obligation of that State to give effect to the free and unencumbered title following a judicial sale.

4. It deals with both situations when a purchaser either wishes to retain the existing flag of the vessel and merely requests a change of ownership or, wishes to have the newly purchased vessel registered elsewhere and thus requires deletion and a deletion certificate from the vessel's old flag.

Article 8 provides clearly that a State party must immediately dismiss an application for the arrest of a vessel previously sold in a judicial sale on production of the certificate of judicial sale. It also clearly provides that if a vessel is effectively arrested in a State party, the Court of that State party must order its release on the production of the certificate of judicial sale.

The only exception to this is if the court determines that dismissing the application or ordering the release of the ship would be manifestly contrary to the public policy of that State.

During the various sessions, there was much debate regarding the exception to the rule. Some expressed the view that a State party should be able to maintain an arrest of a vessel sold free and unencumbered for grounds that go beyond public policy. However, it was understood by the working group that for the Convention to have the desired effect, it was extremely dangerous to provide escape routes for unscrupulous persons in bad faith, aiming to put illegitimate pressures on *bona fide* purchasers of vessels. It was thus agreed that it was only in cases which were manifestly contrary to the public policy of the State where the vessel was arrested that such a State would not refuse to grant an application for arrest or refuse to release the vessel.

Article 9 provides another cornerstone to this convention. It provides for the exclusive jurisdiction of the State where the judicial sale is held. It was appreciated and recognised by the working group that for the convention to work and for free and unencumbered title to be given proper effect we had to eliminate the possibility of any person taking advantage of the trading patterns of a ship and invoking the jurisdiction of 3rd party states in relation to a judicial sale that took place in a State party for the purposes of avoiding or suspending the sale. It was recognised that if any person wished to challenge the judicial sale and have it avoided or suspended, then such a person should address those issues before the court of the State of judicial sale itself and that such a court should have exclusive jurisdiction to avoid or suspend a sale.

The article provides that in the event that such a sale is avoided or suspended, such a decision should also be sent to the repository along with the notice of judicial sale and the certificate of judicial sale.

Article 9 not only grants the courts of the State of judicial sale exclusive jurisdiction but binds other states to decline jurisdiction in cases where a judicial sale has conferred clean title to the purchaser.

The only exception to this rule which is contained in a stand-alone Article 10 is if the court in another State party determines that the effect would be manifestly contrary to the public policy of that other State party.

Article 11 is the article dedicated to the repository. As explained earlier in this summary, the “persona” of the repository did not exist in the original Beijing draft and came about as a result of the sentiment expressed in the working group that there needed to be a point of reference, accessible on a 24/7 basis by everyone interested in knowing whether or not a ship they had an interest in was about to be sold in a judicial sale. The creation of the repository and the agreement and acceptance that the repository should be the IMO has injected a huge degree of comfort in those delegations who expressed concern about the extent to which interested parties could get to know about a judicial sale without burdening unnecessarily the notification provision in the convention.

This article provides for the repository to be the Secretary General of the IMO and provides that upon receipt of a notice of judicial sale, certificate of judicial sale or a decision to suspend or avoid a judicial sale, the repository must make it available to the public in a timely manner in the form and in the language in which it is received.

Apart from the above articles which really form the substantive part of the draft convention, there are of course other articles of equal importance which deal with what I like to call the “mechanics” of the convention. These include articles on communications between authorities of States parties, the relationship with other international conventions, the depository of the convention identified in Article 16 as the Secretary General of the United Nations, the signature, ratification, acceptance, approval and accession, participation by regional economic integration organisations, nonunified legal systems, authentication of certificate of judicial sale, procedure and effects of declarations, amendments, denunciations and entry into force. As Article 22 currently stands, it is being recommended that the Convention shall enter into force 6 months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession.

4. CONCLUSION

As has been explained above, following the submission by interested delegations of comments on the draft convention as sent on to the Commission, our next very important appointment is on the 27th of June 2022. Also, as stated above, if the Commission approves the Draft, it will then be sent on to the General Assembly for adoption.

Needless to say, it is very exciting indeed to be on the cusp of a very important international legal development. This Convention when adopted will encourage purchasers to pay top dollar for vessels in judicial sales giving more hope to creditors that their unpaid claims will be settled. It will give comfort to new purchasers that their newly purchased ship will not be subject to an arrest by a previous creditor, provide assurances to new financiers and clarity to registrars. It will, as a result, bring clarity and certainty which will facilitate international trade.