COMITÉ MARITIME INTERNATIONAL

PRESIDENT

Proposal of the Comité Maritime International (CMI) for possible future work on cross-border issues related to the Judicial sale of ships.

The CMI has been in existence since 1897 when it was formed by a number of far sighted representatives in both government and business who were dedicated to seeking to achieve uniformity in international law in relation to shipping. The object of the CMI, as enunciated in Article 1 of its Constitution, is:

> "to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI.

Background to the Judicial Sales project

Following on a paper given by Professor Henry Li of China in 2007 which drew attention to problems arising around the world from the failure to give recognition to judgments in other jurisdictions when ordering the sale of ships, the Executive Council of the CMI proposed that an International Working Group (IWG) conduct a preliminary study of the issues in relation to the Judicial Sale of Ships.

The draft international instrument

The work which has been done by the CMI commenced with a detailed Questionnaire being sent to the Maritime Law Association members of the CMI, the results of which were discussed at a Colloquium held in October 2010 in Buenos Aires. Members of the IWG summarised the responses which had been received at that time from 19 Maritime Law Associations. Since then at subsequent meetings of the CMI, the topic has been discussed and a draft international instrument prepared at numerous meetings including the Beijing Conference in 2012, the Dublin meeting of 2013 and the Hamburg Conference of 2014 where a draft instrument was completed, and approved. The proposal for approval of the final text of the draft international instrument was made by the China Maritime Law Association at the CMI Assembly in Hamburg in 2014. The proposal was supported by 24 acceptances with two abstentions and no vote against. The 24 acceptances comprised the national Maritime Law Associations of Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Malta, the Netherlands, New Zealand, Nigeria, Norway, Republic of Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. The two abstentions were the national Maritime

Law Associations of Brazil and Poland. Throughout its preparation it received widespread support from delegations.

It was felt that a simple, largely procedural, international instrument addressing the recognition of foreign Judicial sales would fill a gap left open by the International Convention on Maritime Liens and Mortgages, 1993, the International Convention Relating to the Arrest of Sea-Going Ships, 1952 and the International Convention on the Arrest of Ships, 1999, and met the commercial needs of the industry.

The prevalence of Judicial Sales

While there has been no exhaustive compilation of data on the number of ships sold by way of Judicial sale, the data from four significant maritime jurisdictions in Asia (Republic of Korea, China, Singapore and Japan) shows that, during the period 2010-2014, more than 480 ships were sold by way of Judicial sale per year in those countries. It follows that the number of ship sales that would benefit from the certainty provided by the draft international instrument would run to many hundreds of ships a year.

It is apparent that many hundreds of ships are sold each year through some competent form of Judicial sale. The underlying cause or causes of a Judicial sale may be numerous, but usually the non-payment of debts due and owing by the ship owner.

Clean Title; Reflagging

Purchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation. This, in turn, will enable the purchased ship to trade freely; and to ensure that the ship will realize a greater sale price which will benefit all the related parties, including creditors, (which could include port authorities and other government instrumentalities that have provided services to a ship owner)

It is important to highlight the important legal principle that flows from a Judicial sale that once a ship is sold by way of a Judicial sale, the ship should, with only very limited exceptions no longer be subject to arrest for any claim arising prior to its Judicial sale. If purchasers and their financiers lose confidence in the predictability of obtaining a clean title and being able to reflag the vessel after acquiring a ship from a Judicial sale the process becomes less attractive and effective to the detriment of the purchaser and other creditors of the ship owner whose vessel is to be sold by way of Judicial sale.

The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The international instrument, once it has received widespread support, will permit banks to provide ship finance with greater confidence that the ship will realize its full market value at a Judicial sale and not the reduced value realisable where there is the risk, as at present, that the ship may be subsequently arrested for claims predating the Judicial sale, and by reason of a general loss of confidence in the sanctity of the process.

Judicial Pronouncements

In the English case *"Acrux"*[1] Mr Justice Hewson confirmed that Courts must recognise: "proper sales by competent Courts of Admiralty, or prize, abroad — it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"[2].

The study by the CMI also drew to light a number of Judicial pronouncements from various jurisdictions that highlighted difficulties that parties had experienced in having a foreign Judicial sale of a ship recognised by another court. In one Canadian decision the court went so far as to say that the matter could only be repaired by an international instrument regulating the Judicial sale of ships and their enforcement. Apart from the reported cases there are many unreported cases and cases which do not go to full hearings which the maritime legal community is aware of.

Most importantly, the judiciaries of many countries have observed that the need to recognize Judicial sales by foreign, competent courts forms part of the comity of nations and contributes to the general well-being of international trade.

There is currently no international instrument that addresses the recognition of Judicial sales. Nor is there any instrument that adequately protects purchasers from prior claims and which addresses the de-registration on re-flagging and re-registration of ships from and to national registries.

As there is currently no international instrument dealing with the recognition of foreign Judicial sales of ships it can be said, with some confidence, that in this regard maritime transportation is neither secure nor efficient and hinders rather than promotes global trade and the world economy. The need for intervention by inter-governmental and international organisations has been clearly recognised both Judicially and by national and international maritime bodies. The recognition of foreign Judicial ship sales is fundamental to international maritime law.

The difficulties that arise when one country will not recognise an order for the Judicial sale of a ship in another country has been succinctly summarised as follows:

(1) It is an affront to the Court and the State ordering the sale;

(2) It represents a refusal by that country to abide by the decisions of a Court in another country, and an exception to a rule honoured by most nations in the world.

(3) If other countries, or other debtors, decided to follow this bad example, it could create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations[3].

The recognition of Judicial sales at an international level has also been highlighted in the Canadian case of the ship *"Galaxias"*[4] where the Court noted that:

(1) whilst a purchaser on a Judicial sale will take a clean title free and clear of all encumbrances according to the laws of Canada and notwithstanding that it is

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[1] [1962] Vol 1 Lloyds Law Reports at p405

[2] At p409

[3] The Associate Chief Justice Noel in Vrac Mar Inc v Demetries Karamanlis et al [1972] FC 430 at p434 (Canada)

[4] (1988) LMLN 240, being a judgment of the Federal Court of Canada

clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, however this was not an area over which a national jurisdiction exercises control, nor is it appropriate that it attempt to do so;

(2) international regulation of the Judicial sales was necessary; and

(3) in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This would not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with.[5]

In commenting on judicial orders for the sales of ships that did not ensure the passing of clean title, the same Court noted that 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. The legitimate claims of many local and foreign creditors would thus be defeated by the resulting low bids made at the auction conducted by the court seised of the case.

In order for the recognition of foreign Judicial ship sales to be uniformly accepted by way of an international instrument, the intervention of UNCITRAL will be of considerable benefit to the international maritime community.

Necessary and sufficient protection should be provided to purchasers of ships at Judicial sales by limiting the remedies available to interested parties to challenge the validity of the Judicial sale and the subsequent transfer of the ownership in the ship.

Other Conventions

The *International Convention on Maritime Liens and Mortgages, 1993* has not been successful as it contains controversial provisions which do not solve the problems of the recognition of foreign Judicial sales, and the wording with respect to recognition is more in the nature of denying recognition, rather than granting recognition of the Judicial sale. However, wherever possible, the draft international instrument has been prepared so that its provisions do not conflict with those set out in the Maritime Liens and Mortgages Convention.

Whilst the *International Convention Relating to the Arrest of Sea-going Ships, 1952* seeks to regulate the claims that can be enforced by the arrest of a vessel, it does not provide for the Judicial sale of a ship.

The *International Convention on the Arrest of Ships, 1999* mentions the Judicial or forced sale of ships, but only in the context of its article 3.3, allowing, as an exception to the general rule, the arrest of a ship owned by a person not liable for the claim.

[5] At page 11 of the judgment

The IMO

The CMI first approached the IMO Legal Committee in view of its past involvement with the Maritime Liens and Mortgages Conventions, and made an information presentation to the IMO Legal Committee in 2015 with a view to making a formal request twelve months later that it add this work to its agenda.

A further presentation was made in June 2016. Two sponsors were required for that work and in the lead up to the IMO Legal Committee meeting in 2016 China and South Korea agreed to sponsor this work. The IMO Legal Committee did not accept the proposal for the inclusion of this work on its agenda. It was, however, left open for the matter to be raised again at a later date.

The views expressed by delegates at the time included: whilst it was felt that this was an important subject of interest to the Committee some considered it to be a matter of private and commercial law and did, therefore, not fall within the remit of the Committee; some delegations appeared not to want to take on new work, although other delegations highlighted that they accepted foreign Judicial sales of ships in their national legislation and that it entailed a lot of benefits, in particular because it provided certainty towards stakeholders; others pointed out that it was also an important issue from the perspective of the port industry, as arrests of vessels can negatively affect the efficient port operations.

Hague Conference (HCCH)

After the IMO Legal Committee had declined to take on this project the CMI approached the Hague Conference, which was working on its project entitled the Recognition and Enforcement of Foreign Judgments. Representatives of the CMI attended the recent meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments of the HCCH, held between 16 and 24 February 2017 at which a presentation was made on behalf of the CMI to suggest that the CMI's draft Instrument on the Judicial Sale of Ships could be accommodated within that work. It was decided, however, by that Commission, not to proceed down that route. The CMI was therefore invited to present an information paper to the Council of the HCCH on 15 March 2017 so that consideration could be given at the HCCH Council meeting in 2018 to add this project to its work programme as a new stand alone topic. Opinions were expressed by some delegations at that time to the effect that such an esoteric and industry specific topic might be better suited to UNCITRAL and others preferred not to take on new work until the current programme was concluded. The matter is, presently, to be revisited at the Hague Conference's Council meeting in 2018.

Conclusion

The failure of States to recognize the Judicial Sale of a ship in another jurisdiction reduces confidence in the international maritime community in the system of Judicial sales. They will only be supported, and proper values for ships fetched, if the prospective purchasers can be confident of receiving the vessel with a clean title, free of any encumbrances and capable of being deleted from its old registry and registered in a new register of the purchaser's choice. Thereafter the purchaser must also be able to trade the ship without it being subject to arrest in respect of any claim arising prior to its Judicial sale.

CMI has experience of working with UNCITRAL, most recently, on the Rotterdam Rules. Members of Maritime Law Associations were appointed to national delegations and were able to assist in the work of UNCITRAL in the development of those Rules, which CMI had initially drafted. CMI does not expect UNCITRAL to rubber stamp its draft international instrument. CMI takes comfort in UNCITRAL's "universal" coverage in terms of States participating in any

negotiation; the fact that it is a specialist organisation on private international law and is experienced in working in the area of commercial and international trade law.

The CMI is therefore requesting UNCITRAL to add this topic to its work programme. If UNCITRAL decides to add this topic to its work programme (either on its own or in conjunction with another body) the CMI will not pursue its requests to the IMO or the HCCH to pursue this work.

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