

To: Neil Beadle, Chair, MLAANZ (NZ Branch)
From: Jacob Meagher
Date: 9 May 2014
Subject: **Draft International Convention on Recognition of Foreign Judicial Sales of Ships (art 3 issue on receipt of notices)**

Background

- [1] You have asked me to review the relevant material relating to the 2012 final draft ("Beijing Draft") of the CMI Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships.
- [2] In this memo I discuss the footnoted issues related to Article 3 paragraph 4 of the Beijing Draft. During my review of this issue I also came across some other points that may be helpful to you in Hamburg, so I will forward these in a supplementary memo shortly.

Summary

- [3] In summary the Article 3 issue focuses on whether the provisions relating to notice should include a requirement that the means used provide 'confirmation of receipt' given that:
- a. Any deviation from the Maritime Liens and Mortgages Convention 1993 ("MLM") could immediately put MLM countries in breach as Art 11(3) of that Convention provides for confirmation of receipt in such cases; and
 - b. If affected parties can argue that they did not receive notice, and thus notice provisions have not been complied with, it will invalidate judicial sales and potentially render the Beijing Draft unworkable.
- [4] On balance, I conclude that 'confirmation of receipt' should be included in Art 3(4), even though the first issue is not particularly problematic, as even if it is not included MLM countries would still require receipt as per Article 9 of the Beijing Draft. However, the benefits of having a notice of receipt requirement in the Convention outweigh any disadvantages, as notice is an important procedural safeguard, and arguments as to receipt notice of will revolve around ordinary evidential principles.
- [5] In Appendix 1 I set out an illustration of the notice requirements in action using one of the cases discussed in Prof Li's memo, the "*Union*".

Article 3 of the Beijing Draft

- [6] Art 3 deals with notice requirements for judicial sales. Without evidence of the relevant notices having been given, no state is required to recognise a foreign judicial sale. Art 3(1) and (2) essentially require notice to be given to the vessel's flag state, mortgage/charge holders, lien holders and the vessel's owner. Art 3(3) provides the

minimum requirements for the information those notices must contain, including particulars such as the vessel's name and owner, the time and date of sale, and any other particulars the court deems appropriate.

[7] Art 3(4) then provides that:

The notice specified in paragraph 3 of this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means '[which provide confirmation of receipt]', to the Persons as specified in paragraphs 1 and 2, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other publications.

[8] The CMI IWG commentary to the draft text notes the following:¹

An issue left unresolved in the Beijing Draft concerns the way in which notice in writing shall be provided pursuant to Article 3. Whereas paragraph 3 of Article 3 the Second Working Draft is identical with paragraph 3 of Article 11 MLM 1993, in Article 3 of the Beijing Draft the qualifying words "which provide confirmation of receipt" immediately after "by any electronic or other appropriate means" are placed between brackets. On the one hand there was concern that a removal of this qualification might put contracting States to MLM 1993 in breach of their obligations under the convention. On the other hand it was feared that if lack of receipt of the prior notice were to invalidate the (Recognition of) a foreign Judicial Sale, the purpose of the proposed convention might be defeated.

[9] I address these two concerns below.

Is there a clash with MLM?

[10] The relevant provision of the MLM is Art 11, entitled "notice of forced sale". Similar provisions are found in the 1967 liens and mortgages convention and the slight differences in that iteration and the Arrest Convention 1952 are of no concern.

[11] The wording of Beijing Art 3(4) is in brackets; "[which provide confirmation of receipt]" and is directly copied from Article 11(3) MLM 1993. I believe that these words should be included in the Beijing Convention.

[12] If they are not then states that have ratified the MLM convention must use a form of notification which provides confirmation of receipt for forced sales of vessels, while the same matters being dealt with under the Beijing Draft will not require confirmation of receipt. Although only 17 states have ratified the MLM convention this will create an unnecessary inconsistency for those states, potential confusion for the remaining others, and therefore 'receipt' is worth including in the Beijing Draft.

¹ CMI Document: PRC/HHL130322.1 'Commentary on Beijing Draft Final Version' p 4 at 12.

[13] However, in practice Art 9 of the Beijing Draft, which specifies that other treaties must still be complied with, i.e. MLM, will apply so the MLM provisions will take precedence. Nonetheless, given the similar issues covered by the two conventions a consistent approach appears preferable. Remedying uncertainty in various international approaches is the second principle of the Beijing Draft and therefore 'receipt' should be included for this very reason.

Why is there a concern that a receipt requirement will defeat the aims of the Beijing Draft?

[14] Clues as to the concern that a requirement for receipt of notice might end up defeating the aims of the Beijing Draft can be found in the Commentary provided by countries on the second Draft of Art 3(4).²

[15] The previous, second, draft of the Beijing Convention had the text "requires confirmation of receipt" without brackets, and therefore notification of receipt of notice was mandatory. This was not at that stage considered contentious by the IWG. I have provided a table indicating the views of the respondent countries from the second Draft comments. Most of the respondents did not comment directly on the issue footnoted, indicating a lack of concern, and my conclusions are implied from their responses.

	Notice Required in country's rules of procedure	Comment in submission as to 'receipt'	Indication concern as to 'receipt'?
France	yes	yes	no
Great Britain	yes	no	no
Croatia	yes	no	no
Ireland	yes	no	no
Malta	yes	yes	yes
Norway	yes	no	no

[16] Malta's comments on the receipt issues were as follows;³

"There are concerns as to what would happen in case one of the parties is not notified at least 30 days prior to the Judicial Sale, bearing in mind that when for example giving notice by registered mail, one would only receive the confirmation of receipt or the confirmation of unsuccessful delivery a few days prior to the Judicial Sale. The party at whose request the Judicial Sale would be taking place would therefore have to reschedule the Judicial Auction to a later date and notify afresh the parties, with no guarantee that the notification of the new date of the Juridical Auction would be successfully made the second time around. This could prejudice the expeditious nature of a Judicial Sale which is essential to all creditors

² CMI Document: DBN_Non_Matters-#112909-v1

³ At 14.

since the longer it takes for the ship to be sold, the expense to preserve the ship increase, thus decreasing the proceeds from which the creditors will be paid, and the chances of deterioration of the ship are higher"

- [17] Thus Malta holds concerns that lack of receipt could invalidate the judicial sale, thus defeat the purpose of this Convention, but it appears to be the only state to have highlighted this concern to date.
- [18] It is more concerning that the potential for invalidation is by and large only implied by Art 3(4), ie even with the bracketed words included the impact of lack of receipt is not specified in the article. It can be assumed that the lack of notice, or the lack of receipt of notice, will invalidate a judicial sale, but there remains the risk of inconsistent future domestic court interpretations as to its effect(s).
- [19] There is also the potential for a party to give notice in the wrong form (ie by sending an email with no confirmation of receipt facility), which the interested party nonetheless receives, but then complains that the form of notice was insufficient as per Art 3(4) and therefore the sale should be invalidated. Again, this could lead to inconsistent interpretations with some courts holding that this is an important procedural breach, and others saying this was a minor oversight.

Is the Confirmation of Receipt Requirement Too Big a Risk?

- [20] I argue that, even with the risk that parties could argue that they have not received notice and thus invalidate a sale, it is worth having the confirmation of receipt requirement in the text.
- [21] The requirement will compel those responsible for giving notice to use a tracked courier parcel or process server or similar means of delivery in the first place, and thus avoid evidential disputes as to receipt from arising in the first place. Given that this convention requires a high level of international trust to facilitate the recognition of foreign sales, it seems like a sensible option.
- [22] The alternative, i.e. not specifying a confirmation of receipt requirement, would not necessarily lead to problems in practice, as it would be in most parties' interests to ensure that notice was properly given and received to avoid arguments further down the line, so they might use such means of notice regardless. But it seems like a "better safe than sorry" approach works best here, and I cannot see any major downside in having the requirement.
- [23] Problems of parties avoiding service/receipt of notices could be dealt with through a court's normal procedures in such cases – the *means* of service will not be at fault in such cases, but rather the party who was supposed to be receiving them.
- [24] If a person does not receive notice then it seems best to have the sale invalidated, and I do not think it defeats the aims of the convention if this important step is not followed.

[25] While the particulars of 'notice' as a minimum are specified I cannot find anything concrete stating that interested parties have a right to be heard in any Judicial Sale proceedings once they receive such notice. This appears to turn on the relevant civil procedure rules of the relevant state. Naturally there is little point in receiving notice if you do not then have hearing rights!

Jacob Meagher

Appendix 1 – An Illustration of the Impact of the Beijing Draft’s Notice Requirements in Action: The Belize Registered ship; The "Union", 2005 Jin Hai Fa Shang Chu Zi No. 401 (China).

[26] What transpired in this case according to Prof Li’s memo (the original judgment is in Chinese) is that;⁴

"It was maintained by the current ship-owner that the ship, *Phoenix*, was arrested in May 2003 and auctioned in November 2004 by the Court of Ranson, The Democratic People's Republic of Korea at the applications of a number of claimants for unpaid crew wages and port charges, and for repayments of outstanding loans"

[27] This ship was then arrested in China at the request of a French bank that had a mortgage over the *Phoenix* (which was the former name of the *Union*).

[28] It is questionable whether the North Korean Court of Ranson is used to dealing with disputes of an international commercial nature. Be that as it may the French Bank argued in China that they had not received notice that the *Phoenix* was subject to judicial proceedings in the DPRK. Indeed no one argued what they would have done had they received notice, but I doubt that was the point.

[29] The Chinese court ruled as follows;

- a. After the Judicial Sale of the ship by the DPRK court all encumbrances were extinguished.
- b. It was only a legal fact to be investigated by the Chinese court if the ship was subject to a Judicial Sale by the DPRK court and did not involve any recognition or enforcement of an order of the DPRK court.
- c. In regards to the issue of notice, and directly relevant to Article 3(4) of the Beijing Draft;

"It is not within the jurisdiction of this court to examine and judge whether or not the ship sold by the DPRK Court was in accordance with the DPRK law, including whether or not a proper notice has been sent to the French Bank and/ or the ship's register in St. Vincent and the Grenadines. Based on these grounds, the claims of the mortgagee were dismissed by the maritime court."

[30] Under the Beijing Draft a much better outcome for the French Bank would likely occur;

- a. As per Art 3, as notice had not been provided then the sale would be declared invalid.
- b. A court could use Art 8(3) and declare for matters of public policy that the decision of the Court of Ranson would not be recognised (although this is debatable in this case given China is an ally of the DPRK).

⁴ Henry Hai Li, above n 1, at 13.

- [31] Further, if the Beijing Draft had been in force with the bracketed wording included there would be more likelihood of the DPRK judicial sale having been conducted with proper notice (with confirmation of receipt) in the first place (if the DPRK became a party to the Convention).
- [32] Alternatively, and perhaps more likely, as the French bank had not received notice of the judicial sale the Chinese court would not have recognised the DPRK sale under Art 3 and declared that sale invalid. This illustrates that while most countries consider notice a basic, uncontentious requirement, Art 3 provides a useful safeguard if signatory states lack the same level of commitment to this basic procedural norm.