



# SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



## Vice President's Message

Dear Members

### ***CMI Hamburg Conference — approval of the 'Beijing Draft'***

At Hamburg on 19 June, the Assembly of CMI approved the text of the Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (known as the Beijing Draft). A key purpose of the draft Convention is to improve the prospects of achieving the best price on judicial sale of a ship by limiting the opportunity to challenge the sale in the state of the ship's registration. The Convention does this by requiring notice of the intended sale to interested parties so providing them with the opportunity to intervene at that stage, rather than later when that sale is registered.

While substantially in the form distributed by the CMI in February this year, the International Working Group had produced a 4th draft, and that was then further refined during the Conference debate on 18 and 19 June.

Matthew Harvey as President, and I as New Zealand Vice-President, represented MLAANZ over two days at the conference and the assembly meeting at which the finalised text was approved. There was forthright debate on points of detail which were resolved by majority voting by States at the conference. At the Assembly, the Beijing Draft was approved by 22 votes in favour with 2 abstentions and no opposition.

I explain some of the areas of debate which in turn may help to explain the result. The full text of the draft Convention is available [here](#).

### ***Overview of the draft Convention***

The recitals to the Convention set out its purpose and provide:

RECOGNIZING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that any uncertainty for the prospective Purchaser regarding the international Recognition of a Judicial Sale of a Ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONVINCED that 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 transfers of the ownership in the Ship;

CONSIDERING that once a Ship is sold by way of a Judicial Sale, the Ship should in principle no longer be subject to arrest for any claim arising prior to its Judicial Sale;

CONSIDERING further that the objective of Recognition of the Judicial Sale of Ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the Judicial Sale, the legal effects of that sale and the de-registration or registration of the Ship.

Central to the draft Convention is the requirement of notice to parties to be affected by the judicial sale, prior to it occurring (Article 3). Such notice then affords affected parties the opportunity to intervene in the process in the State in which the judicial sale is undertaken. If such parties (for example a mortgagee) chose not to do so, there are then only narrow grounds for challenge to the judicial sale in the State in which the ship is registered, thus providing the purchaser with a high level of comfort that its interest in a clean title (subject to any mortgages or charges assumed by it during the Judicial Sale), will be recognised by the State in which the ship is registered.

The draft Convention does not address the method of judicial sale, or priorities in relation to the proceeds of sale. Those remain issues to be determined by the law of the State of judicial sale. The focus for a party with an interest in the ship should therefore be in intervening in the judicial sale and in the distribution of the proceeds.

### ***The mechanism by which this is achieved***

Article 3(4) sets out the mechanics by which notice of judicial sale is to be given either:

- (1) By sending it by registered mail or by courier or by any electronic or other appropriate means to the registrar of the ship register in the State of registration, all holders of any registered mortgage/hypoteque or registered charge, the owner of the ship, and all holders of any maritime lien, provided the Competent Authority conducting the judicial sale has received notice of their respective claims.
- (2) By press announcement published in the State of judicial sale and in other publications published or circulated elsewhere if required by the law of the State of the judicial sale.

At Hamburg, civil lawyers expressed concern at the requirement that notice be 'given', on the basis that the corollary to that was that their courts may require proof of receipt. In practical terms, once a ship has been arrested and if it is to be sold it is common for the ship's owners to go to ground and for post to be returned. The issue was addressed to their satisfaction by specifying that giving notice is achieved by prescribing sending of it, rather than having to prove receipt.

Notice having been given and the sale having been undertaken in accordance with the law of the State of judicial sale and in accordance with the Convention, the purchaser will receive a certificate to that effect issued by a Competent Authority. That certificate will then be recognised by the ship's registry where the ship was registered prior to the judicial sale. The certificate is the 'key to the door' which ensures registration in accordance with the terms of sale (ie with clean title) and recognition of that by the State of registration.

A form of certificate is appended to the Convention. The conference was concerned to ensure the integrity of the requirements of notice under Article 3 while not prescribing exactly the form of the certificate noting that practices may differ. Consequently, the certificate shall be "substantially in the form of the annexed model and shall contain the following minimum particulars" (which are then set out at Article 5 clause 2). As a matter of practicality, the conference decided that the certificate include particulars of any mortgage or charge assumed by the purchaser under the judicial sale in the list of minimum particulars, so that the registrar in the State of registration receiving the certificate will have a clear statement of mortgages on the register which are to remain.

### ***In what circumstances may recognition of a judicial sale be suspended or refused?***

Given the mechanism under the Convention is to give notice to interested parties so they can intervene in the judicial sale, there are only limited options to oppose that sale later in the State in which the ship is registered.

So recognition of a judicial sale may be suspended or refused only on the grounds under Article 8, namely that:

- (1) an Interested Person provides proof that the ship was not physically in the jurisdiction of the State in which the judicial sale was conducted; or
- (2) an Interested Person proves there is a legal challenge to the judicial sale in the state of the judicial sale, or such a court has nullified the sale; or
- (3) if the court in a State Party in which recognition is sought finds the recognition of the sale would be manifestly contrary to public policy of the State Party.

The first ground is a fundamental point of jurisdiction. The risk of it occurring must be low and any prospective purchaser has the opportunity of exercising its own due diligence in this respect before participating. The second ground recognises the primacy of the State in which the judicial sale is being undertaken. The 'public policy' option is a narrow ground.

The prospect of successful opposition to registration of a judicial sale is further limited because only an "Interested Person" as defined in the Convention can object under Article 8 rules (1) and (2). That means "the Owner of the Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypothèque or Registered Charge attached to the Ship immediately prior to its Judicial Sale".

Holders of any maritime lien known to the Competent Authority conducting the Judicial Sale will have been sent prior notice of the sale under Article 3(2), and holders of other unregistered interests in the ship will have been notified by advertising of the sale in the press, but they are not an "Interested Person". They can only challenge in the State of registration on the ground of public policy.

There was debate at Hamburg as to whether the definition of Interested Person ought to be broadened. The International Working Group had already considered the point and taken the view that the scope of potential applicants was best restricted. That position was adopted by the conference.

### ***Reservation***

The conference accepted the proposal of the United Kingdom that the Convention provide that it apply not only as between two States who are party to the Convention, but that States may restrict application of the Convention to recognition of Judicial Sales conducted in State Parties.

That amendment is given effect in Article 2 which deals with the scope of the Convention, and Article 9 which contains the reservation.

### ***Next steps***

The Beijing Draft will now be submitted to an inter-governmental or international organisation for its consideration and adoption. The CMI Executive Council will consider asking a country to convene a diplomatic conference to consider and adopt the text as an International Convention. Given the International Working Group was chaired by Henry Lai, and the draft Convention was formulated at

Beijing, we anticipate that CMI will approach China to be the host of that diplomatic conference. Of course, the Beijing Draft is only a draft and further refinements may occur during the process of adoption as an International Convention. But the International Working Group chaired by Henry Lai has applied significant time and resource in producing the draft and chairing debate through a number of CMI gatherings, and MLAANZ extends its thanks to them.

Kind regards

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MLAANZ  
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