



THE MARITIME LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

(MLAANZ) ACN 054 763 923

Date: 2 March 2020

Ms Sarah Grant, Office of International Law, Attorney-General's Department, Canberra

Via email: sarah.grant@ag.gov.au

Dear Ms Grant

I refer to a letter dated 15 January 2020 received from your colleague Anne Sheehan requesting the views of the Maritime Law Association of Australia and New Zealand (MLAANZ) on the proposed international instrument on the judicial sale of ships, in preparation for UNCITRAL's 37th Session and upcoming Working Group meeting in New York on 20-24 April 2020.

MLAANZ is delighted that the Attorney General's Department of the Commonwealth of Australia will be represented at the upcoming New York meeting. We consider it a matter of high importance that the Australian Government be represented at a forum such as this.

If unaddressed, problems associated with judicial sale of vessels can damage comity between Courts in international States and adversely impact the fluency of international trade.

MLAANZ wishes to see as an outcome from the current deliberations that the current draft instrument, or an instrument based upon it, will proceed to become a widely accepted international Convention around the world.

The views expressed in this letter are the result of consultations with a limited number of MLAANZ members who have subject matter familiarity – experience with judicial sale of ships. We are continuing to consult with our broader membership and will keep you informed of any additional viewpoints that emerge.

We wish to refer you to two background documents, prepared by esteemed Australian members of MLAANZ, which provide context for our Association's views on this topic.

Background Paper #1 – Stuart Hetherington

The first background document is a paper on Judicial Sale of Ships presented by Stuart Hetherington, a partner of the law firm Colin Biggers & Paisley, Sydney, on 10 May 2019 to UNCAA's 5th Annual Seminar. Mr Hetherington, as you would be aware, is a former President of the Comité Maritime International. A copy of his paper is attached.

This paper makes reference (at p 2) to the case of the “Beluga Notification” which was the subject of a judicial sale in the Federal Court of Australia in 2011. It makes the point that aspects of critical importance in connection with a judicial sale are that a successful bidder should be recognised as such a sale in all jurisdictions that the ship might visit subsequently (given the temptation for creditors unsuccessful in obtaining repayment from a sale to subsequently seek to re-arrest the ship in some other jurisdiction). A critical problem is the failure in some jurisdictions to give recognition to judgments from other jurisdictions when the sale of a ship has been ordered.

Mr Hetherington’s paper refers (at p 4) to an article published in Lloyd’s List Australia by a New Zealand member of MLAAANZ, Dr Bevan Marten, which highlighted the “legal nightmare” that can arise when a purchaser of a vessel following a court ordered sale finds that the flag State refuses to transfer the ship off its books.

Mr Hetherington highlighted (at p 4) the recent case of the “Bright Star” which was arrested and sold in a judicial sale in Jamaica in January 2018 but was subsequently arrested in Malta in June 2018 in reliance on a registered mortgage, after the judicial sale.

Reference was also made (at p 5) to a case in the Federal Court of Australia in which an Australian purchased a vessel at a judicial sale in Singapore but was unable to have it deleted from the Taiwanese register, to enable it to be registered in the Australian register. The problems with which the proposed international instrument deals are not issues from which Australia (or New Zealand) are immune.

As Mr Hetherington highlights (see pp 5-6), the risks created for buyers of second hand vessels adversely impact on ship prices, which can mean that mortgagees and other creditors of a defaulting shipowner (including crew members, port authorities, agents, stevedores and cargo owners) are not fully compensated from sale proceeds.

Mr Hetherington’s paper details the history of CMI’s attempts to have its draft Instrument on this subject become the basis of inter-governmental action (see pp 10-11), culminating in the attention now being given to the topic by UNCITRAL. Five main “things you need to know about the CMI draft Instrument” were highlighted (at p 7):

1. It does not seek to make substantive changes to the law.
2. It provides a process which should eliminate risk and provide unimpeachable rights to the new owner which cannot be impugned in other jurisdictions.
3. It provides for notice to be given to all relevant parties of the potential sale.
4. It provides for a certificate to be issued by the State in which the sale takes place which other parties to the Convention would have to recognise, in particular flag States.
5. It provides for a limited number of situations in which the judicial sale can be challenged.

Mr Hetherington commented (at p 15) that “assuming UNCITRAL produces a Convention which Australia decides to ratify, I do not see any need for any amendments to be made to Australia’s Admiralty Act (1988), unless it is decided to make it the chosen vehicle for bringing such a Convention into force in Australia. Another alternative might be the Shipping registration Act (1981).”

Finally, Mr Hetherington (at p 16) made the compelling point that:

“the system of Judicial sales can only succeed and continue to work if purchasers and their financiers are confident that in acquiring vessels from Judicial sales their slate is wiped clean, they can reflag their vessels if they wish and they can trade their vessel without fear of having the debts of the prior owner revisited on it. Creditors ... will receive less from Judicial sale if confidence in the system disappears.”

Background Paper #2 – Gregory Nell SC

A second highly useful background document we commend to you is a paper titled “Some practical aspects associated with the judicial sale of ships” presented by MLAANZ member Gregory Nell SC of New Chambers, Sydney to the National Admiralty Seminar of the Federal Court of Australia in July 2017. This is available to read at the following link - <https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/nell-20170725>

Mr Nell’s paper details when, under current Australian law, an order for sale can be made, who may apply for an order for the sale of a ship and what property is comprised in a sale. It also describes the fees and expenses associated with a judicial sale and the procedure needing to be followed after a sale.

This paper provides an excellent ‘navigation aid’ for understanding the intricacies of the current Australian legislative provisions. It could assist in identifying provisions requiring adjustment by amending legislation to be in synch with any new Convention ultimately entering into force in Australia.

Observations on ‘Unresolved Questions’

In relation to the request in your letter of 15 January 2020 for comments on “unresolved questions regarding the content of the draft instrument” we note that you have specifically asked for our views on “the balance the draft instrument strikes between protections afforded to persons with interests in the ship (e.g. creditors, ship owners and demise charterers) and the purchaser in a judicial sale”.

We are concerned that any prioritisation of “striking a balance” would misunderstand the purpose of a Convention, as described above.

Nothing in the Instrument impacts on creditors except, implicitly improving it. By seeking to improve the position of a purchaser after the sale (by replacing reliance on the comity of nations in recognising each other's Judicial sales with the discipline of a treaty) - which will hopefully increase the interest of buyers to Judicial sales and thereby increasing the competition and the amount recovered in a judicial sale - the expectation is that the greater returns made from Judicial sales will benefit creditors. A Treaty will benefit both purchasers and creditors by bringing greater certainty to purchasers.

In relation to shipowners/bareboat charterers (who are more likely to be insolvent) their position will also be improved by greater amounts being achieved from judicial sales - it may keep them solvent or if not will mean that more of their creditors are satisfied, and there will be less likelihood of further actions against the owner/bareboat charterer or individuals connected with the insolvent company as directors or officers of a failed company.

The notification requirements (presently contained in re-draft (2) in Article 4) are not onerous (and presumably will be a cost that will be charged back to the Plaintiff or the sale proceeds) and are preferable to the present system in which mortgagees (for example) can sometimes not hear of a sale taking place. If a mortgagee does not hear about a sale, the present position can be quite disastrous, with significant legal consequences. If a mortgagee is aware of the sale and fails to act, that is *its* problem.

The circumstances in which a judicial sale can be held to be ineffective must of necessity be highly circumscribed.

As further background reading we strongly recommend the document which Switzerland submitted to UNCITRAL in 2018, and which reported on the Malta Colloquium CMI held that year. (It is Annex II to the document issued by UNCITRAL Working Group following its Meeting No. VI, 13-17 May 2019, distributed 14 February 2019.)

A further matter we wish to highlight is the question of interplay between the Rotterdam Rules and any proposed new Instrument. You will note that in his aforementioned paper Mr Hetherington (at p 13) expressed concern that, as at May 2019, there had not been formal consultation between the Attorney-General's Department and MLAANZ as to "the carve out of 'the carriage of passengers and goods' from the current draft HCCH Convention". He said:

"Whilst the carve out may be entirely justified on the basis that the Rotterdam Rules provide in Articles 73 and 74 for recognition and enforcement, the complete absence of any activity by the Australian bureaucracy to move towards ratification of the Rotterdam Rules cannot at this stage be cited as a justification ..."

We endorse these comments and consider it desirable that clarity on the way forward for the Rotterdam Rules should be established, if linkages between Conventions are to be discussed.

As to more general matters referred to in the Introduction to the present Draft report of UNCITRAL, we have the following comments:

1. Form of the Instrument.

We see little point in this document being anything other than a Convention. The reason CMI took on this work was that the system of comity and recognition of other States' judicial sales had been breaking down. It is questionable whether there is value in putting 'soft law' Guidelines in place.

2. Geographic scope.

The instrument should only apply to judicial sales conducted in the jurisdictions of State parties.

3. Types of ships covered.

Should the Instrument apply to 'seagoing' vessels only or include inland navigation? Whilst we acknowledge that UNCITRAL is doing further work on this, from an Australian point of view, for consistency our Admiralty Act the Instrument should preferably not apply to inland waterways vessels. See s. 3(1)(f).

4. Publication of notices and certificates in a centralised depository.

UNCITRAL is doing further work on this but, assuming there no downsides are identified in the further dialogue to be undertaken, this seems to be a sensible proposal.

5. Certified copies and translations of the certificate of judicial sale.

The concept of a Certificate (included as an annexure to the CMI Draft Instrument) was introduced to facilitate deletion of registration and re-registration of ships. The Registry of the Court ordering the Judicial sale could no doubt issue such certificates and, if necessary, certified copies, presumably on payment of a fee by the Plaintiff/purchaser.

6. Function of the notice requirements.

The first issue raised is: what should be the content of the notice requirement? In our view it should be kept as simple and limited as possible – i.e. by simply drawing attention to the application being made for an identified ship to be sold by the Court. A second issue is: what should be the effect of a failure to comply with the requirement to give notice? Option (c), in our view, would be appropriate. This would leave a discretion in the Court to set aside the sale if an application is made to it by reason of this failure.

7. Operation of the grounds for refusal.

See comments above.

8. Other issues.

These are identified as footnotes to the draft report.

Finally, we would like to say that MLAANZ believes the present drafting of parts of the draft Instrument is in need of significant improvement. We would be happy to provide specific examples of drafting concerns in a meeting with representatives of your Department.

Michelle Taylor (Australian Vice President) and myself (President) from the MLAANZ Executive would be in a position to meet with you in Canberra on **Monday 6 April 2020** to discuss these matters, if that would be of assistance to you.

Yours sincerely

(Signed)

David Goodwin
President, MLAANZ