

UNCCA 5th Annual May Seminar

Judicial Sale of Ships

Background to Comité Maritime International (CMI)

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 co-operate with other international organisations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI. The CMI also has Consultative status with the IMO, UNCITRAL and UNCTAD and works together with all those organisations at various times in order to seek to achieve its objects of unifying maritime law around the world. It also has a number of organisations as Consultative members (including IMLI, BIMCO, and FONASBA).

The CMI has been responsible for drafting the following international Conventions which were agreed at diplomatic conferences in Brussels, or the later versions as a result of a UN body's involvement:

1. Collision: 1910
2. Salvage: 1910, 1989
3. Limitation: 1924, 1957, 1976 and 1996
4. Unification of Certain Rules of Law Relating to Bills of Lading 1924 and Visby Protocol 1968
5. Liens and Mortgages: 1926, 1967 and 1993
6. Arrest: 1952 and 1999

Coming closer to the present time the CMI drafted the CLC Convention for the IMO and the Rotterdam Rules for UNCITRAL for them to take them to international diplomatic conferences. It is also the Custodian of the York Antwerp Rules.

The CMI is incorporated in Belgium, has an annual Assembly meeting, and it operates through an Executive Council.

The CMI usually responds to problems which the clients of maritime lawyers or other international organisations refer to it as being in need of our specialist assistance.

In other cases the CMI has taken the initiative because one or more of our colleagues has identified an issue in international law which it was thought the CMI could improve. One good example is that in relation to Unmanned Ships which is an issue which is only now coming to the attention of the international regulators although the CMI has been working on this issue since 2015. Another example is the topic before us today, Judicial Sales.

When the CMI takes on a new piece of work its traditional way of going about it is to prepare a questionnaire usually about 2 or 3 pages in length requesting the Maritime Law Associations around the world to provide information as to how their country has dealt with the issue which the CMI is working on. Usually within a year or so about half of the membership will have responded, some very much earlier than others, and some come trickling in up to 2 or 3 years after the initial questionnaire has been sent out.

Judicial Sales: "Beluga Notification" Federal Court of Australia (2011)

In 2011 the "*Beluga Notification*" was the subject of a Judicial sale in the Federal Court of Australia. The following chronology might assist in providing some background as to what takes place in a Judicial sale:

- This bulk carrier was arrested in Townsville on 13 April 2011 by its mortgagee.
- An application was made to the court to allow the vessel to be moved to an anchorage outside Townsville.
- The Statement of Claim was filed on 27 April 2011.
- Judgment was entered (no appearance) on 10 June 2011.
- A further application was made to allow the vessel to sail to Brisbane.
- An order for valuation and sale of the vessel was made on 30 June 2011.
- Bill of Sale executed 29 August 2011.
- Protocol of Delivery and Acceptance signed 30 August 2011.

The plaintiff in the proceedings was the mortgagee bank and financier for the shipowner. The same bank was the financier for the successful bidder at the Judicial sale. I therefore had the pleasure of being instructed by the bank and the new owner but that required me to attend to take delivery of the vessel off the coast of Brisbane on 30 August 2011.

To put it simply for those who are not experienced or indeed have not encountered a Judicial sale scenario, let me just say that the common factual situation, is that a creditor of a shipowner arrests a shipowner's vessel and brings its claim in the jurisdiction in which the vessel is arrested. If a creditor obtains a judgment which is not met by the shipowner it can then ask the court to sell the ship, which it would usually do by way of a public auction process.

One of the key attributes of a Judicial sale is that the successful bidder acquires the vessel free of all encumbrances. That is the first aspect of critical importance. It almost goes without saying that the second aspect is that the sale is recognised as such a sale in all jurisdictions that the ship might visit subsequently. Without it there is a risk that creditors, who were unsuccessful in obtaining repayment, from the proceeds of the sale, for their debt (because, for example, all the proceeds went to a secured creditor such as a mortgagee or other lien holder), might seek to re-arrest the ship in some other jurisdiction.

CMI's involvement with Judicial Sales

This issue was first brought to the attention of CMI by Professor Henry Li of the China Maritime Law Association and a member of the CMI Executive Council in 2007. He drew attention to the problems arising around the world from the failure in some jurisdictions to give recognition to judgments in other jurisdictions when the sale of ships had been ordered. In 2014 the International Working Group that was set up concluded its work with a draft Instrument. Since then the CMI has been seeking to persuade an international organisation to take the project on and bring it to an International Convention.

It is a serious problem. Whilst there may not be many examples in any individual country where the system of Judicial sales has not progressed smoothly for the participants the fact is that there are a large number of Judicial sales taking place all around the world and they do give rise to legal problems which cause delay, cost and expense to those who have participated in them. I do not know if it is still the case but there was a case before the Federal Court in which the Australian buyer in a Judicial sale in Singapore was seeking to change the flag from Taiwan to Australia but the Taiwanese were refusing to delete it and thus the Australian Registry were unable to register it here.

Data that was obtained by the CMI's International Working Group indicated that in the four year period between 2010 and 2014 more than 480 ships were sold by way of Judicial sale each year in four Asian jurisdictions: the Republic of Korea, China, Singapore and Japan.

Who are the stakeholders in relation to Judicial sales?

1. The shipowner which is sued in admiralty and loses the case and cannot afford to pay the claim is liable to have its ship sold by way of Judicial sale.
2. The financier of a ship, the mortgagee, who may instigate the proceedings and the order for sale.

3. Unsecured creditors, who may have instigated the proceedings and the order for sale (eg a Port Authority, tug operator, bunker supplier, cargo claimant, providore, stevedore, other ship owners, charterers and crew etc).
4. The Court (Judges).
5. The Flag State of the defaulting shipowner and/or intended Flag State of the purchaser at the Judicial sale.
6. The purchaser at the Judicial sale.

What do they have in common? The interests of, at least, the first three of the above are to achieve the highest sale price as possible.

The Problem

The problem can best be seen in an interesting article, which New Zealand academic Bevan Marten had published by Lloyds List Australia entitled "Why the draft Convention on Foreign Judicial Sales of Ships must be adopted across the globe", when he said:

"Imagine this legal nightmare - you purchase a vessel following a court ordered sale, only to find that the flag State refuses to transfer the ship off its books.

Or you pick up the phone one morning and find out that a court in some far-flung jurisdiction has sold the vessel you were mortgagee of, without any prior notice that there were proceedings underway.

Even if such events seem uncommon decisions from various courts show that they have taken place from time to time."

The problem was further identified by Bevan Marten with reference to the CMI Beijing draft, as the draft Instrument has been known, (as the work was almost completed at the CMI Beijing Conference in 2012), in which the Preamble recognised that "the needs for 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". The Preamble goes on to recognise 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".

A very real example of the problems that can be encountered took place in Malta last year. One of my colleagues on the Executive Council of the CMI is acting for the new owner of the vessel, the "*Bright Star*", which had been arrested and sold in a Judicial sale in Jamaica in January 2018 for USD\$10.3million.

The vessel had been subject to a mortgage registered in Malta in 2016 and the mortgagee arrested the vessel in Malta on 19 June 2018 in reliance on that mortgage, after the Judicial sale.

Whilst acknowledging that the buyer had bought the vessel at a Judicial sale free of any mortgage the Maltese court held in a decision following summary proceedings that it was not enough that the sale had been carried out and it was equally important to ensure that the interest of any creditor had been effectively passed on to the proceeds of sale. A legal opinion had been obtained in Jamaica which did not satisfy the Maltese court that the protection which a registered mortgage offers a creditor in Malta was recognised in Jamaica. The evidence relied on by the court spoke only to the absence of reciprocity between Malta and Jamaica and said nothing about the law of priorities under Admiralty law in Jamaica. Despite the fact that sufficient funds were available to cover the debt owed the court was not satisfied that there would be no other higher ranking creditors in Jamaica. Therefore it accepted that the filing and action against the proceeds of the sale would only be tantamount to suing for breach of contract and the mortgagee would be treated as having only a cause of action for a debt which did not carry with it any executive or preferential force. It therefore held that by reason of the fact that the preferential right and executive title afforded by the Maltese registered mortgage was not being recognised under Jamaican law there was no compliance with reciprocity justifying the sale of the vessel being free and unencumbered and having the same effect as it would have had, if it had been carried out in Malta. I am informed that this is still an ongoing matter and is to be the subject of a full blown hearing.

There was a case, which may still be continuing, in the Federal Court of Australia in which an Australian purchased a vessel at a Judicial Sale in Singapore but has been unable to have it deleted from the Taiwanese register, to enable it to be registered in the Australian register.

To sum up, difficulties can arise: (1) for companies in any country which purchase a vessel overseas from a court ordered sale which then find that the flag State refuses to transfer the ship from its register, or (2) the buyer of a ship at a Judicial sale who then trades that ship to another State can find the vessel rearrested by creditors of the original owner, (despite the fact that the court ordered sale was predicated on providing the buyer with a clean title and all prior encumbrances being removed), and (3) a further problem can also exist for a mortgagee of a vessel which is sold in another jurisdiction without notice having been given to the mortgagee.

These problems have occurred on many occasions in recent years.

All these problems create risks for **buyers of second hand vessels** at Judicial sales which adversely impacts on ship prices, which may mean that a mortgagee is not fully compensated under its loan, or other creditors of the defaulting shipowner are not paid out of the proceeds at all. Such creditors can be crew, port authorities, agents, stevedores, cargo owners and any third party supplier of services to the ship owner.

Whilst these are not necessarily every day events they do reflect adversely on international **trade** and damage comity between courts in international States.

Some Judicial Observations

1. Dr Lushington "*The Tremont*" (1841) 1 Wm. Rob. 163 at p.164:

"The jurisdiction of the Court [-that is, the Admiralty Court-] in these matters is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the Court in the exercise of this authority is a valid title against the whole world, and is recognized by the courts of this country **and by the courts of all other countries.**"
2. Belinda Ang Saw Ean J "*The Turtle Bay*" (2013) SGHC 165

"Dr Lushington's statements in "*The Tremont*" are fundamental to admiralty Judicial sales. Indeed many legal systems continue to give effect to admiralty Judicial sales of foreign Courts as a matter of comity. **This recognition of the legal consequences of an admiralty Judicial sale is important to a purchaser who intends to register the vessel in a different jurisdiction.**"
3. *The Norsland* (1972) Carswell Nat 18 FC 430. The Court order in Canada read in part:

"...the Republic of Panama, after filing a caveat for \$2,585.15, refuses to comply with the proceedings for sale of this ship, and observe the order of this Court giving the purchaser a clear title. I do not for the moment wish to characterize this action by that country, **I would say nevertheless that the refusal to comply with a judgment of this Court after filing a claim, in addition to being an affront to a Canadian court, 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 every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in an area which can be effectively controlled only with the good faith of all seafaring nations**".
4. Hewson J "*The Acrux*" (1962) 1 Lloyds Rep. 405 at p.409:

"It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, assented to the sale to an innocent purchaser, should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This Court recognizes 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.**"
5. Justice Rouleau *The "Galaxias"* (1988) LMLN No. 240 (p.2):

"However, 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. [If a sale made by a Court is not described as being free and clear of all encumbrances.] ...**the legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into court of purchase prices.**"

6. Sheen J *The "Emre II"* (1989) 2 Lloyds Rep. 182 at p.185:

"There is one other matter to which I must refer. During the course of the hearing I was told by the defendants that if the ship is sold by order of this Court the Turkish authorities may not delete the name of the ship from the register in Istanbul. When a ship is sold by order of this Court the purchaser gets a clean title. **As a matter of comity between nations it is important that the Courts of one nation should recognize the validity of the orders of another nation. If it be correct that the Turkish authorities will not delete from their register a ship which is sold by order of this Court the effect is to diminish the value of the ship. When the ship is advertised for sale it will have to be made clear to any potential purchaser that there may be some difficulty in having the name of the ship deleted from the Turkish register.** That would be unfortunate for the parties in this litigation and would adversely affect all other Turkish shipowners. In this country effect will be given to the order of a Turkish Court. If it becomes necessary for the Admiralty Marshal to sell "*Emre II*" the solicitors for the defendants should obtain clear instructions from the relevant authority in Turkey as to whether that authority will recognize and act upon a sale by order of this Court. Those instructions should be communicated to the Marshal so that he may advertise the ship appropriately."

7. Sheen J "*Cerro Colorado*" (1993) 1 Lloyds Rep. 58 at p.61:

"I can only express the hope that the Spanish court will, as a matter of comity, recognise the decrees made by this Court, which endeavour to give effect to the International Arrest Convention. **From time to time every shipowner wants to borrow money from his bank and give as security a mortgage over his ship. The value of the security would be drastically reduced if when it came to be sold by the Court there was any doubt as to whether a purchaser from the Court would get a title free of encumbrances and debts.**"

The Contents of the CMI Instrument

There are **five main** things you need to know about the CMI draft Instrument:

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.

Article 1 is a "**Definition**" provision and defines, for example, the following words:

"Certificate": "means the original duly issued document, or a certified copy thereof, as provided for in article 5" (to which I will return);

"Charge": "includes any charge, Maritime Lien, encumbrance, arrest, attachment" etc;

"Clean Title" "means a title free and clear of any Mortgage ... or Charge unless assumed by any Purchaser";

"Competent Authority": "means any Person, Court or Authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title";

"Court": "means any Judicial body established under the law of the State in which it is located and empowered to determine the matters covered by this Convention";

"Interested Person": "means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage ... or Registered Charge attached to the Ship immediately prior to its Judicial Sale".

"Judicial Sale": "means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors".

"Maritime Lien": "means any claim recognised as a Maritime Lien or privilege maritime on a Ship by the law applicable in accordance with the private International law rules of the State of Judicial Sale";

"Mortgage...": "means any mortgage effected on a Ship in the State of Registration and recognised as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale";

"Owner": "means any Person registered in the Register of Ships of the State of Registration as the owner of the Ship";

"Purchaser": "means any Person who acquires ownership in a Ship or who is intended to acquire ownership in a Ship pursuant to a Judicial Sale".

"Recognition": "means that the effect of a Judicial sale of a Ship shall be accepted by a State party to be the same as it is in the State of Judicial Sale";

"Registered Charge": "means any charge entered in the Registry of the Ship that is the subject of the Judicial Sale";

"Registrar": "means the Registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires";

"Ship": "means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State of Judicial Sale";

"State of Registration": "means the State in whose Register of Ships ownership of a Ship is registered at the time of its Judicial Sale";

"State of Judicial Sale": "means the State in which the Ship is sold by way of Judicial Sale";

"Unsatisfied Personal Obligation": "means the amount of a creditor's claim against any Person personally liable on an obligation, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale".

Article 2 "Scope of Application" provides that the Convention shall apply to the conditions in which a Judicial sale taking place in one State shall be sufficient for recognition in another State.

Article 3 "Notice of Judicial Sales" requires notices to be sent to:

- (a) The Registrar of the ship's State of registration
- (b) Holders of mortgages or charges
- (c) Holders of Maritime Liens
- (d) Owner of the Ship
- (e) State of Bareboat registration (the Registrar).

There are time requirements for such notices and the minimum information is identified such as the name of the ship, time and place of Judicial sale, particulars of the proceedings concerning the Judicial sale; the means of publication of notices etc.

Article 4 "Effect of Judicial Sale" provides that subject to the ship being within the jurisdiction at the time of sale and the sale is conducted in accordance with the law of the State all rights prior to the sale in the ship are extinguished and clean title is given to the purchaser, but it does not extinguish any rights except to the extent that they have already been met out of the proceeds of the sale of the ship.

Article 5 "Issuance of a Certificate of Judicial Sale" provides that at the request of the purchaser from a Judicial sale the Competent Authority (for example, the court) shall issue a Certificate (in the form annexed to the draft Instrument) recording the sale to the purchaser when a ship has been sold by way of Judicial sale and the conditions required by the law of the State of the Judicial sale and the instrument, have been complied with. I suggest that that would only happen once all the financial issues have been dealt with, ie payment has been made to secured and unsecured creditors, the priorities having been determined etc. If there has been any delay, presumably the purchaser could agitate the court in which the sale has proceeded to have all payments made and the Certificate issued promptly.

Article 6 "Deregistration and Reregistration of the Ship" provides that on the production of the Certificate to the prior registry it is required to make the deletion. Accordingly, there should be

no justification in the prior registry for any delay in making the deletion once the Certificate has been produced to it.

Article 7 "Recognition of Judicial Sale" requires the court of a State party on the application of a purchaser or subsequent purchaser to recognise a Judicial sale conducted in any other State for which a certificate has been issued in accordance with Article 5, and as having the effect that a clean title has been acquired by the purchaser and all rights and interests in the ship prior to the Judicial Sale have been extinguished and that the ship has been sold free of any mortgage or charge, except as assumed by the purchaser. It also requires a ship which has been sold by a Judicial sale and is sought to be arrested or is arrested by order of the court in a State party for a claim that arose prior to the Judicial sale to be dismissed, set aside or the application for its arrest rejected upon the production by the purchaser or subsequent purchaser of a certificate issued in accordance with Article 5 unless the purchaser can bring itself within Article 8.

Article 8 "Circumstances in which recognition may be suspended or refused" requires proof that the ship was not in the jurisdiction at the time of sale or that the competent court has suspended the effect of the sale or has subsequently nullified the sale or on grounds of public policy of the State in which recognition is sought.

Article 9 "Reservation" states signing the draft instrument can restrict its application to Judicial sales in State parties.

Article 10 "Relations with other international instruments" provides that nothing in the Convention derogates from any other convention, instrument or agreement or principle of comity.

Attempts to have the Instrument become a Convention

The CMI approached the IMO Legal Committee with a request that it take on this work in 2015 and 2016 but was unsuccessful. That attempt was succeeded by a request to the Hague Conference in 2017 to consider adding this subject to its work on the "draft Hague Convention for Recognition and Enforcement of Civil and Commercial Judgments". It was decided by the Hague Conference that that work was too far advanced for Judicial sales to be brought within its purview.

After the rejection by HCCH, the CMI then approached UNCITRAL in 2017 and it was suggested at its Vienna meeting that year that the CMI organise a Colloquium at which the work could be made known to a wider audience.

At relatively short notice the CMI organised a Colloquium to take place in Valletta, Malta at the end of February 2018. It was extremely successful. A report was then prepared of that meeting which had originally been intended would go in under the auspices of Malta and Switzerland but Malta fell foul of the EU who did not give it permission to do so, so the report went in under Switzerland's name. That report noted that the Colloquium attracted 174 participants including delegates from 60 countries. They represented governments, including governments of flag States, the Judiciary, the legal community, a number of specific industries such as shipowners,

banks, financiers, shipbrokers, ship repairers, ship builders, bunker suppliers, port and harbour authorities, charterers, tug operators, and ship agents, as well as a number of international organisations such as the Institute of Chartered Ship Brokers (ISC), Baltic International Maritime Consultative Organisation (BIMCO) and the International Transport Workers Federation (ITF).

A prominent shipowner representative identified four of the most important considerations in relation to Judicial sales. They were:

- Legal certainty
- Maximisation of the asset value
- Availability of ship finance
- Ease of registration after the sale has taken place

A leading ship financier from Germany shared the views of 11 major banks from his jurisdiction and confirmed the need for certainty and highlighted the substantial value of the assets at issue.

The Registrar of the Maltese flag referred to the difficulties that are faced when a Judicial sale has taken place in a foreign jurisdiction and a request has been made for the deletion from the Register of the vessel's flag as a result of that Judicial sale. The issuance of an internationally recognised certificate of Judicial sale by the State in which the sale has taken place would, he thought, greatly improve the situation. (The arrest to which I have referred earlier had not taken place then!)

Other speakers included bunker suppliers and service providers, crew interests, ports and port service providers all of whom reiterated the need for certainty in this area of the law. That is necessary both in relation to the giving of a clean title and the ease of having former registrations deleted as well as the prevention of re-arrests taking place despite the Judicial sale in support of past debts as being crucial to the system working well.

UNCITRAL Working Group VI (May 13-17 2019)

In June last year CMI persuaded UNCITRAL to take on this work. We were informed late last year that the work would be done by Working Group VI.

Issues that might arise

1. An issue that might arise in the discussions that take place in New York is one which arises from the work of the Hague Conference on Private International Law. Between the 18th June and 2nd July 2019 it is hoping to finalise its work on a Convention for the Recognition and Enforcement of Foreign Judgments of Judicial Sales in Civil or Commercial matters. Those words ("civil or commercial") are contained in both the title

and in Article 1 but are not defined. Article 1 does however say it does not extend to "revenue, customs or administrative matters". Neither are those words defined.

"Judgment" is defined as follows:

"'judgment' means any decision on the merits given by a court, whatever that decision may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this convention. An interim measure of protection is not a judgment."

Article 2 identifies what is excluded from the scope of the proposed convention. Article 2.1 says "this convention shall not apply to the following matters -". It then lists a number of matters many of which are in square brackets and thus still under discussion.

Amongst those which are not under discussion are the following which would be of interest to maritime lawyers:

- "(f) the carriage of passengers and goods;
- (g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;"

Thus, "Judicial sales" are not expressly excluded so the question arises whether an order for the sale of a ship after a "judgment" has been given in favour of the plaintiff comes within the definition which I have quoted of the word "judgment", or whether it is an excluded "administrative" matter.

Paragraphs 82 and 87 in the Draft Explanatory Report for the Hague Conference's forthcoming meeting in June are relevant.

The former says that a "decision on the merits" does not include: "Procedural rulings, different from orders determining costs or expenses... Likewise enforcement orders, such as garnishee orders or orders for seizure of property, do not qualify as judgments."

Paragraph 87 expressly states that: "an interim measure of protection" is not a judgment and then explains that those words cover "measures that serve two main purposes: providing a preliminary means of securing assets out of which a final judgment may be satisfied, or maintaining the status quo pending determination of an issue at trial".

The fact that those drafting the HCCH Convention did not want to include the work that the CMI had done in its draft suggests that it did not consider that it was a fit subject for it. It is of interest however that an earlier draft of the Hague Judgments Convention of 1999 expressly excluded "admiralty or maritime matters" but as has been seen, the current version does not go so far. The Explanatory Report of the 2019 draft states: "subject to

the limitation of liabilities, other maritime matters, such as marine insurance, non-emergency towage and salvage, ship building or ship mortgages and liens are included in the scope of the draft convention" (paragraph 49).

It seems from the examples given in paragraphs 82 and 87 of the Explanatory Report that a Judicial Sale order would not be covered by this proposed Convention. Where I think there is some potential for overlap is when a court after an admiralty arrest does enter a judgment on the merits. Notwithstanding what is said in paragraphs 82 and 87 paragraph 38 makes it clear that rights in rem are intended to be covered. There does not appear to be anything to exclude such a Judgment from the proposed Convention. Paragraph 49 gives express examples of some such maritime claims that are intended to be covered. Unless they relate to carriage contracts of passengers or goods (paragraph 48) or one of the specified matters referred to in paragraph 49 such judgments would seem to be covered. Therefore, for example, a mortgagee's claim, a dispute over ownership and other recognised maritime claims, such as damage done by a ship, or a claim for crew wages would be included within the proposed Convention. In the light of paragraph 82 which excludes "enforcement orders" a subsequent order for sale would probably not be covered. Minds may differ as to whether an order for sale is a "procedural order" as described in paragraph 82. It is perhaps a pity that greater clarity is not contained within the definition of "judgment" along the lines of what is stated in paragraph 82 of the Explanatory Report.

Paragraph 84 of the Explanatory Report has left open for further "reflection" the question of non-monetary judgments such as "pecuniary penalties". There may be scope within the discussion of that issue for support for an amended definition of judgment which excludes such matters and consequential orders such as sales of ships or property when the Hague Conference resumes its work in June.

The UNCITRAL Secretariat is aware of this potential overlap and has spoken to the HCCH Secretariat. One way of dealing with it would be to clarify the official commentary on the HCCH or to have a specific exclusion in the HCCH Convention, leaving the field to UNCITRAL.

The Australian Maritime Law Association was not, so far as I am aware, contacted by those within the Attorney-General's department who will have attended the HCCH meetings. It is unclear whether MLAAANZ would support, for example, the carve out of "the carriage of passengers and goods" from the current draft HCCH Convention. 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 for the lack of consultation by the bureaucracy with the maritime shipping industry in relation to the negotiation of the HCCH draft Convention.

It really is appalling that such a carve out would have been made without consultation with MLAANZ.

2. Another preliminary issue which might arise at the UNCITRAL meetings in New York is as to what it is intended to be achieved by this work. When UNCITRAL met last June and agreed to take this project on the delegate from the EU indicated that it would only support a "soft law" outcome, and after it had examined the proposal in greater detail. That could still be the approach which the EU will take at the meeting in New York. To my mind the Lex Maritima and the comity which has guided courts since at least the 19th Century in this area of the law is an example of "soft law", and it is this which the CMI Convention has been designed to make more certain and effective. A set of Guidelines based on the CMI draft Instrument would not, in my view, make any difference to the present situation. An International Convention is needed.
3. Another issue with the EU is that up until now it has been treating the topic as solely within EU competence. There are signs that it may be stepping back from that position and leaving individual states to their own devices.

Recent Developments

A recent interesting development has been the engagement of the International Chamber of Shipping (ICS) with this work. Whilst members of its Secretariat attended CMI meetings where discussion on this topic took place over the years between 2008 and 2014 it was never supportive of the work ("it does not affect our members" being the constant refrain).

CMI was successful in obtaining the presence of the Secretary-General of BIMCO (ICS's rival for shipowner membership) to attend the Malta Colloquium which was held in February last year. He was amazed at the interest in the topic by the wide range of attendees at that meeting. ICS has appointed an in-house lawyer from one of its Belgian members to attend the UNCITRAL meeting and has also produced a very useful "briefing note" which it has shared with the CMI. That "briefing note" draws attention to the similar provisions in the CMI instrument on the giving of notices and the issuing of certificates under Articles 11 and 12 of the Maritime Liens & Mortgages Convention 1993. That Convention has not been ratified by Australia, although it is referred to as a signatory of the final act. Strangely, however, it is not identified as a signatory on the UNCTAD website. There have only been 18 ratifications since 1993, none of them being from major ship owning or trading nations. There have been no ratifications for example from: United States, China, Japan or major European trading countries, with the exception of Spain.

A sad development from Australia's point of view is that the Australian government will not be represented at the UNCITRAL meetings next week. Whilst the Attorney-General was extremely supportive last year in having this matter put on the UNCITRAL agenda the bureaucracy within the Attorney-General's department has lamentably and consistently shown a lack of urgency despite the views expressed by the CMI, the Maritime Law Association of Australia and New

Zealand, or indeed the judges. When countries such as Switzerland, Japan, Spain, the US and China can send, not only delegations including members of their bureaucracy, to attend UNCITRAL but also maritime lawyers knowledgeable about the day to day activities of shipowners and the needs of the industry I fear for the future of Australian trade and shipping.

In my early years of practice as a maritime lawyer in the late 1970s and early 1980s the Attorney-General's department held an annual seminar to which the Judiciary, the profession, academics and representatives of organisations such as MLAANZ, shipowners, exporters and others were invited to hear from those within the Attorney-General's department who were considering and advising government on potential international conventions that were being negotiated within the international bodies such as UNCITRAL, the IMO, UNCTAD and the HCCH. It was a wonderful opportunity for government to explain to those at the coal face of industry about such discussions and to receive input from them. Sadly those seminars (which took place, to the best of my recollection, on a Friday afternoon and Saturday in Canberra) have not continued. They should be revived. This organisation (UNCCA) has, in a sense, filled part of the gap. There are, however, very many more international organisations dealing with maritime matters such as the IMO, UNESCO (Cultural Heritage), UNIDROIT (Cape Town Convention), HCCH and UNCTAD and industry and the Maritime Law Association remain oblivious as to what happens at the meetings attended by the bureaucracy. It seems to me that the Canberra "bubble" which such seminars were clearly intended to burst has intensified over the years and the bureaucracy rarely ventures out of its Canberra bunker and its interactions with the maritime industry are extremely rare.

The Future

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).

The current legislative/regulatory regime for Judicial sales is contained in the Admiralty Rules (Rules 69 to 74). Further provisions will need to be incorporated into the Rules to take account of the current provisions in Article 3 (the giving of notices of Judicial sale, that is to whom such notices are to be given) and Article 5 (which provides for the issuance of a certificate which is Annexure A to the Convention).

Any legislation that gives effect to such a Convention will need to deal with Articles 6, 7 and 8. The most obvious legislation to deal with Articles 6 and 8 is the *Shipping Registration Act* (1981). The current Article 6 in the draft Instrument deals with de-registration and registration of ships sold by Judicial sale and Article 8 deals with the circumstances in which recognition may be suspended or refused. Article 7 deals with the recognition of Judicial sales in other countries, and Australia may want to limit that recognition to countries who are also parties to the Convention.

Those seem to me to be the only areas in which alterations may need to be made to Australia's current regime for the Judicial sale of ships.

Conclusion

I cannot emphasise sufficiently 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 the slate is wiped clean, they can reflag the vessel if they wish and they can trade the vessel without fear of having the debts of the prior owner revisited on it. Creditors, whether they are secured or unsecured (other shipowners, crew, port authorities, providores, agents, brokers, stevedores etc) will receive less from Judicial sales if confidence in the system disappears.

It is the preservation of the integrity of the Judicial systems of States to the benefit of international trade, which this draft instrument seeks to achieve. Now that the work is being done by Working Group VI at its first meeting between the 13th and 17th May in New York, I am hopeful that this draft instrument (or something based on it) will proceed to become a widely accepted international Convention around the world.

Stuart Hetherington

Partner, Colin Biggers & Paisley, Sydney, Australia

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