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Judicial Sales of Vessels - CMI Draft Convention on the International Recognition of Judicial sales.

*Asociacion Espanola de Derecho Maritimo
Congreso Nacional - Madrid – 2018*

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Important to remember why we are even discussing
This issue:

- Situations of unpaid creditors of vessels ranging from mortgagees to suppliers to crew
- Vessel and her owners remain in default.
- Vessel is tracked down in a jurisdiction where the creditor can arrest.
- Invariable the creditor, unless he is specially privileged like a mortgagee in Malta, needs to commence an action.
- He obtains a favourable judgment.
- The owner remains in default and does not honour the judgement in favour of the judgement creditor

- The creditor then needs to enforce his judgments against the vessel.
- This invariably leads to the judicial sale by auction of the vessel so that the creditors can get paid.
- How the money paid into court after the judicial sale is distributed to the creditors is dependant on the law of the country where the judicial sale is held.

This is a story, which all of us in this room are all too familiar with.

Malta – an exemplary jurisdiction for judicial sales by auction and court approved private sales



The difference between a Judicial Sale by Auction And a Court approved private sale

The Indian Empress – Judicial Sale on the demand of
a creditor – Melita Marine – 28-6-2019



Court approved private sales – Thor Spirit – sold for mortgagee Commerz Bank - 2011



“A Ladybug” sold on the demand of Bank of America



“B Ladybug” – sold on the demand of Hyundai



“D Ladybug” - sold on the demand of Macquarie



BOTH ARE JUDICIAL SALES.

Once you reach this unfortunate stage, *the most important thing is that the vessel fetches the best possible price for the creditors as well as the original owner* – HOW?

1. That the judicial sale takes place in a well organised, fair, transparent and efficient manner.
2. That it takes place as smoothly as possible in the interests of all particularly the unpaid crew often left stranded on the ship.

4. The best price will only be achieved if the vessel is sold free and unencumbered ensuring that the buyer can post sale go anywhere in the world without any concern of re-arrest.
5. The new buyer also needs to know that the vessel can be de registered from its old flag and reregistered under new ownership in a new flag without any problems.
6. This is not only important for the new ship owner but for the financiers, who need the security that the vessel they are about to finance is clean and that they are the only creditors and that they can freely register their mortgage against the newly purchased vessel which is otherwise clean.

In Malta as is the case in a great number of jurisdictions, when a vessel is sold in a Judicial Sale, it is indeed sold “Free and Unencumbered.”

The issue is, will such a transfer which is free and unencumbered be recognised as such every where else as the ship under its new ownership travels from port to port around the globe?

The recognition of Judicial sales between EU Member states:

EC Regulation 44 / 2001 on “*Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*”

“*A judgement given in a Member State and enforceable in that State shall be enforced in another Members State when on the application of any interested party, it has been declared enforceable there.*”

EC Regulation 1215 /2012 (recast)

Article 39 of the recast:

“A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.”

What happens outside the EU?

Is there automatic recognition?

Are judicial sales challenged outside Europe?

What happens to the new owners when this occurs?

What happens to the rights of the financiers when this occurs?

Do flag states always recognise the new ownership?

Are lenders happy with the situation?

Does this lead to certainty in international trade?



The *Sam Dragon 2012*, was the case of a judicial sale in Belgium and the difficulties encountered by the buyer to delete the mortgagees interests in the vessel as it was registered in Korea

The *Galaxias 1988*, related to the difficulties in the recognition by Greece of a Judicial Sale in Canada

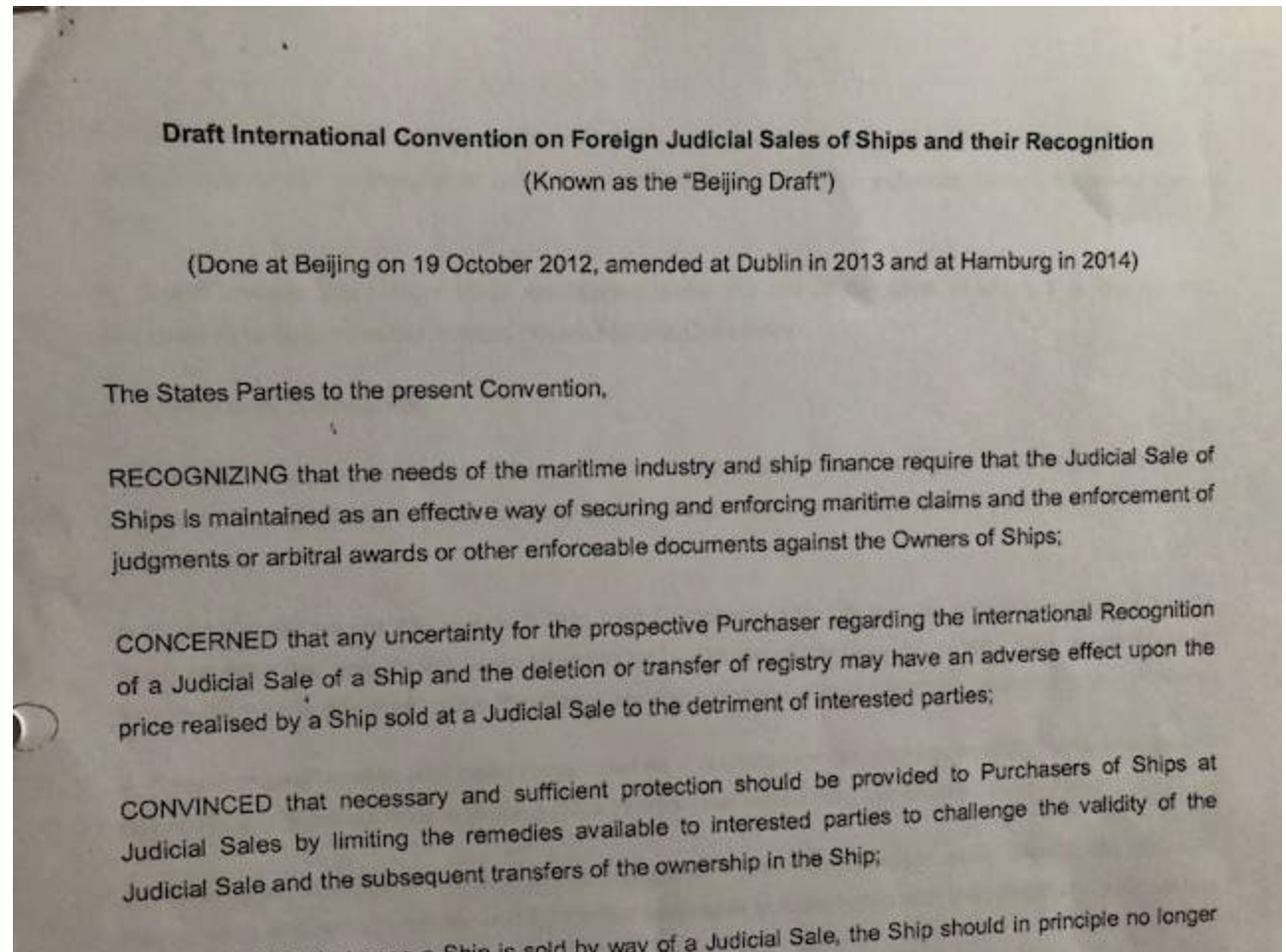
The *Pelamis No 68*, related to the difficulties an Australian buyer of a vessel in a judicial sale in Singapore had because the Taiwanese authorities where the ship was registered refused to recognise him a a new buyer.

ENTER the COMITE MARITIME INTERNATIONAL

1. Professor Henry Li from the China Maritime Law Association raised the alarm
2. International Working Group was formed in 2014 composed of:

IWG had numerous meetings, deliberations and working sessions, and ultimately produced the *“Draft International Convention on Foreign Judicial Sales and their recognition.”*

This is referred to as the *Beijing Draft* because it was agreed to in Beijing in 2012, it was amended in Dublin in 2013 and finalised in Hamburg in 2014.



Draft has 10 Articles and some of the most important points are the following:

1. It provides the criteria which a judicial sale must satisfy such as:

Notification at least 30 days prior to the judicial sale of the sale to the ship's register, to all holders of registered mortgages, to all known holders of maritime liens, to the owner of the ship

And:

The vessel must be present in the jurisdiction of the state where the sale is being held in accordance with the laws of that state.

2. It provides for the effects of the Judicial sale which include that any title to and all rights and interests in the ship prior to the judicial sale shall be extinguished and any mortgage / hypothec or charge shall cease to attach to that ship

3. It provides for the issuance of a “*Certificate of Judicial sale*” which records that the vessel:

- a. Was sold to the purchaser
- b. Free and unencumbered

4. It provides that upon the production of such a certificate the Registrar where the vessel was registered will delete any previously existing charge or mortgage and delete the vessel and issue a certificate of de-registration as the new purchaser may direct.

5. It provides that State Parties

- * shall recognise a judicial sale conducted in the states for which a certificate has been issued,
- * that clean title has been acquired
- * that the vessel is sold free and unencumbered.

6. It also provides those grounds in which recognition of a Judicial sale may be suspended or refused.

Approaches were made to the IMO who thought that there was not a sufficient compelling need to go in that direction.

Approaches were also made to UNCITRAL and the secretariat at UNCITRAL encouraged the CMI to test the market and suggesting the holding of a Colloquium to which a vast cross section of the maritime industry would attend.

It was decided that such a Colloquium could be held in Malta.

The Malta Colloquium on the international recognition of Judicial sales was held on the 29th of February 2018 at the Chamber of Commerce.

This was jointly organised between the:

Maltese Ministry of Maritime Affairs and Transport
The Comité Maritime International
The Malta Maritime Law Association.



Interesting statistics about the colloquium:

- 180 delegates
- From over 52 Countries
- Representing Ship owners, banks and financiers, provision suppliers, bunker suppliers, tug operators, pilots, ship yards, ambassadors representing their countries, members of the Maltese and foreign judiciary, BIMCO, FONASBA, ITF





PAULA COLLEGE OF BUSINESS
Thandi-Rose MCAULISTER
Executive Vice President, Academic Affairs
PAULA COLLEGE

The programme was introduced by myself as the Chairman of the Malta Maritime Law Association, by *Stuart Hetherington*, the President of the CMI, by the *Minister responsible for Maritime Affairs and Transport* and by *Mr. Ryan Harrington* from the Secretariat of UNCITRAL who made it very clear that UNCITRAL *was keen to listen to what the industry had to say*





THE MALTA CHAMBER
OF COMMERCE
ENTERPRISE AND INDUSTRY



The first panel was chaired by myself and was intended to show the various difficulties that have arisen in a number of practical cases ably explained by:

- Camila Mendes Vianna Cardoso from Kincaid Vianna Advogados – Rio de Janeiro
- Jan Erik Poetske from Ahlers and Vogle - Hamburg
- Lawrence Teh from Dentons, Rodyk and Davidson - Singapore
- Charles Buss from Watson Farley and Williams - London
- Brooke Shapiro from Winston Strawn - New York



The second panel was intended to show how various interested parties considered the matter – the panel was chaired by Alex von Ziegler an executive committee member of the CMI and was made up of:

- Tilman Stein from Deutsche Bank - Hamburg
- Peter Laurijssen from CMB - Belgium
- Ivan Sammut the Registrar of Maltese vessels
- Norman Martinez from the International Maritime Law Institute
- Cornelia Zammit German from Falzon Fuels

Bunker suppliers



Numerous contributions from the floor including from:

Petra de Bruin – Judge adjudicating over Judicial
Sales in Rotterdam

Soren Larsen – BIMCO

Capt. David Bugeja – Maltese Harbour Master

Colin Formosa – Pilots Co-operative

Alexandra Wilcox – Wilcox ship brokers

Paul Debono – International Transport Federation



Between the speakers and the comments from the floor the general conclusion was:

1. Smooth operation of vessels including therefore the transition on change of ownership in judicial sales was crucial to the effective conduct of international trade. International trade demanded certainty.

2. That a vessel under arrest undergoing judicial sale proceedings affects numerous persons in the international trade chain including the old owner, the crew, the various creditors ranging from the usual mortgagee bank to a variety of other creditors who all deserve and demand that the best possible price is achieved.

3. That an interested buyer will only pay the best possible price if he has the certainty that the free and unencumbered nature of the sale is not only guaranteed by the law of the country in which the sale takes place but is recognised in as many countries as possible.



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Following the Malta Colloquium, the Governments of Malta and Switzerland presented a Proposal to UNCITRAL entitled:

“Proposal by the Governments of Malta and Switzerland on possible future work by UNCITRAL on cross-border issues related to the judicial sale of ships.”



United Nations

General Assembly

United Nations Commission
on International Trade Law
Fifty-first session
New York, 25 June - 11 July 2014

Possible future work on cross-border issues related to the judicial sale of ships: Proposal from the Governments of Malta and Switzerland

Note by the Secretariat

1. In preparation for the fifty-first session of the Commission, the Governments of Malta and Switzerland submitted to the Secretariat a proposal for possible future work by UNCITRAL on cross-border issues related to the judicial sale of ships. The text received by the Secretariat on 21 March 2014 is reproduced as an annex to this note.

Date: General
21 March 2014
Original: English

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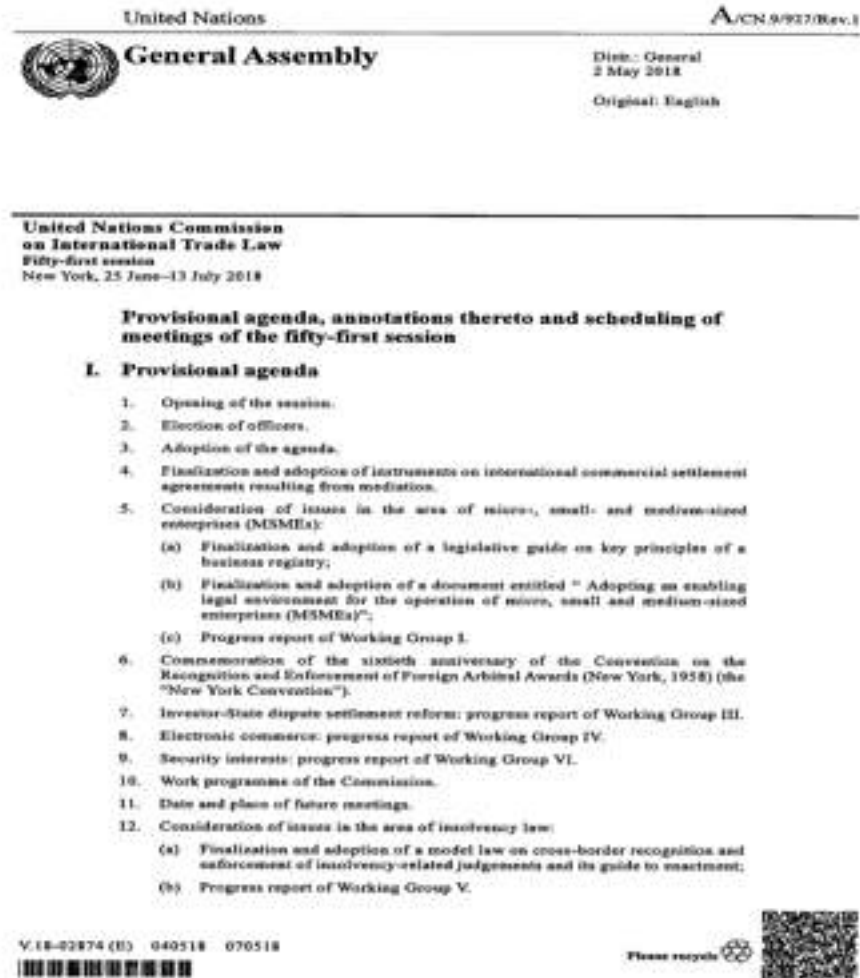
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Conclusion of Proposal:

“Broad consensus emerged from the Colloquium in support of an international instrument to remedy the problems arising from the lack of harmony among States in recognising the Judicial sale of a ship in another jurisdiction. For that reason, Malta and Switzerland propose that UNCITRAL undertake work to develop an international instrument on foreign judicial sale of ships and their recognition...”

“It is noted that CMI has undertaken significant work in identifying issues and possible solutions on this topic and that this work has been endorsed by a number of industries and States. That work provides a useful starting point to further UNCITRAL work , providing guidance for a working group and indicating the direction that might be taken.”

UNCITRAL has agreed to put this item on the agenda of its fifty first meeting in New York on Friday the 29th of June 2018



This is a very important moment for all the work that had been done over the past 5 years by the CMI and an opportunity for there to be a really useful convention which will be used by each and every single maritime practitioner bringing certainty to an area of our work which so really needs certainty.

For this to work on June 29th we need as many states at UNCTRAL to agree that there should be further discussion.

The good news is that at this stage it is not necessary for the state representatives to be present but it is sufficient if the states send a note verbal to the UNCITRAL SECRETARIAT:

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The Indian Empress – a perfect example – Let us be pro-active – let us be part of ensuring certainty in international trade.



**Thank you.
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