

Pressure builds for greater legal clarity of judicial ship sales

A Malta colloquium agreed on steps to persuade the United Nations Commission on International Trade Law to develop a new instrument and call a diplomatic conference to transform it into an international convention.

27 Mar 2018 **ANALYSIS**

by Stuart Hetherington

The United Nations Commission on International Trade Law will be asked to develop a new legal instrument covering judicial ship sales that are ordered by a court



DRAFT INSTRUMENT SEEKS TO BRING GREATER CLARITY TO THE SALE OF SHIPS, TO ENSURE NEW OWNERS ARE NOT BURDENED BY ANY MURKY DEBT HISTORY THEY MIGHT HAVE.

A DRAFT instrument has been produced by the Comité Maritime International aimed at bringing greater certainty and simplicity to judicial sales of ships which take place around the world, in order to provide for greater recognition of such transactions by other states.

A judicial sale is one which is ordered by a court and held under the supervision of a court, on the request

of a creditor who has either been successful in an action against a vessel and has remained unpaid, or whose title gives them the right to proceed directly to a judicial sale as is the case of a mortgagee in some jurisdictions, such as Malta.

The advantage of a judicial sale over a private sale is that the vessel is sold to the buyer free from and unencumbered by the vessel's previous debts. The purchase price is deposited in court and then creditors of the vessel get paid out of the sale price of the vessel.

The comité has embarked on a process to persuade the United Nations Commission on International Trade Law to develop the instrument and call a diplomatic conference to transform it into an international convention.

With the encouragement of the Commission Assembly in July 2017, as well as the financial support and encouragement of the Maltese government and organisation of the Malta Maritime Law Association, the comité hosted a colloquium in February 2018 to "discuss and advance" its proposal that the commission add the comité's draft instrument to its work programme.

The comité, which was set up for the unification of maritime and commercial law and of maritime customs and usages, will now be asking the commission to put this topic on its work agenda in July in New York.

It takes confidence from the views expressed from all stakeholders in relation to judicial sales that this topic is important to all players in the industry and the time has come for formal recognition in an international convention.

The challenge now for the comité is to persuade governments to add this project to the commission's work programme when it meets in July in New York. The comité considers that the UN Commission is the most appropriate body to work on this document and take it to a diplomatic conference. Its experience and expertise is in making international trade more efficient.

"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," Bevan Marten, a prominent New Zealand academic, wrote in 2014. "Or you pick up the phone one morning and find 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."

Mr Marten had highlighted the problems which Henry Li of China drew attention to when he pointed out to the comité in 2007 that many states were not recognising the decisions of courts in other jurisdictions when ordering a ship to be sold, which can cause the new buyer great cost, expense and delay.

The draft instrument is designed to provide a process which, if followed, should reduce the risk factor of non-recognition for buyers in judicial sales.

As Tilman Stein of Deutsche Bank said at the colloquium, "risk drives price".

"Legal certainty; maximisation of the asset value; the availability of ship finance; and ease of registration are the key ingredients of an efficient and effective system of judicial sales of ships," Peter Laurijssen of Belgium ship owner, CMB Group, said. "Any failure by one state to recognise sales in other jurisdictions impacts severely on each of those ingredients."

Charles Buss of Watson Farley & Williams solicitors in London (and co-author of the leading text *The Law of Ship Mortgages*) expressed the view that "bidding interest needs to be stimulated".

Others commented that lack of confidence by financiers means that asset values are destroyed.

"The needs of the industry are to obtain the best possible price for the asset," said Alexandra Willcox of Eggar Forrester Shipbrokers. "Potential buyers need to be confident with the process in order to attract them to bid and buyers need to be satisfied with the title they are going to attain."

In my paper on this topic, I referred to a current problem being experienced by an Australian buyer of a fishing vessel in a judicial sale in Singapore, who, two years after the sale, is still trying to have the flag changed from Taiwan to Australia.

The colloquium was opened by Ian Borg, Malta's minister of transport, who confirmed that Malta supported the draft instrument and would support the comité's proposal that UNCITRAL adds the draft instrument to its work agenda.

Malta is the largest flag state in Europe with over 65m tonnes of registered tonnage; it provides an extensive range of maritime services and facilities to ships who trade to and operate from its shores, including ship repairers, transshipment operators, berths, bunker suppliers, suppliers of provisions and many other services which are generally supplied on credit, exposing the suppliers to substantial losses if a shipowner client becomes insolvent.

For far too long, judges from around the world have identified circumstances in which there had been a lack of comity from other countries in the recognition of judicial sales that take place in their own countries and they had in many cases called for an international solution which would achieve a more formal recognition of such decisions.

The comité's draft instrument contains 10 articles which do not seek to make substantive changes to the law and is focused on establishing a uniform process for the administration and recording of judicial sales to facilitate greater recognition of sales that take place in one jurisdiction in other jurisdictions to which vessels might travel, especially to facilitate deletion and change of registration.

Panellists from Brazil, Germany, Belgium, Malta, Singapore, the UK, and the US underlined the critical importance of recognition by all states of judicial sales that take place in other states. This supports the system and achieves good sale prices, which benefit the defaulting owner because it can realise a better price for the asset, ship financiers and other mortgagees. It can therefore also benefit other creditors such as crew members, port authorities, ship agents and brokers, charterers, cargo owners, bunker suppliers and maritime creditors generally.

There was also a general consensus among the diverse maritime interests in the audience that an instrument which would provide a global framework for the international recognition of judicial sales would give certainty and peace of mind to a buyer.

This in turn would assist greatly in ensuring there would be maximisation of asset value, with more proceeds to be distributed to creditors. This would make the ship finance market more robust, ensure that sale procedures are streamlined and facilitated and thereby alleviate the plight of crew and harbour authorities.

It would also assist in the resolution of challenges not infrequently faced by flag administrations in such circumstances.

Clearly the solution lies in international regulation. This would lend stability to the world of international

maritime trade.

Stuart Hetherington is president of the Comité Maritime International, a non-governmental organisation established in 1897.