

The judicial sales of ships – part 1



ANN FENECH

On June 30 in New York, the 55th Session of the United Nations Commission for International Trade Law (UNCITRAL) approved the text of the convention on the international effects of judicial sales of ships and this after the Commission had at its 35th Session in New York in May 2018 agreed to take on the project. It was a cause for great celebration for the Comité Maritime International (CMI) and for international maritime trade.

The convention owes its beginnings to a draft prepared by the CMI. In 2008 Henry Li from China suggested that the CMI should undertake a study on the subject matter. It was evident that while in the majority of states, vessels sold in judicial sales are sold free and clear of any pre-existing claims, with their laws also providing for old creditors of such vessels to present their claims against the proceeds of the sale, there are states which refuse to recognise and give effect to the free and unencumbered title which accompany such judicial sales acquired by the purchasers of such vessels.

These instances lead to hugely challenging situations presenting serious interruptions to the orderly conduct of international trade, bearing in mind that 90 per cent of world trade is carried by sea. This failure not only leads to mala fide claimants exerting illegitimate pressure on bona fide purchasers who would



Ninety per cent of world trade is carried by sea. PHOTO: SHUTTERSTOCK.COM

have spent good money in purchasing vessels in judicial sales, the failure also gives rise to great uncertainty for the new financiers of such vessels who assume they are financing vessels leading to a clean title, only to find old creditors making a claim against the ship purchased clean.

There have also been cases where old mortgagees refuse to let go of their pre-existing mortgages, causing problems to registrars of ships leading to great delays in the deletion of mortgages, or even ships from the old registries which in turn lead to further challenges with the registration of new mortgages.

These problems also lead to the question, which purchaser is going to risk paying top dollar

for a ship in a judicial sale which is supposed to give him a clean title if after the sale, an old creditor can come along and arrest that vessel? This, in turn, leads to loss of confidence in judicial sales, leading to lower prices for ships in judicial sales, which in turn leaves less money for the vessel's old creditors.

So between 2008 and 2014 the CMI worked on a draft convention aimed at ensuring that when a vessel is purchased in a properly held judicial sale free and clear of all previous debts, such a title will be given full effect by other state parties. The draft convention was called the 'Beijing Draft'. Following its finalisation, the CMI needed to find an international legislative body for its draft, which would work on

the project and turn it into an international treaty.

In July 2017 the CMI approached UNCITRAL, and the Commission at UNCITRAL recommended that the CMI should first hold an international colloquium with the maritime industry in order that the industry may express its view on whether there was a real need for such a convention.

This international colloquium was organised in Malta by the CMI in conjunction with the Malta Maritime Law Association and the support of Transport Malta in February 2018, and it was attended by over 150 international maritime protagonists ranging from BIMCO, to IACS, to ITF, ship owners, flag registries, financial institutions, ship

owners, service providers and maritime judges. There was an overwhelming agreement on the need for certainty in international trade and on the need for such a convention.

Switzerland thus presented the conclusions of the Malta Colloquium and the 'Beijing Draft' to the 51st session of the Commission in June 2018 and, notwithstanding some very stiff competition, the proposal garnered support from a number of very important state delegations leading the Commission to decide that this was a topic that would be added to the work programme of the Commission. Subsequently the project was given to Working Group V1 and from May 2019 it held five working sessions until the Working Group presented the finalised text to the Commission in June of this year.

The 55th session of the Commission deliberated the draft for four days and approved the text of the Convention on June 30. It agreed to submit the text to the General Assembly of the United Nations recommending to the same General Assembly the adoption of the convention at its 77th session, the authorisation of a signing ceremony to be held as soon as practicable in 2023 in Beijing, upon which the Convention would be open for signature, and recommending that the Convention be known as the Beijing Convention on the judicial sales of ships.

It is anticipated that the General Assembly of the United Nations will adopt the convention at its 77th session in September.

Ann Fenech is a partner at Fenech and Fenech Advocates, vice president of CMI and CMI coordinator for the project at UNCITRAL.

The judicial sales of ships – part 2



ANN FENECH

Part 1 of this article last week explained the importance of giving full effect to the rights of purchasers of vessels sold free and unencumbered at the request of the old creditors in judicial sales.

Our Merchant Shipping Act clearly provides that where a ship has been sold in a judicial sale, the interest of the mortgagees as well as of any other creditor in the ship pass on to the proceeds of the sale of the ship.

However notwithstanding this and that for decades the position in Malta has been that when a vessel is sold in a judicial sale, it is sold free and unencumbered so that a purchaser purchases the vessel without any of the vessel's previous debts, in June 2018, the vessel *Bright Star* was arrested in Malta for an old debt, six months after having been sold free and unencumbered in Jamaica, following the arrest of the ship in Jamaica by the same old creditor.

In May 2021, the court in Malta decided in favour of the new owners underlining the fact that once a vessel is sold in a judicial sale free and unencumbered, any previous creditor must make a claim against the proceeds of the sale declaring the subsequent arrest to be illegal. The case is now before the Court of Appeal.

This case clearly shows that even in jurisdictions like Malta where the law is crystal clear, unscrupulous *mala fede* claimants will try to put illegitimate pressure on *buona fede* purchasers who purchase vessels in judicial sales.

The convention on the international effects of judicial sales of ships seeks to resolve this. It has 23 Articles with its entire *raison d'être* contained in Article 6 which states: "A judicial sale for which a certificate of judicial sale referred to in Article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser."

There are a number of criteria which need to be satisfied for the convention to apply, and important among which are the



Ann Fenech addressing the 55th Session of the United Nations Commission for International Trade Law in New York last June.

notification criteria contained in Article 4 and the issuance of a certificate of judicial sale by the court where the judicial sale takes place provided for in Article 5.

Article 4 provides that while the judicial sale needs to take place in accordance with the law of the state of judicial sale, a notice of judicial sale must be given to the owners or bareboat charterers of the ship, the registry or bareboat charter registry of the vessel, to the mortgagees, holders of registered hypothecs or other registered charges and to holders of maritime liens which would have presented a claim before the same court.

Article 5 provides that upon completion of a judicial sale which confers clean title to the ship, which was conducted in accordance with the law of state of judicial sale and in accordance with the convention, the court or other public authority conducting the sale will then issue a certificate of judicial sale to the purchaser. This certificate will state that the vessel was sold free

and unencumbered in accordance with the law of the state of judicial sale and the criteria provided in the convention.



Convention to be adopted by the General Assembly of UN

The convention also provides that both the notice of judicial sale and the certificate of judicial sale are to be transmitted to the repository mentioned in Article 10. The repository is the IMO which will provide a module in its already existing GISIS platform to host the repository.

This enables any person to access the digital IMO GISIS platform to see whether any vessel is about to be sold in a judicial sale and/or whether such a ship has in fact been sold and a certificate issued. This is of great

benefit to creditors of ships who have an interest in pursuing the proceeds of a sale and who may wish to partake in any ranking of creditors procedures which may take place following the sale of such ships.

Article 7 provides that at the request of a purchaser who produces a certificate of judicial sale, a registrar of ships is obliged to delete the vessel, or affect a transfer of ownership, and is obliged to delete any pre-existing mortgages, hypothecs or registered charges.

Article 8 provides that an application for an arrest of a ship for a claim pre-existing the sale free and unencumbered shall be refused on the production of the certificate of judicial sale by the new owner of the vessel, and that if the vessel is arrested in *ex parte* proceedings, that vessel is to be immediately released on the production of a certificate of judicial sale.

In order to have further certainty, the convention provides in Article 9 that it is the court of the state of judicial sale which

has exclusive jurisdiction to hear a claim or application to avoid the judicial sale and no other court of any other state. The only exceptions to these are two. The court of the state of registration may decide that giving effect to the convention is against its public policy, and similarly, the court of the state where the vessel is subsequently arrested may also decide that not arresting such a vessel or releasing from arrest such a vessel would be in breach of its public policy.

It is expected that the convention will be adopted by the General Assembly of the United Nations at its 77th Session in September. It will be a significant step forward in achieving certainty in international maritime trade particularly in today's challenging economic climate.

Ann Fenech is a partner at Fenech & Fenech Advocates and vice president of CMI and CMI coordinator for the project at UNCITRAL.