

UNCITRAL DRAFT INSTRUMENT ON THE JUDICIAL SALE OF SHIPS

What's in it for the shipping industry?



Genesis of the draft instrument



- CMI Beijing Draft (done at Beijing on 19 October 2012, amended at Dublin in 2013 and at Hamburg in 2014)
- UNCITRAL puts Draft International Convention on Foreign Judicial Sale of Ships and their Recognition on the agenda (June 2018)
- 35th Session UNCITRAL Working Group VI (Judicial Sale of Ships) in New York (May 2019)
- 36th Session UNCITRAL Working Group VI (Judicial Sale of Ships) in Vienna (November 2019)
- 37th Session in May 2020 in New York cancelled due to pandemic
- Next Session scheduled for November 2020 in Vienna

UNCITRAL Observer Status

- Working Group composed of all States members of the Commission
- Observer status:
 - (a) States not members of the Commission and international governmental organisations
 - (b) NGO's who have expertise or international experience so as to facilitate the deliberations
- Invited NGO's representing shipowners:
 - (a) ICS
 - (b) BIMCO

Joint representation in Working Group VI (Judicial Sale of Ships)

Ship owners' interest organisations

- National shipowners' organisations
(e.g. Japanese Shipowners' Association, Armateurs de France, Singapore Shipping Association, Chamber of Shipping of America, Royal Belgian Shipowners' Association,...)
- ECSA – European Community Shipowners' Associations
(EU based national associations)
- ICS – International Chamber of Shipping
(national associations worldwide)
- BIMCO – Baltic and International Maritime Committee
(individual shipping companies)



CMB



Aim of the draft Instrument (recitals Beijing Draft)



- Securing and enforcing maritime claims and enforcing judgments or arbitral awards against shipowners
- Adverse effect on price realised caused by the uncertainty of prospective purchaser regarding the international recognition and the deletion/transfer of registry
- Provide protection to the purchaser by limiting remedies for challenging validity of the judicial sale
- After judicial sale ship should no longer be subject to arrest for claims arising prior to its judicial sale
- International uniformity with regard to notice to be given of the judicial sale and its legal effects

Aim of the draft Instrument (preliminary considerations WG VI)



Preliminary considerations on the need for an international instrument:

- Lack of legal certainty
 - (a) as to the acquisition of clean title (i.e. free of all encumbrances)
 - (b) as to the ability of the purchaser to deregister the ship following the judicial sale

With negative effect on the price attracted by the ship
- Impact not only on shipowners, but also on financiers, maritime service providers and crew
- Consensus to focus on the issues of clean title and deregistration with Beijing draft as basis for discussion

Aim of the draft Instrument

- Failure in some jurisdictions of recognition of foreign judgments ordering the sale of a ship hampering the ship's future operation (impossibility to reregister) or commercial trading (maritime claims, arrests, ...)
- Extra delays, costs and expenses for parties interested in the judicial sale
- Limited interest in ships sold judicially
- Sale at discount due to risks involved
- Limited pay-out of dividends to creditors

Judicial Sales and Shipowners



Shipowner scepticism:

- Judicial sale = *forced* sale
- Selling shipowner = *defaulting* shipowner
- Securing of claims *against* shipowners
- limiting remedies for challenging validity of the judicial sale
- After judicial sale ship cleansed from all rights from the past

Judicial Sales and Shipowners



Shipowners are central to the topic of judicial sale of ships:

(a) 'defaulting' shipowner / old shipowner

his ship is being sold and his rights of defence/due process are to be safeguarded. (notification of judicial sale, grounds for challenging judicial sales and cases where judicial sales cannot have any effect)

(b) purchaser / new shipowner

requires legal certainty in the form of clean title and ability to register the ship in the flag state of its choice are crucial (clean title, (de-)registration, lifting of arrests, ...)

(c) shipowner-creditor

legal security leading to greater proceeds for distribution between creditors



The draft Instrument: a mixed bag?

- Opposed interests?

ship finance banks, ship leasing houses, shipowners, crew, maritime service providers, sellers and buyers, ...

- Or common interests?

- shipowners require legal certainty as they need to trade their vessel
- need for optimal ship finance
- need for affordable insurance cover
- need for crews, ship agents, ports, terminal operators, ship chandlers, ...

The draft Instrument: a mixed bag?



- ultimate goal of shipowners as well as other players in the shipping industry is to facilitate continued trading without disruption of a ship sold by way of a judicial sale
- the draft instrument cannot be looked at solely from the point of view of the selling shipowner or the purchasing owner, or the creditors
- the draft instrument needs to be a truly unbiased instrument, striking a fair balance between all interests involved





Striking the balance



Defaulting shipowner / old shipowner

- Article 4, Notification of judicial sale
notice to a.o. “the owner of the ship for the time being”; law of the state of the judicial sale; minimum requirements in Appendix I; publicity (repository); determination of identity and address of parties to be notified
- Article 9, Avoidance and suspension of judicial sale
exclusive jurisdiction of the state of the judicial sale; domestic law
- Article 10, Circumstances in which judicial sale has no international effect
 - not physically in the jurisdiction; public policy; fraud
 - circle of persons entitled to invoke: “owner of the ship immediately prior to the judicial sale”



Striking the balance



Puchaser / new shipowner

- Article 2 (b), definition ‘Clean Title’
ongoing discussion / further deliberation: tension between Beijing Draft and e.g. 1948 UN Convention on the International Recognition of Rights in Aircraft: extinction of any pre-existing rights and interests and any mortgage, hypothèque or charge to cease to attach to the ship
- Article 6, International Effects of a Judicial Sale
effect is to confer clean title to the purchaser; cf. Art. 3,1 limiting the Instrument’s scope to judicial sales conferring domestic clean title
- Article 7, Action by Registrar
(de-)registration upon production of Certificate of Judicial Sale at direction of the purchaser; cf. Certificate and central repository
- Article 8, No arrest of the Ship
application to arrest to be dismissed; arrested ship to be released



Striking the balance



Shipowner-Creditor

- Legal security implies higher sale proceeds
- International disparity and legal risks lead to destruction of asset value
 - worldwide a few hundred auctions/year but world's biggest shipbrokers (Howe Robinson) only see 2 or 3 auctions/year up to max. 6 in a good year
 - mainly South Africa, Aruba, Panama, Gibraltar, Netherlands
 - in normal markets large differential with market price
 - brokers shy away from judicial sales (commission)
 - documentation: clause 9 NSF (free of mortgages, charges and encumbrances)



Only two bidders took part in the auction multipurpose vessel Ekarma on 13 August.

Photo: Solution Strategists

Turkish buyer submits winning bid at poorly attended multipurpose vessel auction

TRADEWINDS

17 August 2020 5:05 GMT Updated 17 August 2020 6:12 GMT By [Jonathan Boonzaier](#)

An as-yet undisclosed Turkish buyer submitted the winning bid for an arrested multipurpose vessel linked to the Tulshyan Group of Singapore during an online auction held by South African courts ...

Cape Town auction sets low bar for MPP asset values





Nature of the Instrument



Model Law vs. Convention

- SWOT analysis of Model Law and Convention
- Reciprocity
- Geographical scope
- Shipowners' fear of rogue states
- Requirement of sufficient number of ratifications

Conclusion: truly unbiased instrument is a necessity

