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CROATIAN MARITIME LAW ASSOCIATION
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COLLOQUIUM ON JUDICIAL SALE OF SHIPS

Ministry of Justice and Administration of the Republic of Croatia

▪ **Croatian Maritime Law Association**

Inter-University Centre

▪ **Dubrovnik, 7 September 2020**

Dear colleagues and friends,

In the first half of 2020, it was a Croatian term to hold a six-month Presidency of the Council of the European Union. On the Agenda of the Presidency, planned for March 2020, was holding of a Workshop on the Judicial Sale of Ships in Brussels. Due to COVID-19, the event was postponed.

The Croatian Maritime Law Association offered its help to the Ministry of Justice and Administration in organising the postponed event, this time in the form of a Colloquium on the 7th of September in Dubrovnik at Inter-University Centre within the International Maritime and Transport Law Course in order not to lose the momentum and the effort put into the organisation of the Workshop, despite the COVID-19 situation that is still challenging.

A decision was taken in the light of the possibility of holding the event in a hybrid form, allowing the participants to decide freely (depending on their particular situation and travel restrictions) to either take part in person at the Colloquium or online.

The aim of the Colloquium is to provide some insights on the proposal of the future international instrument regarding the judicial sale of ships, which is currently being negotiated at UNCITRAL Working Group VI.

Into the insides, you will be guided with a help of our experts, coming from the field and with different backgrounds, to which the organisers express deep gratitude.

We wish you enjoyable Colloquium and safe sea....

Nataša Šarić Maloseja
Ministry of Justice and Administration
Republic of Croatia

COLLOQUIUM ON JUDICIAL SALE OF SHIPS

Programme

Welcome Addresses (09:00 – 09:15)

Nataša Šarić Maloseja (Ministry of Justice of the Republic of Croatia)

Gordan Stanković (Croatian Maritime Law Association)

Session I: What Should Be the Scope and What Definitions Could Be Included in a New UNCITRAL Draft Instrument on the Judicial Sale of Ships? (09:15 – 10:30)

Moderator: Nataša Šarić Maloseja

Petar Kragić: General Scope of the Instrument

Ann Fenech (CMI): The Scope - to Avoid Chaos and Confusion - The Bright Star Case

José Angelo Estrella Faria (UNCITRAL): Some Aspects of the Current Version of the Draft Instrument: Overlap with the Convention on the Registration of Inland Navigation Vessels and its Protocol No. 2 on the Attachment and Forced Sale of Inland Navigation Vessels; Options for Repositories; Implications of Having Certificates in Electronic Form

Session II: Effects of a Judicial Sale (10:30 – 11:25)

Moderator: Mišo Mudrić

Juan Pablo Rodríguez Delgado: The “Clean Title” Effect in the UNCITRAL Draft Instrument on the Judicial Sale of Ships

Harmen Hoek: Material and Formal Aspects of the Dutch Procedure Regarding the Judicial Sale of Ships and its Effects

COFFEE BREAK (11:30 – 12:00)

Session III: Some Legal Aspects of the Judicial Sale (12:00 – 13:15)

Moderator: Igor Vio

Laura Carballo Piñeiro: Overlapping with Service of Documents Convention and Other Instruments; the Role of the Notice in a Judicial Sale of Ships

Gordan Stanković: Challenging / Denying Effect to a Foreign Judicial Sale

Merle Stilkenbäumer: Registration

Session IV: UNCITRAL Draft Instrument from the Perspective of the Shipping Industry and Seafarers (13:15 – 14:10)

Moderator: Petar Kragić

Peter Laurijssen: The UNCITRAL Draft Instrument on the Judicial Sale of Ships - What's in it for the Shipping Industry?

Jonathan Warring (ITF): Ship Arrest from a Seafarers' Perspective

Final Discussion and Conclusions (14:10 – 14:40)

Juan Pablo Rodríguez Delgado



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Current position

Assistant Professor of Commercial Law at the University Carlos III, Madrid, Spain

Professional experience

- ▶ Obtained his PhD from the Universidad Carlos III (2015) with a thesis on the period of responsibility of the carrier in the maritime transport of goods.
- ▶ His publications include the book "The period of responsibility of the carrier in the maritime transport of goods" (Marcial Pons, 2016) and numerous articles and book chapters, mainly in two areas of Commercial Law: the Law of Maritime Navigation and the Law of International Contracts.
- ▶ Author of a number of publications on company law and industrial property law.
- ▶ Carried out several research stays in institutions of great international prestige in the field of Private Law, among others, at the University of Southampton (2011, 2016), Fordham University (2012), UNIDROIT (2013, 2019) or Tulane University (2010).
- ▶ Coached the university team for the last 5 years at the International Maritime Law Arbitration Moot organized by Murdoch University.

The "Clean Title" Effect in the UNCITRAL Draft Instrument on the Judicial Sale of Ships

Judicial sales of a ship and distribution of the sale's proceeds to creditors represent the final chapter of any *in rem* admiralty proceeding. The sale has to secure the best possible price for the ship, thereby procuring the largest possible fund for the benefit of all parties (permitting more creditors can satisfy their credits). In order to achieve this finality, the judicial sale has to confer 'clean title' on the purchaser, extinguishing all rights and interests that were previously attached to the ship. This process shall ensure that the purchaser may deregister the ship from its old flag and re-register under new ownership in a new flag without any problems; and the purchaser may sail worldwide without any concern of re-arrest.

The difficulty in the real world is that there is no uniform maritime law of judicial sales (except for the low adoption of the Convention on Maritime Liens and Mortgages 1993). An admiralty court's judicial sales orders are made under, and subject to, domestic law, and as such do not have any automatic extra-territorial effects, except for the bilateral treaties on recognition among States (or in the EU the Brussels I Recast Regulation). The court's practical ability to confer clean title is dependent on the co-operation of the administrative authorities (and the courts) in the place of the ship's registration in deleting any existing

mortgage or other registered interests in the ship and allowing deregistration or transfer of registration of the ship.

Under these circumstances, a brief study is proposed of the judicial sale of ships Instrument that is currently being drafted in UNCITRAL. The following sections will be briefly analysed: the structure of the UNCITRAL Draft Instrument; what judicial sales have international effect in a Contracting States; the clean title meaning; what charges, rights or credits are extinguished as the effect of the clean title; the materialization of the effects of the sale (in the State of the Flag and in any other State Party); and lastly, in what circumstances a judicial sale has no international effect.

José Angelo Estrella-Faria



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Current position

Principal Legal Officer and Head, Legislative Branch, at the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) in Vienna (Austria)

Professional experience

- ▶ Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT), an independent intergovernmental organization based in Rome (Italy) and devoted to the unification and harmonization of private law worldwide (from 1 October 2008 to 31 July 2017).
- ▶ Until his appointment to UNIDROIT, worked at the UNCITRAL secretariat from 1996 to 2008.
- ▶ As secretary to the relevant intergovernmental working groups, he was responsible for UNCITRAL work on privately financed infrastructure projects and electronic commerce.
- ▶ Supervised the work of Working Group III (Transport Law) between 2005 and 2008.
- ▶ Before joining the United Nations in 1992, he had worked as an attorney in Brazil, specialising in commercial and trade law.
- ▶ Published articles and books, and taught various courses on legal harmonisation, commercial law and international law.

Some Aspects of the Current Version of the Draft Instrument: Overlap with the Convention on the Registration of Inland Navigation Vessels and its Protocol No. 2 on the Attachment and Forced Sale of Inland Navigation Vessels; Options for Repositories; Implications of Having Certificates in Electronic Form

Since 2018, the United Nations Commission on International Trade Law (UNCITRAL) has been working towards an international instrument on the judicial sale of ships. The project is being carried out by UNCITRAL Working Group VI.

In many States, a judicial sale has the legal effect of conferring 'clean title' on the purchaser, extinguishing all rights and interests that were previously attached to the ship. However, a failure to recognize such clean title leads to difficulties in deregistering the ship and gives rise to the risk of subsequent arrest of the ship. The Beijing Draft, which is a draft convention on the recognition of foreign judicial sales of ships prepared by the Comité Maritime International (CMI), seeks to address the effects of a judicial sale and the procedural requirements therefor.

Working Group VI has been considering the Beijing Draft since 2019 and agreed that the future instrument should focus on the acquisition of clean title and the (de)registration of the ship following a judicial sale. The draft convention establishes a set of basic harmonized rules:

- It applies to a judicial sale of a ship that confers clean title on the purchaser;
- Such judicial sale conducted in one State Party has effect in every other State Party;
- The authority designated by the State of judicial sale issues a certificate and communicates it to a centralized online repository;
- Upon production of such certificate, the ship registry deregisters the ship;
- No action may be taken to arrest the ship for a presale claim; and
- Only the courts of the State of judicial sale may hear a challenge to the judicial sale.

The issues to be considered in the upcoming session include the types of ships covered in relation to the Convention on the Registration of Inland Navigation Vessels (1965), options for possible repositories to publish notices and certificates, conditions for giving international effect to the judicial sale and grounds for refusal, and the function the notice requirements serve.

Ann Fenech



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Current position

Managing Partner of Fenech & Fenech Advocates - Malta.

Professional experience

- ▶ After having qualified in 1986 joined Holman Fenwick and Willan, an international Shipping Law firm in London. From there she moved to the shipping law firm of Chaffe McCall Phillips Toler and Sarpy in New Orleans.
- ▶ On joining Fenech & Fenech, created the marine litigation department dealing exclusively with maritime issues for the past 34 years ranging from salvage to charterparty disputes and from towage to enforcement of mortgages.
- ▶ Lecturer at the University of Malta and at the International Maritime Law Institute and a regular guest speaker at overseas maritime fora.
- ▶ Chairperson of the Pilotage Board (2000 – 2010) - responsible for the drafting of the Pilotage Regulations 2003.
- ▶ Awarded Best in Shipping Law at the European Women in Business Law Awards held in London in 2012, 2014 and 2015.
- ▶ Regularly ranked in publications such as Chambers Europe, Legal 500 and Who's Who Shipping.
- ▶ President of the Malta Maritime Law Association.
- ▶ Appointed Honorary Patron of the Malta Law Academy in 2013 and Director of the Malta Maritime Forum in 2015.
- ▶ Elected to the Executive Council of the CMI in 2014 and currently Co-Chair of the CMI IWG on International Recognition of Judicial Sales and CMI Co-Ordinator of the project at UNCITRAL.
- ▶ Member of the CMI IWG on Arrest of Ships and was Chair of the IWG on Ship Finance Security Practices.
- ▶ Elected for Vice President of the CMI at a General Assembly meeting at the IMO Headquarters in London in 2018.
- ▶ Awarded the Honorary Membership of the Croatian Maritime Law Association in October 2018.

The Scope - to Avoid Chaos and Confusion - The Bright Star Case

In 2014 in Beijing, the CMI approved a draft Convention on the International Recognition of Judicial Sale of Ships. My presentation will explain what led to this draft. It will explain what can and will go wrong when properly held judicial sales which transfer title to the buyer free and unencumbered are not given

the same effect in other jurisdictions and how this leads to absolute chaos which effects the buyer, their financier, the subsequent charterers of the same vessels, cargo owners carried on board such vessels leading effectively to an absolute break down in the links in the chain of international trade and commerce.

The chaos that ensues is not something limited to cases of the past but something that still occurs today.

By sheer co-incidence, a few weeks after UNCITRAL had agreed at its fifty first session in New York in June 2018, to add this topic to the work programme of the Commission, the vessel **Bright Star** was arrested whilst taking bunkers in Maltese territorial waters. She was at the time en route from Kavkaz to Venezuela under charter and fully laden with a cargo of wheat when she was arrested by the previous mortgagee of the vessel. The same mortgagee had the previous year arrested the then **Trading Fabrizia** and as a consequence she had been sold in a Judicial Sale by auction held in Jamaica “*free and unencumbered*” to her new buyers who paid 10.3 million dollars into the Jamaican Court. Notwithstanding this, the mortgagee decided to re-arrest the vessel in Malta under new ownership to the amazement of the new owners, her financiers and the vessel’s P & I Club.

The new owners had no option but to put up security for the claim amounting to circa Euro 800,000 and have been fighting this for the past two years – the saga and challenge continues.

Harmen Geert David Hoek



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Current position

Owner at HWTK Advocatuur B.V. ; Rotterdam, The Netherlands

Professional experience

- ▶ LL.M. Leiden University, 1998; Grotius Academy, post academic course on Transportation Law, 2006
- ▶ Yearly professional courses to maintain qualifications as Dutch advocate on subjects of Dutch maritime/transportation law, procedural law and private international law
- ▶ Member of the Dutch Transport Law Association of the Netherlands; International Bar Association; Rotterdam Bar Association
- ▶ Maritime advocacy since 1999; founder and owner of Hoek Advocatuur, 2012; Hoek Ten Katen since 2017; guest lecturer at STC-Netherlands Maritime University on transportation law since 2008.

Material and Formal Aspects of the Dutch Procedure Regarding the Judicial Sale of Ships and its Effects

Different jurisdictions choose different paths to recognise the effects of a foreign judicial sale of a vessel. UNCITRAL is working on a draft instrument, either to become a model law or an international convention. This provides some notes on the Dutch system applied to the recognition of judicial sales and a brief overview of the contents of the draft instrument.

Under Dutch law, the transfer of title to a Dutch vessel sold judicially requires a decision from a court, or a deed from a (civil law) public notary, by which the vessel is awarded to the buyer. Under Dutch law the transfer of title, the formal delivery of the right of ownership to the buyer, takes place at the moment of registration in the name of the buyer.

In a European context, the question of recognition is governed by the Brussels Regulation and the Lugano Convention as these cover recognition of decisions or deeds originating in a member state, as well as their effects in other member states.

For other foreign judicial sales, recognition would simply depend on whether or not there is a reciprocal bilateral or multilateral convention in place that the court will have to apply *ex officio*. If not, the court will have to fall back on more general principles, including the principle of comity.

Petar Kragić



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Current position

Retired

Professional experience

- ▶ PhD in maritime law from Law Faculty of the University of Split, Croatia.
- ▶ Worked his entire professional career as in house lawyer for the Croatian largest ship owning company Tankerska plovidba.
- ▶ President of the Croatian Maritime Law Association from 2000-2018 and chairman of the legal committee of Croatian Chamber of Shipping.
- ▶ Director in a leading international insurance company UK P&I Club 1994 – 2009, in SiGCo (international provider of guarantees for oil pollution liability), and in an international investment fund.
- ▶ Titulary member of the CMI participated in CMI drafting committee for the Rotterdam Rules and member of the Croatian delegation to UNCITRAL.
- ▶ Member of the drafting committee for the Croatian Maritime Code.
- ▶ Author of a legal textbook Tanker Charterparties and a number of articles on maritime law topics. He is a regular speaker at maritime conferences.

General Scope of the Instrument - How to Get a Ratifiable and Functional Convention?

Fridrich List, German administrator and economist foresaw in – the mid of the 19th century – that the international trade would need to be regulated by international rules and organizations. Obviously, he was aware that the sovereign states would not be able to the job without an efficient mutual cooperation.

A functional international legal regime could be created to some extent by unification of the substantive rules but in any case it needs the mechanism for international recognition and enforcement of a nation state tribunal decision.

There is a number of international conventions on recognition and enforcement of foreign judicial decisions. The question is what are the tests for such an exercise? In other words, how much one state

trusts the legal system of the other, and *what the state of recognition wants to check and through which kind of procedure?*

The presentation suggests the Instrument should rely on CERTIFICATE OF JUDICIAL SALE issued in the *State of judicial sale* if

- (i) the *Notice of judicial sale* has been given THROUGH THE REPOSITORY; and
- (ii) if the *judicial sale* (or issuance of the Certificate) has not been successfully challenged in the Party State (State of recognition) on the grounds of violating its ORDER PUBLIC.

In the presentation comments on some of the issues pertained to *Art. 3 Scope of application* of the Draft Instrument, such as the definition of the ship, her physical presence within the territory under control of the state of judicial sale, clean title requirement and seizure or confiscation by law enforcement authorities.

Peter Laurijssen



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Current position

Manager Legal Department CMB - Compagnie Maritime Belge NV, Antwerp, Belgium

Professional experience

- ▶ Degrees in law and philosophy from universities of Namur, Leuven and Louvain-la-Neuve.
- ▶ Degrees in shipping & freight forwarding BIHB (Antwerp, 1999); qualifying examinations Institute of Chartered Shipbrokers (London, 2002).
- ▶ Lawyer at Antwerp Bar in marine & transport law practice (1994-1998); legal consultant at CMB Transport – Safmarine Container Lines (1998-2000); legal consultant and manager in cargo claims department at Safmarine Container Lines (2000-2006); manager legal department Delphis / Team Lines (2007-2014), CMB and Bocimar.
- ▶ Member of the editorial board of ETL – European Transport Law since 1996; editor in chief of ETL - European Transport Law since 2014.
- ▶ Fellow of the Institute of Chartered Shipbrokers since 2003; examiner & assessor of various legal courses at the Institute of Chartered Shipbrokers since 2004.
- ▶ Member of the Belgian Maritime Law Association since 1997; member of the general council of the Belgian MLA since 2011; member of the board and vice-president of the Belgian Maritime Law Association since 2019.
- ▶ Active participant in Comité Maritime International - member of the CMI's International Working Group on the Recognition of Foreign Judicial Sales of Ships
- ▶ Winner of Clarkson's award for dry cargo chartering (2000) and winner of maritime policy & management award for economics of sea transport and maritime trade (2002); owner member of BIMCO documentary committee since 2013.
- ▶ Representative of the International Chamber of Shipping and BIMCO - voices the interests of the international ship owning community in the UNCITRAL Working Group VI (Judicial Sale of Ships).

The UNCITRAL Draft Instrument on the Judicial Sale of Ships - What's in it for the Shipping Industry?

In June 2018 UNCITRAL decided to pick up the gauntlet and put on its agenda the Draft International Convention on Foreign Judicial Sale of Ships and their Recognition, which had been prepared and

submitted by the CMI. Since then the UNCITRAL Working Group VI (Judicial Sale of Ships) has gathered in May 2019 in New York and November 2019 in Vienna. Its May 2020 meeting has been cancelled due to the Covid-19 pandemic.

The aim of the draft Convention (let's refer to the draft instrument as a convention although the eventual nature of the instrument remains uncertain for the time being) is basically to provide legal certainty to the shipowner who buys a vessel in a judicial sale by

- (i) guaranteeing that the clean title (free of all mortgages and charges) which is conferred upon him in the state of the judicial sale, will be recognized by other states so that the vessel's trading will not be hampered by arrests or other measures on basis of claims originating prior to the judicial sale.
- (ii) providing the shipowner-buyer with a title document which allows him to deregister the vessel in its previous flag state; and
- (iii) same title document should allow him to register the vessel upon the purchase in the flag state of his choice.

It is obvious that the genesis of the draft convention is should be monitored closely by shipowners, as they are the alpha and the omega of any issue of judicial sale:

- (i) there is necessarily a defaulting shipowner, whose ship is being sold and whose rights of defence and due process are to be safeguarded. (cf. issues re notification of judicial sale, grounds for challenging judicial sales and cases where judicial sales cannot have any effect;
- (ii) the party buying the ship is (or becomes) a shipowner. Legal certainty in the form of clean title and ability to register the ship in the flag state of its choice are crucial (cf. issues re clean title, (de-)registration, lifting of arrests, ...)
- (iii) finally, shipowners are quite often creditors who lodge claims against the sale proceeds of a ship, which has been judicially sold. Due to the risks and legal uncertainty surrounding judicial sales today, brokers and buyers are shying away from such deals. Consequently, sale prices in judicial sales tend to be below market, wherefore there's a destruction of value not only for the owner whose ship is being sold, but also for shipowners who are claiming against the sale proceeds. Not to speak of the loss to ship financiers.

From the ship owning perspective, the Convention needs to be a truly unbiased instrument, striking a fair balance between all interests involved, i.e. both the defaulting shipowner's as the buying ship owner's and the creditors' interests. It is against this background that ship owners and their professional organisations are closely following discussions, especially inasmuch as provisions are concerned which are dealing with rights of defence and due process of the defaulting shipowner (notification, grounds for challenge, cases where judicial sale has no effect), legal certainty for the buyer (clean title, no subsequent arrest, mentions of the certificate of judicial sale, limit the grounds for challenge and refusal to give effect) and the geographical scope of the convention in relation to the reciprocity as between states. Because of the required reciprocity between states, there is a lot to be said for the draft instrument to take the form of a convention rather than a model law.

Laura Carballo Piñeiro



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Current position

Professor, Nippon Foundation Chair of Maritime Labour Law and Policy, World Maritime University, Malmö, Sweden

Professional experience

- ▶ Prior to joining WMU, she worked at the Universities of Vigo and Santiago de Compostela in Spain, where she developed her expertise in private international law, international litigation, international insolvency and maritime law.
- ▶ Received a PhD in civil procedure law from the University of Santiago de Compostela and a PhD in private international law from the University of Vigo, where she won the Extraordinary Prize for outstanding doctoral dissertation.
- ▶ Admitted to practice as a lawyer and has worked as a deputy judge in Spain.
- ▶ As a Fellow of the Alexander von Humboldt Foundation, she has specialized in international maritime labour law being her research published in 2015 by Springer at the Hamburg Studies on Maritime Affairs Collection edited by the International Max Planck Research School for Maritime Affairs at the Hamburg University.
- ▶ Leading member of a government-funded Research Network on Labour, Maritime and Law of the Sea issues based in Spain, but involving researchers across Europe and Latin America.
- ▶ Published in a number of international journals; visiting fellow at the Max Planck Institute for Comparative and Private International Law, Columbia Law School, the Institute of European and Comparative Law at Oxford University and UNCITRAL, and she has taught in a number of institutions in Europe and Latin America.

Overlapping with Service of Documents Convention and Other Instruments; the Role of the Notice in a Judicial Sale of Ships

The recognition of a judicial sale of ships abroad encounters the problem as to what is exactly the object of such recognition. In a number of jurisdictions, the understanding that the transfer of property over the ship is a foreign legal act has led to the application of their domestic conflict rules in order to ascertain whether the sale is valid and effective, or not. The Beijing Draft shifts this approach to focus on the decision concluding the judicial sale of ships and transferring the property title; while the latter seems not to be a judgment on the merits, it is a decision that can be submitted to a recognition and enforcement

proceeding. Several international instruments deal with this issue and other related matters that are relevant when examining the grounds for refusal of recognition and enforcement, in particular service of judicial documents abroad.

The presentation will address the compatibility of the Beijing Draft currently under discussion at UNCITRAL, with already existing international instruments, in particular with the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) (Judgments Convention) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast); as well as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (Service Convention) and Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (Service Regulation). The objective is to learn to what extent the Beijing Draft fills up an existing gap and what type of relationships might have with these instruments.

Gordan Stanković



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Current position

Partner and head of the Shipping and Admiralty Department at Vukić & Partners, Croatia's leading commercial and shipping law-firm.

Professional experience

- ▶ Law degree from the University of Rijeka Law Faculty, LL.M. degrees from the University of Split Faculty of Law and Southampton University, and Ph.D. degree from the University of Split.
- ▶ Fulbright visiting scholar at the Tulane Law School in New Orleans, Louisiana, USA.
- ▶ Extensive experience in various fields of shipping law, with special expertise in the fields of shipbuilding, ship finance, ports/terminals/maritime demesne, and enforcement of maritime claims.
- ▶ Acted as legal consultant to the Government of Croatia on restructuring of the Croatian shipbuilding industry on two occasions (2000 and 2006-2007).
- ▶ Associate Professor – teaching Maritime Law at the University of Rijeka Faculty of Maritime Studies Law of Shipping Finance at the University of Rijeka Faculty of Law, and Maritime Procedural Law at the University of Split Faculty of Law.
- ▶ Author of a series of monographs and papers on various shipping law topics, including the chapter on Croatia in Kluwer's International Encyclopaedia of Laws - Transport Law. He has given presentations on a large number of international and domestic maritime law conferences.
- ▶ Active in the drafting committee for the Croatian Maritime Code as a member of the working group on registration of ships, liens and mortgages, as well as the working group on judicial sales of ships and ship arrest.
- ▶ President of the Croatian Maritime Law Association and listed as arbitrator at the Permanent Arbitral Court of the Croatian Chamber of Commerce.

Challenging / Denying Effect to a Foreign Judicial Sale

The purpose of the presentation is to briefly analyse the provisions of the Draft Instrument on the Judicial Sale of Ships (second revision of the Beijing Draft, April 2020) dealing with avoidance / suspension of judicial sale and its effects. While Article 9 ("Jurisdiction to avoid and suspend judicial sale") and Article 10 ("Circumstances in which judicial sale has no international effect") regulate the bulk of the matter, further provisions can be found in Article 7 ("Action by registrar"), paragraph 5, and in Article 8 ("No arrest of the ship"), paragraph 4.

Efficiency of the legal regime set out in the Instrument will depend (inter alia) on its un-breakability. For this reason, the possibility to avoiding / suspending the judicial sale and its effect should be narrowed down to an absolute minimum. On the other hand, the international acceptability of the Instrument may depend on how firmly it protects basic interests of those whose legal interests are most affected by judicial sale (such as the owner, mortgagees and holders of maritime liens), and who can lose a lot if the judicial sale was not carried out in accordance with the basic principles of justice. These conflicting principles require a right balance. The members of the Working Group are obviously mindful of that.

Article 9 of the Draft Instrument deals with two main issues. The first is the international jurisdiction regarding claims to avoid judicial sale or suspend its effects. Such jurisdiction is assigned exclusively to the courts of the State of judicial sale. The second main issue is the effect of such avoidance and/or suspension. As it appears from paragraphs 3 and 4 of this Article, those effects operate *erga omnes* and internationally (i.e. in all the State Parties). Article 9 is silent on the standing (unlike Article 10) and on the grounds for avoidance / suspension, leaving those issues to the national law of the State of judicial sale.

Article 10 deals with the powers of the courts in other States Parties (i.e. States Parties different from the State of judicial sale). The court in any such State Party has the authority to deprive a judicial sale of its effect set out in Article 6 if such court determines that the judicial sale or its recognition in such State Party was / would be fundamentally flawed. Such court decision would operate only in the State Party in which the court has rendered such decision. Unlike Article 9, Article 10 also includes a very limited list of persons with the standing to bring an action under this Article.

Special attention should be given to the interaction between Article 10, as a provision of general nature, and two other provisions regulating special situations, i.e. Article 7, paragraph 5 (dealing with the circumstances in which ship registrars in other State Parties are not bound by the certificate of judicial sale) and Article 8, paragraph 4 (dealing with the circumstances in which the courts in other State Parties are not bound by the “No Arrest” rule).

Merle Stilkenbaeumer



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Current position

Managing Director, YCF Maritime LLC, LISCR (Deutschland) GmbH, EuroFlag Services SARL, Hamburg, Germany

Professional experience

- ▶ 2009-2011: Dual Apprenticeship as a Shipping Merchant, Specialization: Tramp Shipping.
- ▶ After the apprenticeship, working as a technical purchaser in a Hamburg based shipping company.
- ▶ Since end of 2011 working for the Hamburg regional office of the Liberian International Ship & Corporate Registry (LISCR); since mid of 2018 as Managing Director.
- ▶ In parallel to the above completed a Bachelor of Science in Shipping, Trade & Transport as well as a Master of Science in Business Psychology.

Flag State Perspective

The number of judicial sales is in the hundreds, if not thousands. The underlying cause for a judicial sale usually includes the non-payment of debts due and owing by the shipowner. The purchaser in a judicial sale must be put in a position to take clean title to the ship and to re-flag the ship in the purchaser's registry of choice to trade the vessel appropriately and without the threat of costly delays and expensive litigation with former creditors. With litigation risks absent, the ship will trade freely and realize higher sales proceeds in a future sale scenario to the benefit of all parties involved, including creditors.

The legal principle flowing from a judicial sale is that once a ship is sold, the asset should no longer be subject to arrest for any claim having arisen prior to the sale. In the absence of legal clarity and certainty, purchasers and financiers alike would lose confidence in the future tradability and bankability of the ship and consequently consider the purchase of a ship by way of a judicial sale less attractive.

Currently, there exists no international instrument that addresses the recognition of judicial sales comprehensively. Nor is there any instrument that adequately protects purchasers against prior claims and which addresses the de-registration or re-flagging and re-registration of ships from and to national registries. Necessary and sufficient protection should be granted to purchasers by limiting the remedies to challenge the validity of the judicial sale and the subsequent transfer of the ownership in the ship to the purchaser.

In view of the failure to give recognition to foreign judgements ordering the sale of ships, it was held that a legal instrument providing for the acquisition of clean title and obliging the registrar to deregister the ship at the election of the purchaser would automatically lead to higher sales proceeds to the benefit of the financial system and its participants.

Jonathan Warring



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Current position

Senior Legal Assistant, International Transport Workers' Federation, London, United Kingdom

Professional experience

- ▶ Obtained an LLB at the University of Otago in 2006 and joined the ITF in 2015.
- ▶ Provides advice to various ITF committees and sections, with a specific focus on the Maritime Sections.
- ▶ Assists and supports the ITF's maritime affiliates and the ITF's global Inspectorate on various issues relating to Flags of Convenience, the Maritime Labour Convention and seafarers' rights.
- ▶ A member of ITF delegations to the International Labour Organisation, International Maritime Organisation and OECD.

Ship Arrest from a Seafarers' Perspective

The non-payment of wages is an ever-present issue facing seafarers. Despite the requirements of the MLC, the International Transport Workers' Federation receives frequent complaints in relation to this issue and is involved in claims for unpaid wages amounting to millions of dollars every year.

Ship arrest provides an avenue for seafarers to claim unpaid wages, but the obstacles to using this path for a seafarer can be insurmountable. Even when an arrest can be carried out, it may not provide the solution that seafarers expected or desired.

Seafarers have been consistently recognised by the international maritime community as a vulnerable workforce, but commercial realities are still widely used as an excuse to ignore their needs and rights.

The draft convention does little to change the position of seafarers in respect of ship arrest and the international community must continue to be mindful of the vulnerable position of those who work at sea.

