

## **A DRAFT CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS**

Since May 2019, through its role as an observer/participant in an UNCITRAL Working Group the IAJ has been supporting a project designed to better facilitate and improve international commercial relationships and to improve mutual respect for courts in various countries.

IAJ has been represented by the Hon. Justice Neil McKerracher of the Federal Court of Australia at New York for the first meeting and in following meetings during the pandemic by video. The Hon. Mr Justice Brian McGovern of the Irish Court of Appeal attended the second session in Vienna in November 2019.

### **The problem being addressed**

The law of Admiralty, internationally, in both common law and civil law countries, has long provided a remedy of arresting ships when shipowners are, potentially, liable to the arresting plaintiff(s) in a variety of ways. If the ship is not released and liability is finalized, the arrested ship may be sold by the arresting court.

This procedure is common to numerous countries.

A real difficulty can arise in circumstances where a vessel is purchased overseas following a court ordered sale, only to find that the flag State refuses to transfer the ship from its Register.

Secondly, a problem may arise where a court in another state has sold a vessel over which a citizen has taken a mortgage, without first having given notice that there were proceedings underway.

Thirdly, as there are risks as to such problems, prices on judicial sales have been conspicuously deflated. Inability to recover full value on a sale can damage, for example, the prospects of a financier recovering all sums due under a mortgage.

The main issues and obstacles in the maritime environment were:

- The lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer, leading to problems being experienced in the deregistration process in the country of the former flag;

- The obstacle in relation to the recognition of the effects of the judicial sale in respect of the clearance of all former encumbrances and liens;
- The increase of transactional costs in cases of friction in the enforcement of the ship's sale and the risk of costly proceedings and payments just for nuisance value by old creditors attempting to arrest vessels after the judicial sale;
- Factoring of those risks when evaluating the level of bidding in judicial sales, causing a loss on the recoverable assets to the detriment of all creditors (such as crew, financiers, cargoes, ports, agents, bunker suppliers, barge operators, etc.) of the old ship-owner resulting from a less favourable judicial sale due to the lack of certainty in respect of its recognition by courts and authorities; and
- Reduced sales proceeds leading to a downwards trend on the brokers' vessel evaluation and thereby causing a general loss of vessel values in the entire market.

### **The Solution**

The solutions devised in principle by Comité Maritime International (CMI) have been supported by IAJ and numerous others, notwithstanding the differences in legal systems in member countries of the UN. Much debate has ensued to accommodate such differences in a way which will maintain the autonomy of signatory states.

The Draft convention will in very summary form provide the following –

First, the Convention would give all parties interested in the vessel, such as owners and mortgagees, the right to notice that proceedings are underway before any judicial sale can be ordered.

Secondly there is a further proposal under which, once a sale has occurred, a certificate will be issued, which other parties to the Convention would have to recognise, in particular, the flag State. This process is designed to ensure that the ship will be sold with a clean title, or at least with a clear statement of any mortgages remaining against the vessel.

The Convention also provides for a limited number of situations in which the judicial sale can be challenged, for example, if the ship was not physically present in the jurisdiction of the State when the judicial sale was conducted.

## **IAJ's interest**

**However, under the convention, the mode of sale and the distribution of the proceeds of sale will all remain questions to be resolved by each State's own domestic laws and domestic judiciary.**

It is important to emphasise that from the judicial perspective, a central fundamental attraction of the draft instrument is that in achieving its ends, it does not seek to erode any signatory State's sovereignty in any way. To the contrary, it leaves both the substantive and the procedural elements of a judicial sale in the hands of the country effecting it to do so in accordance with its own laws and procedures. This is an important element for courts as well as for Governments. It was the main area of focus of the IAJ in its submissions and contributions.

## **Completion**

After several meetings, the Draft Convention has now been fully approved by UNCITRAL - and a draft decision by the commission to the General Assembly of the UN also approved.

The decision calls on the General Assembly in its next session to adopt the Convention! That should hopefully be a formality.

The Convention should be opened for signing next year.