



ASOCIACIÓN ESPAÑOLA DE DERECHO MARÍTIMO

*CONFERENCIA DE NAVIDAD 2015
MADRID, 17 DE DICIEMBRE*

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RECOGNITION OF FOREIGN JUDICIAL SALE OF SHIPS

The history of this work started at the CMI Conference of Athens in 2008 following a proposal by the Executive Council of the CMI in 2007.

In fact it was acknowledged that several problems had arisen in some jurisdictions in respect of the recognition of judicial sale of ships by foreign Courts which were not accepting a valid title given by a Court of another country. The consequence for the successful bidder was that often he was unable to obtain a certificate of deletion from the previous ships' registry in order to be able to register the ship in a new registry of his choice.

The International Working Group set up by the CMI, chaired by Henry Li of the Chinese MLA and with Jonathan Lux and Lawrence Teh acting as Rapporteurs and Aurelio Fernandez Concheso, Andrew Robinson, Frank Smeele, William Sharpe, Frank Nolan, Benoit Goemans and Klaus Ramming as Members, worked hard and met often, inter alia, in the occasion of the events of the CMI in Rotterdam 2009, Buenos Aires 2010, Oslo 2011, Beijing 2012 and Dublin 2013.

Certain National Associations were of the view that an international instrument on judicial sales was not required since the issue was already covered by articles 11 and 12 of the 1993 Convention on Maritime Liens and Mortgages.

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However, out of the 18 States¹ parties to that Convention only two are traditionally maritime countries and have a relevant ship's tonnage: Spain and the Russian Federation. A possible reason of such little success might be that, with the aim of facilitating ships' financing, the number of maritime liens that have priority over the mortgages and hypothèques has been significantly reduced. This is the case for some of the claims enumerated in art. 2(1) and for all those enumerated in art. 2(5) of the 1926 Maritime Liens and Mortgages Convention.

With regard to the 1926 MLM Convention, although there are 28 countries parties to it² no common law country is amongst them as is the case for the 1993 MLM Convention.

The CMI therefore considered that a specific convention on judicial sale was needed, both because it would attract common law countries and because its scope could be wider than that covered by the 1993 MLM Convention.

Quite an extensive work was done by the IWG of the CMI at Beijing and subsequently the draft instrument, consisting of 10 articles, was continuously refined and amended.

At Hamburg in June 2014 the IWG met constantly, attending at the last finishing touches.

There was quite a debate and discussion on many items, including the definitions in article 1, in which only the mortgage was included amongst the terms defined. However the word "hypothèque" was finally added whenever the word "mortgage" was mentioned.

The Spanish MLA, which attended at Hamburg *inter alia* with its two Vice Presidents to approve the final text, made quite sensible comments on the draft.

In his letter of 3 June 2014 to the CMI accompanying the draft with the amendments proposed by the Spanish MLA, President Rodolfo Lebrero stated *inter alia* that the Spanish Authorities were not against a convention on judicial sale provided it was not inconsistent with EU Regulations and with the 1993 MLM Convention.

The final text produced by the IWG of the CMI was then proposed for adoption to the Assembly of the CMI which convened the 17 June 2015.

¹ Albania, Benin, Congo, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Serbia, Spain, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu.

² Algeria, Argentina, Belgium, Brazil, Cuba, Denmark, Estonia, Finland, France, Haiti, Hungary, Iran, Italy, Lebanon, Luxembourg, Madagascar, Monaco, Norway, Poland, Portugal, Romania, Spain, Switzerland, Sweden, Syrian Arab Republic, Turkey, Uruguay, Zaire.

The proposal, made by China and seconded by Australia/New Zealand was accepted by 24 NMLAs³ with two NMLAs abstaining⁴.

A presentation on this new Convention was made at a Congress in Naples in October 2014 and its provisions were compared with those of the 1993 MLM Convention. The presentation may be found in the website of the Italian NMLA (www.aidim.org) under “Documents”.

The conclusion was that the Convention does not conflict with the 1993 MLM Convention and that there is a need for a new self contained convention dealing specifically with the recognition of foreign judicial sales.

The resolution taken by the Assembly of the CMI at Hamburg after the adoption of the Convention provided for the CMI to submit it to such appropriate Inter-Governmental or International Organizations for their consideration and adoption and also to consider asking a State to convene a diplomatic conference and adopt its text.

After the Hamburg Conference the CMI acted in two directions to promote the Convention: taking contacts with IMO to present the Convention to the Legal Committee and have it placed on the Agenda of the IMO Legal Committee, and co-sponsoring the initiative with IMO Members through the CMI NMLAs.

In order to have the Convention placed on the IMO Agenda the CMI was requested by IMO to identify occasions in which a judicial sale taking place in one jurisdiction had not been recognized in another jurisdiction. This in order to establish the so called “compelling need” which was required by IMO for the Convention to be considered and put in its Agenda.

Unfortunately little progress has been made so far as no reports or inputs have been received yet by the CMI from the NMLAs.

As to the co-sponsoring of the project, the various NMLAs were asked to contact the delegates of their Countries with IMO to seek support to the project.

³ Argentina, Australia, Belgium, Canada, China, Denmark, England, Finland, France, Germany, Greece, Italy, Japan, Malta, Nigeria, Norway, New Zealand, Netherlands, South Korea, Spain, United States, Sweden, Switzerland, Turkey.

⁴ Brazil, Poland.

The next meeting of Legal Committee of IMO will take place from 7 to 9 June 2016. Any documents for consideration at the meeting should be submitted to IMO 6 weeks before. The hope is therefore that, by that time, the NMLAs produce evidence of the “compelling need” for the Convention on Judicial Sales.

Possibly and alternatively inquiries should also be made with other UN Organizations to find out whether there could be an interest in this Convention. That may assist in convincing the Legal Committee of IMO that the Convention is an appropriate subject to be considered.

However and with regard to the European NMLAs, there is the relevant issue of jurisdiction to be considered. In fact articles 7 and 8 of the Convention deal with recognition in a State party of the judicial sale conducted in any other State.

That raises the question whether the Member States to the European Union have individually the power to become parties to the Convention.

In fact art. 71 of EU Regulation 44/2001, now repealed by EU Regulation 1215/2012, provided that it shall not affect conventions to which the Member States are parties and which, in particular matters, govern jurisdiction or the recognition or enforcement of judgments. That means that, with the regime established by the EU Regulation 1215/201, no conventions ruling on jurisdiction can be ratified by EU Member States.

The position was different under the previous system contemplated in the 1968 Brussels Convention. In fact its art. 25.1 provided that it was not affecting conventions dealing with jurisdiction or recognition or enforcement of judgments to which Member States are or will be parties.

At present it therefore seems not possible for a State member of the European Union to become party to a convention providing rules on jurisdiction such as that on recognition of judicial sales of ships.

This unless the European Union adopts a decision authorizing Member States to ratify, as it has occurred for other international conventions. That was the case for the Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 whose articles 9 on jurisdiction and 10 on recognition and enforcement of judgments were affecting the rules laid down in Regulation 44/2001. By Council Decision 2002/762/EC of 19 September 2002 the European Union authorized Member States to sign, ratify or accede the Bunker Oil Convention. The Decision first underlines that “*the Community has sole competence in relation to Articles 9 and 10 of the Convention*” and then states that “*the*

objective of this Decision is to authorize the Member States to sign, ratify or accede to the Convention and to place an obligation on them, when they do so, to make a declaration committing themselves to apply Regulation (EC) no. 44/2001 in their mutual relations”.

That took place also with the Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (the HNS Convention) not in force yet, as it is not its 2010 Protocol, whose articles 38, 39 and 40 deal with jurisdiction, recognition and enforcement. In fact, by Council Decision 2002/971/EC of 18 November 2001 Member States were authorized to ratify the Convention, without prejudice to the existing competence of the European Community on the matter of jurisdiction or the recognition or enforcement of judgments.

The authorizations by the European Community were motivated:

- as to the Bunker Oil Convention:

The Bunker Convention fills a significant gap in the international regulations on marine pollution liability. This Convention makes for improved victim protection, in keeping with the 1982 United Nations Convention on the Law of the Sea.

- and as to the HNS Convention:

The HNS Convention is particularly important, given the interests of the Community and its Member States, because it makes for improved victim protection under international rules on marine pollution liability, in keeping with the 1982 United Nations Convention on the Law of the Sea.

The protection of the environment and of the victims of marine pollution is within the primary interest of the European Union and it is therefore understandable that there is a desire that Member States become parties of such kind of conventions. However it is doubtful that the European Union will authorize Member States to become parties of conventions like that on judicial sales.

Given the interest of the European Union to the Bunker Oil and the HNS Conventions, both Council Decisions referred to above contain an identical article 5 which states:

Member States shall, at the earliest opportunity, use their best endeavours to ensure that the Bunkers Convention (HNS Convention) is amended to allow the Community to become a contracting party to it.

This raises the question whether an Organization like the European Community may become party to a convention without need of an express provision contained therein.

The first example of such an express provision in a maritime convention is contained in the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, which in art. 17 deals with jurisdiction and in art. 19 sets out rules pursuant to which a Regional Economic Integration Organization may become party to the Protocol.

A similar possibility is also contained in art. 93 of the Rotterdam Rules. In addition, and in view of the provisions of the Rotterdam Rules on jurisdiction and arbitration being in conflict with those of Regulation 44/2001, such provisions were made subject to an “opt-in” rule: articles 74 and 78 in fact contemplate that the provisions of chapter 14 on jurisdiction and chapter 15 on arbitration bind only Contracting States that declare in accordance to art. 91 that they will be bound by them. Such an “opt in” possibility might therefore be a way to allow success to a convention dealing with jurisdiction as far as EU Member States are concerned. In fact they would not need to seek an authorization from the European Union.

However articles 7 and 8 of the Convention regarding the recognition of Judicial Sales and the circumstances in which recognition may be suspended or refused constitute the essence of such Convention and it is therefore believed that an opt in, or an opt out, possibility would not be workable.

For the time being, and in order to avoid that EU Member States are accused of violation of the EU competence, it may be suggested that Member States, before acceding to conventions ruling on jurisdiction, await to see which attitude the EU will take or, alternatively, contact the European Commission and inquire whether an evaluation could be made regarding the possibility that the Council becomes party of a convention ruling on jurisdiction in lieu of the Member States.

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STUDY RELATING TO LIABILITY FOR WRONGFUL ARREST

The idea of this new work started at the CMI Conference in Hamburg after Dr. Aleka Mandaraka-Sheppard, a well known arbitrator in London, made a presentation titled “*Wrongful arrest of ships: a case for reform*”, which is published in the CMI Yearbook 2014.

In such presentation the position on wrongful arrest in English law was outlined and a plea for a reform of English law was made.

The test for wrongful arrest in English law is based on the decision of the Privy Council of 1858 in the “*Evangelismos*”. There a collision occurred in the Thames at night when a ship navigating in the river collided with a ship at anchor but continued her course. Boats from the ship at anchor, the “*Hind*”, made searches of the other ship and the following day found a ship in a dock, the “*Evangelismos*”, which was believed to be the ship which had collided with the “*Hind*” as she had damages to her bow.

The “*Evangelismos*” was arrested but it was discovered that she was not the ship which collided with the “*Hind*”. Thereafter the owners of the “*Evangelismos*” claimed damages for wrongful arrest during a period of nearly three months. However the claim for wrongful arrest was dismissed on the basis that the arrest was made in the *bona fide* belief that the “*Evangelismos*” was the colliding ship.

That was confirmed on appeal by the Privy Council, which held that the identity of the colliding ship was not proved but there were grounds to believe that the “*Evangelismos*” was the one which collided and the owners of the *Hind*, in order to be entitled to damages, had the burden of proving that the arresting party acted with *mala fides* or *crassa negligentia*.

Apparently the test of the “*Evangelismos*” is applicable also in other common law countries, whilst in civil law systems there is no unified approach.

In several civil law countries the arresting party is faced with strict liability if the claim fails on the merits and there would be no need to prove bad faith or gross negligence. In Italy the test is that the arresting party may be held liable for damages if it is proved that he acted without ordinary diligence, the dismissal of the arrest claim not being sufficient.

From the replies to the Questionnaire the position in Spain is that the liability of the arrestor is strict, and there is no need to prove negligence, gross negligence or bad faith.

Aleka Mandaraka-Sheppard called for the need to have English law changed and she also referred to a paper delivered by Sir Bernard Eder, formerly the Honourable Mr. Justice Eder, a Justice of the High Court of England and Wales from 2011 until he resigned in April 2015.

It must be said that the 1952 and 1999 Arrest Conventions do not assist much with regard to providing uniform rules on the test for wrongful arrest and for the entitlement to damages.

In fact while art. 6 of the 1952 Convention merely contains a general reference to the law of the State where the arrest is made, art. 6 of the 1999 Convention goes only a bit further and gives the Court powers to impose security and jurisdiction to determine the extent of liability, if any, of the claimant, for loss or damage as a consequence of the arrest having been wrongful or unjustified or of excessive security having been demanded and provided.

From the *travaux préparatoires* of the 1999 Convention it appears that an arrest is unjustified when there is no doubt about the solvency of the debtor as it would be the case if he owns many ships. But what is the standard for establishing when an arrest is wrongful? Is the dismissal of the claim sufficient and liability is therefore strict, or either bad faith or gross negligence is required, or only lack of ordinary diligence may be sufficient?

It was therefore considered to look at the subject by constituting an IWG with the initial task of preparing a Questionnaire aiming at inquiring on how wrongful arrest is regulated in the various jurisdictions.

Aleka Mandaraka-Sheppard was asked to act as Rapporteur and many showed interest to become members. Initially the IWG also included the other Vice President of the CMI Chris Davies, the Past President of the CMI Karl-Johan Gombrii and Ex.Co. member Ann Fenech.

The Group started drafting a Questionnaire and much debate took place on the various questions to be put to NMLAs.

Eventually the Questionnaire was approved and circulated shortly before the Istanbul Colloquium.

A page was posted in the CMI website under “Work in progress” on the “Study relating to liability for wrongful arrest”, which lists the members of the IWG and contains certain documents including the Questionnaire, the correspondence with the Presidents of the NMLAs, the responses to the Questionnaire and the *travaux préparatoires* of article 6 of both the 1952 and 1999 Arrest Conventions.

For the time being responses of 13 NMLAs have been received, including Spain. The response of the Italian MLA is almost completed and should be circulated and posted on the CMI website within the time limit which was extended until end of December 2015.

The responses, in addition to those from Spain, are from the Netherlands, Mexico, the USA, Canada, Poland, Greece, Romania, Brazil, Malta, the Russian Federation, Finland and Japan.

There are therefore many NMLAs (some 50 National Associations are Members of the CMI) which are still to provide their responses, including the U.K. In early January 2016 it is planned to write individual letters to their Presidents calling again for responses.

In the meantime, the IWG was joined by Sir Bernard Eder who has been campaigning for some 30 years to change the law relating to wrongful arrest in England. He is convinced, as Aleka Mandaraka-Sheppard, that the English Courts should revise the text in the "*Evangelismos*".

Aleka Mandaraka-Sheppard and Sir Bernard Eder say that the English Judges would not be precluded to change the law by the doctrine of precedent. In fact there are decisions of the Privy Council but not of the Supreme Court or even of the Court of Appeal.

As mentioned, also Sir Bernard Eder has written an interesting article "*Wrongful Arrest of Ships: A time for change*"⁵. That was a speech for the annual lecture at the Tulane University, which in 2013 was in honour of William Tetley. Interestingly enough, the article is followed by a reply from Professor Martin Davies, the Director of the Tulane Maritime Law Center, and by a rejoinder from Sir Bernard Eder.

Incidentally, the position under U.S. law is, like in Italy, that the mere dismissal of the arrest claim is not sufficient to render the arresting party liable in damages. However a party, whose ship has been wrongfully arrested, may be entitled to damages and the standard for establishing if an arrest is wrongful is quite high in U.S. law as in U.K. law, proof of bad faith, malice or gross negligence being required.

The IWG will now start preparing a Synopsis with a summary of the various responses to the Questionnaire. The Synopsis is to be circulated at the 42nd Conference of the CMI which will take place in New York from 3 to 6 May 2016.

⁵ Tulane Maritime Law Journal, volume 38, Number 1 Winter 2013, 115.

The Program of the Conference is not posted yet in the CMI website but its Draft contemplates a session on Wrongful Arrest the 5th May 2016 with a presentation on this work, followed by a summary of the responses to the Questionnaire and by a speech regarding the possibility to achieve higher uniformity on wrongful arrest.