International Effects of Judicial Sales
Report on the proceedings of the 2nd meeting of Working Group V1 of UNCITRAL on The Judicial Sale of Ships Vienna 18th to 22nd November.

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Co-Chair of the IWG on Judicial Sales of Ships
Co-Ordinator for CMI for the project at UNCITRAL

1. Introduction.

As the CMI co-ordinator for this project I am delighted to report that the progress on the first revised draft of the Beijing Draft which took place at UNCITRAL in Vienna between the 18th to the 22nd of November was substantial. This 2nd meeting of Working Group V1 brought together no less than 50 State delegations and 13 international organisations, inter-governmental organisations and non-governmental organisations, under the capable and steady Chairmanship of Dr. Beate Cherwenka supported by the ever present and ever constructive UNCITRAL secretariat led by Mr. Jose Angelo Estrella Faria.

In my report to you all during our Assembly meeting in Mexico City in September, I had reported that the result of the deliberations at the very first working group V1 meeting was a first revised draft of the Beijing Draft which was carried out by the UNICTRAL secretariat. The entire scope therefore of 2nd meeting held in Vienna was to continue to fine tune and discuss the provisions of the revised draft. In preparation for this 2nd meeting the International Working Group on Judicial sales prepared the Vienna Meeting Notes noting some preliminary considerations of the CMI on the revised draft.

The revised draft as published by UNCITRAL as can be seen in document number A/CN.9/WG.VI/WP.84 provided essentially for two scenarios. As stated in note number II. 1. (a) of this document: *"In keeping with this decision, the first revisions follow the form and structure of the Beijing Draft considered by the Working Group at its thirty-fifth session, but includes, in italicized text, drafting options for a model law to help the Working group visualize such an alternative."*

It was therefore anticipated ahead of the Vienna meeting that at some stage of the discussions there would be deliberations on the form of the instrument as well.

2. Level of participation.

The entire week was taken up with interesting debates on the various articles of the draft which were open for discussion. It was hugely gratifying for the CMI to see such active participation by numerous state delegations and member organisations which put paid to the rather sceptical views of the past that this draft convention would not attract the interest of UNCITRAL member states. Intense daily pertinent and constructive interventions were made by Switzerland, China, Japan, Spain, Argentina, Russia, Iran, Korea, Italy, Singapore, United States, Belgium, Canada, Morocco, Croatia, France, Malta, Ukraine, Cyprus, Panama and Sri Lanka. The other non-state delegations present including the IMO,

the IBA, the International Association of Judges, Law Asia, BIMCO, IACS, the International Law Institute, ITF, and the Moot Alumni Association, all contributed significantly to the debate by sharing experiences of the practical effect and results of situations effecting crew, creditors, owners and financiers explaining what the practical on the ground effect would be of the various articles under discussion.

Throughout the entire week CMI participated fully in the debate of each and every article and paragraph discussed, offering background and likely effect of each of the clauses as they were being deliberated.

3. Progress on the first revised draft.

Substantial progress was registered during the entire week on the first revised draft and deliberations and discussions were held on Articles 1,2, 3, 4, 5 ,6,7, 9, and 10. The extent of the progress was principally due to the fact that most delegations in Vienna had the benefit of having attended the first meeting in New York and time within which to become much more familiar with the subject matter and its objectives. There was clearly a much greater appreciation in the room for the entire raison d'etre of the convention which was to ensure that a vessel sold free and unencumbered in a properly held judicial sale, must have the same effect in all state parties to the convention and that the failure of such an effect would have devastating and chaotic repercussions on international trade.

Thus it would probably be accurate to say that most of the discussions revolved around this central theme with a view to ensuring that this would be precisely the end result of the convention.

Clean title with no exceptions and the qualified sale conundrum

Extensive debate was held on whether or not, the wording in the revised draft which spoke of a "clean" title except for those charges "assumed by the purchaser" was of any benefit at all. It was agreed that if the convention is to reach its objective, we had to continue to speak about absolutely clean titles with no assumptions being made either by the purchaser or by the law of the judicial sale. With the constant deliverable being certainty, it was widely acknowledged that it would be totally counterproductive to speak of "clean title" whilst in the same breadth providing for exceptions. It was therefore agreed that the convention would only apply to judicial sales which conferred clean title to the buyer – a title which was completely free and unencumbered. This was also acceptable to those countries where there existed very specific and limited circumstances in which a judicial sale may not be totally free and unencumbered. In such countries such sales would and could continue to happen, however such sales would not be within the scope of the instrument. Ultimately a buyer of such a ship in such a country would be fully aware of the risks he would be taking and would know that he is NOT purchasing a ship which was totally free and unencumbered which would be undoubtedly reflected in the purchase price. It was stressed that the convention should not be there to offer protection to buyers who are fully aware that the ship they are purchasing is not free and unencumbered but to offer certainty to buyers who purchase ships free and unencumbered.

This was considered to be a major breakthrough in the discussion because an agreement on catering solely for judicial sales in which vessels are sold free and unencumbered effectively led to a significant sprucing up of the entire document and effected Articles 2 (2), 4 (1), 4 (2),

5 (1), 5 (2) (g), 5 (2) (h), 7 (2) and (8 (3) on Scope of Application, Effects of Judicial Sale, Certificate of Judicial sale, Deregistration of a ship, and Arrest of a ship.

This led to extensive discussions on the appropriateness of amalgamating article 4 on the effects of judicial sale in the State of judicial sale with Article 6 on the effects of judicial sales outside the State of judicial sale. This was felt necessary to reflect the view which appeared to receive substantial support being that a judicial sale which confers free and unencumbered title in the state of a judicial sale must have the same effect in all state parties. At the same time there was wide support for ensuring that the new wording would maintain the existing safeguard in article 4 (3) that nothing would affect the rights of any creditors in any ranking of creditors procedure or any *in personam* rights they may have against the old owner. The UNICTRAL Secretariat will be working on appropriate revised wording.

Notice of Judicial Sale

Another extensive debate took place in connection with Article 3 being the Notice of Judicial Sale. Numerous constructive suggestions were made with a view to improving the content of the notice requirements. With regard to the effect of failure to notify, it was widely accepted that it was of paramount importance not to place unrealistic burdens on registrars of ships who simply could not be expected to verify whether or not notice periods have been honoured. It was further acknowledged given the debate on Article 4 that it would be very challenging indeed in view of the different legal regimes involved to prescribe the legal effect of non compliance and the common view was that this was a matter best left to domestic law.

Challenge to a Judicial Sale

In considering and deliberating Article 9 a very interesting discussion was held on the very obvious practical difficulties that would ensue in the event that a judicial sale transferring a vessel to a third party was challenged. Realistic scenarios related to the position of the new mortgagees, the difficulties in retracing or getting back any funds paid out from the proceeds of the purchase price to creditors, the position of any charterers of the newly purchased vessels and an infinite number of realistic scenarios were deliberated.

As a result there was at the end of the debate wide support for limiting article 9 to one which indicated clearly the appropriate court in the event of a challenge, limiting the article effectively to a jurisdiction clause whilst leaving all other matters to the domestic law of that court.

Circumstances in which a Judicial Sale has no effect.

An interesting debate took place on a number of issues effected by article 10 focusing on the importance of stressing that one was here talking about "international" effect and not in the state where the judicial sale was held. Similarly on the issue of timing and whether or not it was at all advisable that there should be any questioning of the international effect beyond the time when the judicial sale was confirmed by the state of judicial sale in the act of issuing the Certificate and this to limit the chaotic effects that would ensue if such a sale would be declared as having no effect. There was also wide support for ensuring that the grounds did not increase the risk for re-arrest to the detriment of the bona fide purchaser possibly leading to the resale of the same vessel with all the further uncertainties and complications that

brought with it. It was underlined that great caution had to be exercised to ensure that this article was not misused by unscrupulous arresting parties who knew they had no legitimate rights whatsoever against the ship owned by the new bona fide purchaser, aimed solely at illegitimately extorting funds from the new bona fide purchaser who may be coerced into giving in, in order to avoid disruption of his commercial arrangements. As a result of these deliberations there was wide support for the secretariat to consider in its further drafting exercise, making a distinction between the limited ground of public policy in the case of the arrest of a vessel previously sold free and unencumbered in a judicial sale and grounds that would apply in the context of deregistering the vessel.

Convention v Model law

On the last day the Chair expressed the view that it would be of benefit to get a feel for the mood of the room in so far as concerns the form of the instrument and whether the instrument should take the form of a convention or a model law.

Of course both Switzerland as the proponent of the instrument and CMI as the drafter of the Beijing Draft made it abundantly clear that it is only a Convention that can achieve the purpose for which the Beijing Draft was intended. We underlined that the success of the entire project depended on the harmonization of the law of states on this very subject and that the only instrument that could lead to that was a convention and that leaving it up to each state to adopt at its leisure a Model Law would get us no closer to our objective than where we are today. The very mobility of ships, the multiplicity of jurisdiction which each ship typically touches or effects or is effected by in a typical voyage, made it all the more important that the subject matter is at the very heart of an international convention.

It was indeed gratifying to hear one state delegation after another and one organisation after another express the view that the appropriate form of the instrument must be a Convention with only one state delegation out of 50 state delegations participating at Vienna expressing a preference for a Model Law.

4. Conclusion

The above is intended to give a broad overview of the more important issues discussed. There were several other deliberations on a number of other matters. It was in conclusion agreed that the Secretariat would now work on a 2nd revised draft taking all the week's deliberations into account. This is not a task for the faint hearted given the amount of work and views expressed. Sincere thanks therefore go to the Secretariat and the Chair of Working Group V1 for their determination, perseverance and guidance and we look forward to the 2nd revised draft.

In addition sincere thanks must go to CMI members who were part and parcel of a number of State delegations or international organisation delegations. Myself representing CMI apart, these were Alex von Ziegler the representative of Switzerland, Henry Li adviser to the Chinese delegation, Beiping Chu member of the Chinese delegation, Frank Nolan adviser to the American delegation, Manuel Alba adviser to the Spanish delegation, Tomotaka Fujita representative of the Japanese delegation, Jan Erik Poetschke adviser to the German delegation, Peter Laurijjsen representative for BIMCO and IACS and Harmen Hoek representative of IBA. The contributions of all were crucial to the development of the debate.

Finally sincere thanks to all the national maritime law associations who assisted greatly in persuading their governments to attend and to take an active part in the deliberations in Vienna. There is of course, still a great deal of work to be done in preparation for the 3rd meeting of Working Group V1 which will be held between the 20th and 24th of April 2020. As soon as the Secretariat finalises the 2nd draft we will again be communicating with all the national maritime law associations so that they can again reach out to their respective governments in order that they may assist them with the preparations for the next meeting in New York in April.

6th December 2019

Davis, Christopher

From: Ann Fenech <ann.fenech@fenlex.com>
Sent: Tuesday, December 10, 2019 6:19 PM
To: Davis, Christopher
Cc: Rosalie Balkin; CMI
Subject: RE: Vienna Report
Attachments: Uncitral Vienna Report for Newsletter Final .docx

Dear Chris

Many thanks for that.

However I just realised that I forgot a very important paragraph. The last one.

Can you please delete the previous attachment and use this version which is marked Final.

Best regards
Ann

Ann Fenech
Managing Partner

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From: Davis, Christopher <codavis@bakerdonelson.com>
Sent: 11 December 2019 00:52
To: Ann Fenech <ann.fenech@fenlex.com>
Cc: Rosalie Balkin <rosaliebalkin1@gmail.com>; CMI <admin-antwerp@comitemaritime.org>
Subject: Re: Vienna Report

Thanks Ann — I am waiting on a letter from John Hare re the 2020 yCMI Essay Prize, and will send the full report along to NMLAs at that time (independent of it being published in the Newsletter). Best, Chris

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On Dec 11, 2019, at 7:37 AM, Ann Fenech <ann.fenech@fenlex.com> wrote:

Dear Rosalie and Chris

Please find attached the full Vienna Report for publication in the Newlsetter and for circulation to the MLA's.

If it is going to be circulated to the NMLAs perhaps Evelien can have it printed out on CMI letterhead.

Best regards
Ann

Ann Fenech
Managing Partner

<image001.jpg>

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