



COMITE MARITIME INTERNATIONAL

Meeting Notes for the 37th Session of UNCITRAL Working Group V1 Judicial Sales

Vienna 14th - 18th December 2020

1st September 2020

Scope

The CMI IWG on the international effects of judicial sales has considered the Annotated Second Revision of the Beijing Draft as circulated by the UNCITRAL Secretariat in the document bearing identification number A/CN.9/WG.V1/WP.87. The IWG has also considered the Notes accompanying this document bearing identification number A/CN.9/WG.V1/WP.87/Add.1.

As it had done following the publication of the First Revision of the Beijing Draft, our IWG has considered that it could be of benefit to annotate and share some preliminary considerations through these meeting notes in preparation for the 37th Session of UNICTRAL Working Group V1 on Judicial sales in Vienna between the 14th and the 18th December 2020 and also as a response to the request by the Secretariat for views from delegations of Working Group V1.

By way of general comment, the CMI would like to congratulate the Secretariat for the sterling work it has done in the preparation of the 2nd Revision of the Beijing Draft, in the extremely useful footnotes evidencing the depth and degree of effort put into the 2nd Revision reflecting the very detailed discussions held during the 36th meeting of the Working Group V1 as well as for the very useful Note accompanying the Second Revision of the Beijing Draft.

1. Convention or Model Law

The Beijing Draft was drafted as a Convention.

Having said that the first revised draft which was considered at the 36th meeting of the working group in Vienna provided text in square brackets in the event that the instrument would take the form of a Model law. However at the same thirty-sixth session of the Working Group, there was at the last session practically unanimous support (bar one delegation - Iran) for continuing to work on the assumption that the draft instrument would eventually take the form of a convention with the actual decision on this matter left to be taken at a future session.

The CMI would like to reiterate its views that there is only one way to go, and that is to have an international treaty. Put very simply a Model Law would not solve any of the existing problems and would in practice leave the situation totally unchanged from what it currently is, being that states have *the option* of incorporating a regime which recognises that the effect of a properly held judicial sale is that the vessel is sold free and unencumbered and this at each individual state's terms and conditions, which are but modelled on the instrument. The entire *raison d'être* of this work is to provide a uniform international law which is binding on states through an international convention.

It would defeat the entire object of the exercise and it would have been a complete waste of time and resources if after such an extensive study, lengthy and detailed deliberations by all the various States and NGO delegations involved one were to end up with a draft of a model law which states would be free to adopt at leisure. A model law would bring us nowhere in solving the serious challenges and breaches in the chain of international trade caused when there is a failure of recognition of a properly held judicial sale, when registries face dilemmas in the registration of new purchases or the deletions of vessels sold in judicial sales. Thus in the event that there is a model law, the great degree of uncertainty would remain and prevail bringing absolutely no solutions to this very serious problem. This is particularly serious as any single judicial sale will inherently involve a number of different States, the State of the judicial sale, the State of the old Registry, the State of the new Registry and any State to which the vessel will travel after the judicial sale. If the effects of such judicial sale will depend on the state of the national law (whether based on Model laws or not) a buyer of such vessel will have no certainty at all whether the vessel after the judicial sale / purchase will be able to sail under the protection of the instrument we are drafting and will be left with complex issues of conflicts of laws and of comparative law in a field that UNCITRAL is now offering a platform to provide an international convention.

These problems and challenges can only be resolved by a binding international instrument signed up by signatory states.

The second revision presented for our consideration is presented in the form of a treaty and includes draft final clauses. CMI therefore welcomes the recommendation of the Secretariat in paragraph 2 of its Accompanying Notes that the Working group may wish to take a final decision on the form of the instrument at the next session.

2. Geographic Scope

In paragraph 3 of its Accompanying Notes – Geographic Scope, the Secretariat also recommended that the 37th session may wish to express agreement with the approach that the recognition regime only applies between States Parties. The CMI supports this.

3. Fluvial vessels

In paragraph 4 of its Accompanying Notes, the Secretariat brings to our attention the fact that in the last session there was a discussion on whether the convention should apply only to sea-going ships thus excluding vessels used for inland navigation. On the basis of the fact that shipowners of both sea going, and inland waterway vessels find themselves in financial difficulties and thus may be the subject to arrest and an eventual sale of the vessel to satisfy claimants, a number of delegates felt that the distinction in treatment was hard to justify.

In some countries it is possible to arrest vessels used for inland navigation as a means to secure a claim in Rem; in the event that the debtor remains in default it is hard to see how the vessel can avoid a judicial sale; in other countries it is not possible to arrest a vessel for inland navigation and no judicial sale will be possible.

It is the view therefore of the CMI that whether or not it is possible to have an inland waterway vessel as the subject matter of a judicial sale needs to be decided and regulated by the law of the country where the judicial sale is taking place.

That said, it was also decided that in view of the fact that there exists the Convention on the Registration of Inland Navigation Vessels (1965) and in particular its Protocol No 2 concerning Attachment and Forced Sale of Inland Navigation Vessels, the Working Group asked the Secretariat to analyse the relationship between that Convention and the Beijing Draft and to present its findings at the next 37th session.

The CMI has considered the very useful Notes provided by the Secretariat at paragraph 5, 6, 7, 8 and 9. It is clear that different states will take different approaches.

Protocol 2 of this Convention provides very interesting provisions regarding the arrest of vessels used for inland navigation, their forced sale, the effects of such forced sale etc. It is noted that the signatories to Protocol 2 are Austria, Belarus, Croatia, France, Luxembourg, Montenegro, Netherlands, Serbia and Switzerland. This naturally means that there are several other countries with rivers with fluvial vessels who are not signatories to either the convention. Such countries therefore will not be able to benefit from the provisions of such a Protocol and therefore the idea of having the Beijing Draft applicable to them which seeks to regulate essentially the same subject matter would still be attractive to them.

CMI is therefore in favour of the words in square brackets suggested by the Secretariat in paragraph 14 of the Beijing Draft since it shows sensitivity to the existence of that Convention whilst ensuring that States not parties to that Convention can benefit from the Beijing Draft.

4. Reduce complications following the judicial sale of the vessel

Addition to Article 5

During the deliberations in Vienna, there were several references throughout the meeting of the possible complications that can arise in the event that the Judicial sale is challenged after a Certificate of Judicial sale is issued.

In practice what will happen after the certificate of judicial sale is issued is that the purchaser will proceed to having the vessel deleted from her existing register and to have the vessel registered in another registry or have the vessel transferred from its previous owner to its own name whilst maintaining the same register; the new owner will enter into new contracts of employment with crew members; the new mortgagee will enter a mortgage against the newly registered vessel; the vessel could be chartered to third parties; the vessel will start to carry cargoes for third parties; the creditors of the previous owner will start to get paid from the proceeds of the sale. All of these are very serious and long term, irreversible effects of the judicial sale subsequent to the production of the certificate of judicial sale.

It is logical that in the event that a sale is challenged AFTER the certificate of judicial sale is issued, that would lead to nothing short of chaos. This situation must be avoided at all costs.

It is therefore being proposed that the wording in bold and italics below be added to the existing Article 5 so that Article 5 paragraph 1 reads as follows:

*“When a ship is sold by way of judicial sale that is conducted in accordance with the law of the State of judicial sale and the notice requirements in article 4, **and no appeal from the judicial sale within the time period applicable in accordance with the law of the state of judicial sale has been filed**, the public authority designated by the State of judicial sale shall, at the request of the purchaser, and in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that etc etc”*

5. Article 6

Omission of proviso (a) and (b)

The content of article 6 (1) (without the proviso) is the very raison d’etre of the Convention.

The CMI is of the view that given that article 3 (1) now makes it clear that the Convention applies only to a judicial sale of a ship if the ship was physically within the jurisdiction of the State of judicial sale at the time of the Sale and given the specific requirement for the physical presence of the ship in the State of judicial sale for the issuing of the certificate of judicial sale as per article 5 (1) (b), there is no need or place for paragraph 1 (a) contained in square brackets in this Article.

Similarly since Article 4 provides very clear notice provisions and since in terms of Article 5 no certificate of judicial sale can or will be issued without the notice provisions of article 4 being observed AND unless the sale is conducted in accordance with the law of the State of judicial sale, and unless the vessel was physically within the jurisdiction of the State of judicial sale at the time of the sale AND only after the time for an appeal from the judicial sale has elapsed (see above), there is no need or place for paragraph (b) contained in square brackets in this Article 6.

CMI is therefore in full agreement with the recommendation of the Secretariat in footnote 29 that these are issues which should be verified as existing by the State of Judicial sale and are confirmed as existing on the issuing of the certificate of judicial sale therefore paragraphs (a) and (b) are redundant and should be omitted.

Repositioning of paragraph 2

It is being suggested that paragraph 2 of article 6 be moved from article 6 and renumbered as article 3 paragraph 3.

6. Article 7 and the Action by the Registrar and Article 9 and the effect of the Exclusive Jurisdiction of the Court of the State of Judicial Sale

The comments which follow essentially relate to and effect the content of Articles 9, 7 (5) and 10 (1) and address the question raised by the Secretariat in foot notes 35 and 36, and 46 and 47.

There was overwhelming support during the deliberations in Vienna that the court which should hear any claims relating to the avoidance or suspension of the judicial sale should be the court of the state of judicial sale. This is properly reflected in Article 9 which makes it very clear that the court of Judicial Sale has exclusive jurisdiction and that the courts of a State party must decline to exercise jurisdiction.

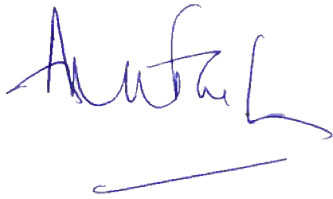
CMI hereby supports a confirmation as stated in foot note 41 that the grounds for avoiding or suspending the effects of the judicial sale are a matter of the applicable domestic law of the state of judicial sale.

It must therefore follow that if the court of the state of judicial sale has exclusive jurisdiction, then the only ground upon which any other court – and therefore the court of the state where the ship is registered – Article 7 (5) and the court of any other state party – Article 10(1) must be limited to the ground of a breach of the public policy of that State otherwise it makes a mockery of the exclusive jurisdiction of the state of judicial sale.

In addition to the above, it is now crystal clear as a result of the clear introduction of the physical presence of the vessel both in Article 3 (1) and Article 5 (1) (b) that this is something that must be assessed by the court of the state of judicial sale. In the event that there is any allegation of fraud that must necessarily be brought before the court of the state of judicial sale within the time frames permitted.

In response to the invitation of the Secretariat to consider whether it is desirable to retain the grounds contained in Article 7 paragraph 5 (a) and (b) and Article 10 paragraph 1 (a) and (b) it is the reasoned opinion of the CMI that it is not desirable to retain these identified paragraphs which would be in direct contradiction to article 9 and the exclusive jurisdiction of the state of judicial sale which is best placed to assess and adjudicate over the matter as above explained.

The CMI agrees fully with the recommendation of the Secretariat in note 46 and 47 that it would not be desirable to retain the two grounds of refusal contained in Article 7 (5) (a) and (b) and Article 10 1 (a) and (b).



Ann Fenech
Co-Chair IWG on Judicial Sales
CMI Co-Ordinator at Working Group V1 UNCITRAL