

Working Group VI – Judicial Sale of Ships

37th Session, Vienna (online) 14 – 18 December 2020

Report to UNCCA by Margo Harris, as UNCCA Chair of Working Group VI

Technology used to host the 37th session

1. The 37th session of Working Group VI (**WG VI**) was originally to be held in New York in April 2020. Unsurprisingly, given the COVID-19 pandemic, the 37th session did not proceed then but in Vienna on 14-18 December 2020. In the interim 6-month period, UNICTRAL had established an online forum for all delegates and observers to attend virtually. The Secretariat attended Vienna in person; the Chair of WG VI appeared from her home State, Germany. Each day there were two, 2-hour sessions, with a 2-hour luncheon. There were minimal technological hitches.
2. Also in adaption to the pandemic, the Secretariat distributed the usual current draft of the instrument and its notes to delegates and observers, but with an invitation for delegates and observes to provide the Secretariat with written submissions returnable mid-September 2020. This proved useful for observers at least. The Comité Internationale Maritime (**CMI**), as the proponent of the Beijing Draft, distributed its paper prepared for the Secretariat to a number of observers for their consideration. Similarly, other observers, such as Law Asia and the International Association of Judges, similarly exchanged their papers with the CMI and other observers, including the Australian Attorney-General's Department.
3. From those submissions, the Secretariat produced a further paper, which cited each of the submissions by delegates and observers. This was most helpful, as:
 - a. it allowed all to identify in advance of the 37th session, issues of contention or agreement;
 - b. for the observers, who were principally representing maritime industry stakeholders, they were able to co-ordinate their position with the CMI in advance and during the 37th session by use of a group chat via WhatsApp and by email. Consequently, this reduced the number of intervenors during the 37th session.
4. From a comradery perspective it would have been preferable to attend Vienna in person, the Secretariat's innovations ensured the work of WG VI continued and much was achieved. It was fortunate that the comradery developed between observers, Switzerland, the United States, Japan, Croatia, Malta and Australia (at least) during the 35th and 36th sessions enabled the very active interaction described above before and during the 37th session.
5. This report is not exhaustive. It covers the key issues.

Expected conclusion of the deliberations and decisions on the 2nd revised Beijing Draft

6. The optimism expressed by observers at the conclusion of the 36th session that the instrument would be concluded at the 37th session did not eventuate for a number of reasons. One reason was the mechanics involved of reaching agreement with the International Maritime Organisation (**IMO**) to host the repository of notices of judicial sale to be issued under the instrument. The IMO has accepted in principle to host the repository (article 12), but its governance arrangements meant it would not be in a position until July 2021 to confirm or reject being the repository. The IMO is the United Nation's specialised agency responsible for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships.
7. Optimism remains that WG VI should be in a position to complete a final draft of the instrument by the end of 2021, which would then be circulated to governments for comments before being submitted to UNCITRAL for approval and transmission to the General Assembly for adoption in the second half of 2022.

The instrument is to be a convention not a model law

8. During the morning session of day 1 of the 37th session, the instrument was agreed to be a convention, not a model law. A convention was preferred form of instrument of the CMI and observers including Law Asia, so this was a major achievement. Iran remained the sole exception to the instrument being a convention, preferring a model law.

Geographical scope

9. After discussion, WG VI decided that the recognition regime under an eventual convention should only apply between State parties.

Article 3: Scope of application

10. A detailed report is provided as to the scope of application given it is fundamental to the operation of the convention.

Limitations on the application of the instrument: article 3(1)

11. Support was expressed for the 2 limitations scoping the application of the instrument, as expressed in article 3(1), namely (and paraphrased):
 - a. The ship (as that term was defined by article 2) was physically within the State of judicial sale (as that term was defined by article 2) at the time of the sale; and
 - b. Under the law of that State, the judicial sale (as that term was defined by article 2) conferred clean title (as that term was defined by article 2) on the purchaser (as that term was defined by article 2).

When must the ship be within the territory of the State?

12. Relevant to the ultimate judicial construction of the instrument of article 3(1), discussions occurred about the time of the judicial sale, which was reflected in:
 - a. two disparate views relating to the time of the judicial sale and whether:

- i. the ship needed to be physically located in the territory of the State of judicial sale from the start to end of the judicial sale procedure; or
 - ii. the ship need only be physically located in the territory at the end of the procedure as the domestic law of some States permitted the procedure leading to sale to commence prior to the ship entering the territory of the State, as some States permitted a ship to continue sailing pending the actual judicial sale
 - b. The words in article 3(1)(a) were to be read in the context of the definition of “judicial sale” in article 2(c) and the notice requirements of judicial sale in article 4.
13. Following discussions, there was general agreement that article 3(1)(a) required the physical presence of the ship at the final stage of the procedure when the ship was actually awarded to the successful purchaser. No greater specificity was possible given the differences in domestic law of States. Concerns could be addressed in any explanatory notes drafted with the eventual convention.

The term “within the jurisdiction” vs “within the territory”

14. The term “within the jurisdiction” is also found in the United Nations Convention on the Law of the Sea (1982). Under that convention, extraterritoriality can be exercised in some circumstances and the word “physically” would not restrict the flag State jurisdiction beyond the territory including the territorial sea of such a State. In the non-English versions of the revised Beijing draft the word “territory” not “jurisdiction” was used in the term “within the jurisdiction”. WG VI noted it preferable that the term be “within the territory” to avoid misunderstanding.

The definition of “ship” is fundamental to the scope of application

15. The scope of application of the instrument is confined to a “ship” defined in article 2(i). The definition is broad and includes pleasure craft and inland navigation vessels. Support existed for retaining that definition.
16. Two issues relevant to Australia arise from that definition:
- a. The *Admiralty Act 1988* (Cth) codified admiralty law in Australia to the extent of its application prescribed by section 5. Section 5(3) of that Act expressly excluded the Admiralty Act applying to a cause of action that arose in respect of an inland waterways vessel or the use or intended use of a ship on inland waters. The proposed instrument therefore has a wider scope of application than the Admiralty Act. Provided any pleasure craft do not come within that exception, they are subject to the Admiralty Act. Consideration might be given to WG VI inserting a provision permitting a State party to reserve the right to exclude the application of the convention to inland navigation vessels although it was considered premature at this stage.

- b. Despite Inland navigation vessels not being registered in a public register in other States (which would exclude those vessels from the scope of application of the convention), they are in Australia; in State and Territory registers under respective Acts and regulations. WG VI has agreed to amend the definition of “ship” by inserting after “that”, “is registered in a registry that is open to public inspection and” in square brackets for later discussion. That definition is unlikely to be curative for Australia.
17. Article 14(2) retains the application of the Geneva Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No.2 Concerning Attachment and Forced Sale of Inland Navigation Vessels including any future amendment to the Convention or Protocol.

Definition of “judicial sale” and article 3(2)(a)

18. Article 3(2) prescribes those ships which are excluded from application of the draft convention:
- a. Article 3(2)(a) – those sales following seizure by tax, customs and other law enforcement authorities is to be removed and the exclusion inserted into the definition of “judicial sale”. Further work is required on the related and defined terms of “public authority” and the distribution of sale funds to “creditors.”
 - b. Article 3(2)(b) – warships or naval auxiliaries or other vessels owned or operated by a State and used, for the time being, only on government non-commercial service. It was agreed to amend this sub-article by removing “ for the time being” and insert “at the time of judicial sale”.

Clean Title

19. The purpose of the instrument is to ensure that ships sold by judicial sale have clean title. Two alternatives were discussed for the definition of “clean title” in article 2(b). The prevailing view was that the second option be retained subject to amendment of the word “charge” defined by article 2(a).
20. Four distinct views about the role of “clean title” to define the scope of application of the instrument were discussed. The issue remains unresolved. At present, article 3(1)(b) will be retained in its current form and will be reviewed at a later time on the common understanding that the draft convention applied to judicial sales where domestic law of a State empowered the court to confer clean title regardless of the eventual outcome of a particular case. This common understanding was the basis upon which the balance of the 2nd revised Beijing draft was to be considered.

Preservation of in personam claims

21. The draft convention is intended to preserve *in personam* claims prescribed by article 6(2). The content of article 6(2) and its proper placement within the convention (in article

6 or in a standalone article immediately following article 3 or elsewhere) require further discussion by WG VI.

Notice of Judicial Sale

Article 4

22. Article 4(1) identified the persons who must be notified of a forthcoming judicial sale of a ship. Article 4(2) required notice to be given in accordance with the law of the State of judicial sale. Was notice: actual notice or notice by secondary means such as a public announcement? WG VI acknowledged further work is required.
23. Article 4(3) prescribed that notice would also be by:
 - a. press announcements within the State or judicial sale and other publications, if required by the law of the State of judicial sale; and
 - b. transmitted to the repository referred to in article 12 (which is anticipated to be the IMO).
24. There was much discussion about whether article 4(3)(a) was required. At present, it will remain and the proviso will be restricted to other publications.

Article 5

25. There was broad agreement that the criteria to be included in the certificate of judicial sale prescribed by article 5(1)(a) to (c) should remain, as by article 5(5) the certificate was conclusive in effect, relieving foreign registrars and other authorities from having to scrutinize the matter recorded, which involved determinations of both fact and law.
26. Amendments are to be made to articles 5(2) and 5(5) to provide clarity.

Conclusion

27. This report is not exhaustive of all articles discussed or all aspects discussed. It focuses on the key articles which reflect the purpose of draft convention.
28. The 38th session is to be held in New York from 19 to 23 April 2021. Covid continues to have its effect on this session, as members of WG VI may appear by the online platform Interprefy or appear in person in Vienna. LAW ASIA will appear by the online platform.

Margo Harris
Counsel, Victorian Bar
13 April 2021