

LawAsia

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

Vienna 14th – 18th December 2020

13 September 2020

Scope

LawAsia has reviewed and considered the international effects of judicial sales of:

1. the draft instrument, “Annotated Second Revision of the Beijing Draft” as circulated by the UNCITRAL Secretariat in the document bearing identification number A/CN.9/WG.VI/WP.87 (**2nd Revision**); and
2. the Notes accompanying that document, bearing identification number A/CN.9/WG.VI/WP.87/Add.1 (**Accompanying Notes**).

In preparation for the 37th Session of UNCITRAL Working Group VI and in response to the Secretariat’s request, LawAsia has prepared its notes set out below in response to the 2nd Revision and 2nd Revision Notes. In preparation of its notes in response, LawAsia has also read and considered CMI’s Notes dated 1 September 2020. LawAsia is in agreement with those matters addressed in CMI’s Notes.

Like CMI, LawAsia would also like to congratulate the Secretariat for its sterling work done not only in the preparation of the 2nd Revision and the Notes to the 2nd Revision but also its very helpful suggestions during the 35th and 36th Sessions, which has enabled meaningful discussions and consideration of how to progress the iterations of the Beijing Draft.

LawAsia has adopted a tabular form of its notes and the rationale for the note.

Draft Instrument Reference	Note	Rationale for Note
Accompanying Notes, paragraph 2.	The instrument ought be a convention, not a model law.	<ol style="list-style-type: none"> 1. The intention of the Beijing Draft was that the instrument be a convention, not a model law; and 2. The overwhelming support at the 36th session in Vienna was that the instrument be a convention, not a model law.
Article 1, 2 nd Revision <i>Purpose</i>	The geographic scope of the instruction be limited to State Parties to the Convention. If limited in this way the reference to “in principle” in the 4 th paragraph of the introduction to the instrument should be retained.	Clarity of the scope of operation of the instrument
Article 2(b) <i>Definition of “Clean Title”</i>	<p>Of the two options identified, the first option be adopted. That is, the instrument read as:</p> <p><i>“Clean title” to a ship means that any title to or rights and interests in the ship existing prior to its judicial sale have been extinguished and that any charge or mortgage have ceased to attach to the Ship.</i></p>	<p>The discussions at the 36th Session held in Vienna in November 2019 included that the instrument ought not affect any <i>in personam</i> rights to enforce mortgages. The first option is instructive in that regard.</p> <p>The definition of ‘Charge’ in Article 2(a) would not need to be changed to give effect to the proposed definition of ‘Clean Title’, as the ‘right’ to arrest, attach or otherwise can only arise if a person has been conferred an interest in the ship.</p>

<p>Article 2(d) - Footnote 6 <i>Definition of “Maritime lien”</i></p>	<p>The reference to “applicable law” ought be omitted and the words “<i>the State in which the Ship is arrested</i>” be inserted.</p>	<p>The defined terms of “Mortgage” and “Ship” identifies the relevant forum in which each is recognised is “the law of the State of judicial sale” (itself a defined term).</p> <p>The defined term “charge” is silent as to which forum it ought be recognised.</p> <p>Article 3(1)(a) requires the Ship to be physically within the jurisdiction of the State of judicial sale at the time of the sale.</p> <p>If the “applicable law” within the defined term “Maritime lien” is not intended to be the State of judicial sale and there being no requirement within the instrument that the arrest occur in the State of judicial sale, the “applicable law” ought be the State in which the Ship is arrested. This would:</p> <ul style="list-style-type: none"> (i) avoid the courts of the State in which the Ship was arrested from being asked to apply the laws of other States; and (ii) be consistent with those States that require a Ship to be within its geographical limits for a judicial sale to occur.
<p>Article 2(i) - Footnote 10 <i>Definition of “Ship”</i></p>	<p>The definition should link the arrest of a Ship to the State of judicial sale.</p>	<p>The <i>Admiralty Act 1988</i> (Cth) expressly excludes the arrest of inland waterway vessels. The proposed link of the arrest of a ship to the State of judicial sale would be consistent with that legislation.</p>

		<p>Within Australia, inland water vessels are more likely to be registered in an “equivalent registry”, i.e. registered on the register kept by a state or territory within the Commonwealth of Australia rather than the registry maintained under the <i>Shipping Registration Act 1981</i> (Cth).</p> <p>To that end, LawAsia supports the State of judicial sale determining whether an inland waterway ship should be subject to judicial sale and different States will take different approaches and favours preserving Article 14(2) of the 2nd revision.</p>
<p>Article 3, paragraph 2(a)</p>	<ol style="list-style-type: none"> 1. Article 3(2)(a) should be retained. 2. The insertion of the words “<i>for punitive purposes</i>” or words to that effect be inserted after “authorities”. 	<ol style="list-style-type: none"> 1. The purpose of Article 3(2)(a) is to distinguish between arrests in “Admiralty” (as that term is used in the common law) and punitive measures, both of which may involve a sale of vessels. It is instructive about what the instrument is not about. 2. The proposed words to be inserted qualify the act of seizure or confiscation for punitive reasons from acts or omissions which occur in the course of the seizure or confiscation which may give rise to a claim capable of arrest of a ship in civil law which is capable of leading to a judicial sale. <p>An explanation by example is illustrative. Customs seized a ship for punitive reasons. Whilst berthing, the ship collided, causing</p>

		<p>personal injuries to crew member and customs officers. The injured person (or their workplace insurer) may have rights to claim against the ship, such as under s4(3)(c) or (d) of the <i>Admiralty Act 1988</i> (Cth) in Australia.</p> <p>As currently drafted, domestic law in the State of seizure or confiscation would need to determine whether article 3(2)(a) extinguished or retained such a claim. The proposed wording is intended to clarify that such claims would not exclude such a claim.</p>
Article 4(1)(a)	After the word “registrar” the words “ <i>or registrars</i> ” be inserted (as proposed for Article 7).	To provide clarity for those States, which permit multiple registrations. For example, in Australia, a Ship may be registered in the registry maintained by its home state or territory under the laws of that state or territory, but can also be registered under the <i>Shipping Registration Act 1981</i> (Cth). Where dual registration occurred, there would be more than one registrar.
Article 4(2)	The word “Sale” in the 2 nd line be omitted and “sale” inserted	Consistent spelling with the defined term “State of judicial sale”.
Article 5(1)	Insert at the end of the sentence, the words “ <i>and the time to challenge the sale in accordance with the law of the State of the judicial sale has lapsed</i> ”	To avoid the chaos that would follow if a challenge occurred after the certificate was issued.

<p>Article 5 – Footnote 19</p> <p><i>Certificate of judicial sale – compliance with “conditions required by the law of the State of judicial sale”</i></p>	<p>The requirements for issuing a certificate of judicial sale be identified by the instrument and not to allow the State of judicial sale to specify procedures for the issue of a certificate of judicial sale.</p>	<p>For certainty and consistency.</p> <p>Consequently, the words “<i>in accordance with its regulations and procedures</i>” should be removed from Article 7(1).</p>
<p>Article 5 - Footnote 20</p> <p><i>Certificate of judicial sale – issuing authority</i></p>	<p>If the instrument takes the form of a convention, a mechanism could be set up by which a State joining the convention would be required to notify the depositary of the authorities competent in its jurisdiction for the purposes of the convention (which could include different authorities for the purposes of different provisions of the instrument)</p>	<p>A practical and effective measure provided the data is kept up to date by States notifying necessary changes to the maintainer of the depositary.</p>
<p>Article 5(2)(d) - Footnote 22</p> <p><i>Certificate of judicial sale – port of registry</i></p>	<p>The reference should instead be to “<i>the registry of ships or equivalent registry in which the ship is registered.</i>”</p>	<p>To mirror the wording used in Article 2(e).</p>
<p>Article 5(2)(h) – Footnote 24</p> <p><i>Certificate of judicial sale – specification of purchase price</i></p>	<p>Retain reference to the “<i>purchase price</i>”</p>	<p>Whilst the purchase price might not be necessary, it would not cause harm, and may prove to be relevant information.</p>
<p>Article 5(5) - Footnote 26</p>	<p>Delete any qualification altogether for invalidation of the certificate of judicial sale in the instrument.</p>	<p>In most legal systems official acts cease to have legal effect once they are invalidated by a court, so that the possibility of the eventual invalidation of the</p>

<i>Certificate of judicial sale – evidentiary value</i>		certificate of judicial sale does not need to be expressly preserved by this draft instrument
Article 6(1)(b) – Footnote 29 <i>International effects of judicial sale – conditions</i>	The matters in Article 6(1)(a) and 6(1)(b) should be verified by the State of judicial sale in the certificate of judicial sale.	Article 3(1) is the very reason for the instrument. The bracketed terms in Article 6(1)(a) and (b) should be omitted as those requirements are already present in Article 5(1)(b) and Article 4 respectively.
Article 6(2)(b)	<ol style="list-style-type: none"> 1. The words “<i>against a person who owned the ship</i>” be removed and the words “<i>against the person who owned or bareboat chartered the ship prior to the judicial sale</i>” be inserted. 2. Article 6(2)(b) be retained. 3. Article 6(2) be moved and become Article 3(3) 	<ol style="list-style-type: none"> 1. In recognition of State laws that recognise bareboat charterers as owners. 2. Instructive as to what is “in scope” and “out of scope” of the instrument, like 3. Related issues be read together.
Article 7(1) - Footnote 32 <i>Effects of judicial sale – preservation of in personam claims</i>	Insertion of the words “ <i>or registrars</i> ” after “ <i>The competent registrar</i> ”	In Australia, sea-going domestic commercial vessels in Australia are more likely to be registered in their home state or territory, but can elect also to be registered under the Commonwealth’s registration scheme. A search of both registries ought be required for the giving notice requirements and if dual registration exists, each registrar would need to be notified.
Article 7(5)(a)	Article 7(5)(a) and (b) and Article 10(1)(a) and (b) should be removed.	<p>These Articles directly contradict Article 9. Footnotes 35, 36, 46 and 47 are noted.</p> <p>The overwhelming support at the 36th Session in Vienna was that the court in the State of the</p>

		judicial sale should hear claims relating to avoidance and suspension of the judicial sale, as reflected in Article 9. Article 9 properly grants the State of judicial sale exclusive jurisdiction and that other State courts must decline jurisdiction. Any grounds for avoiding or suspending the effects of the judicial sale be a matter of applicable domestic law of the State of judicial sale should be avoided. It would follow that articles 7(5) and 10(1) ought be limited only to a breach of public policy.
Article 11 - Footnote 50 <i>Certificate of judicial sale – no legalization</i>	Article 11 ought not preclude the authority from determining when a document purporting to be a certificate of judicial sale is not authentic.	Footnote 50 is noted.
Article 13 - Footnote 53 <i>Cooperation between authorities</i>	The instrument contain a provision similar to article 14 of the International Convention on Maritime Liens and Mortgages (1993) (United Nations, <i>Treaty Series</i> , vol. 2276, No. 40538) (“MLMC 1993”), which provides for cooperation between authorities.	This article reflects that suggestion and supplements the communication contemplated in Article 5(4)(b).
Article 14 - Footnote 54 <i>Relationship with other treaties and national law</i>	1. Replace the words “bilateral or multilateral convention, instrument or agreement or	1. General term open to broader interpretation than specific terms which may limit interpretation. 2. Promotes the purpose of the instrument.

	<p>principle of comity” with “treaty”.</p> <p>2. Expand the provision to preserve the application of national law that is more favourable to the recognition of foreign judicial sales (which may well be based on the principle of comity).</p>	
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