



Fenech
& Fenech
ADVOCATES

***Belgian Maritime Law Association
Webinar***

Antwerp – 4st December 2020

***“The importance of having an international treaty
on the international effects of Judicial Sales.”***

Dr. Ann Fenech

***Vice President Comite Maritime International
Managing Partner Fenech & Fenech Advocates Malta***

Putting the whole project into context:

How do we get to the stage of a judicial sale?

Put very simply the owner of the vessel becomes unable to pay his debts.

Creditor:

- Arrests the vessel

- Obtains judgement or an enforceable title

- Owner remains in default

- Followed by the Judicial sale of the vessel.

Bank of America
Merill Lynch
International DAC

v.

MV Andino

Enforcing its mortgage
for circa 35 million



JUDICIAL SALE BY AUCTION M.V. ANDINO

On the application of **Dr Ann Fenech for and on behalf of Bank of America Merrill Lynch International DAC v MV Andino**, the First Hall of the Civil Court of Malta has ordered the Judicial Sale by Auction of the vessel **Andino** to be held on **Wednesday, 30th September, 2020, at 12pm** in Room number 78, near the Archives, Level -1 of the Civil Courts, The Law Courts, Republic Street, Valletta, Malta. The vessel has the following details:

Name of Vessel	ANDINO	IMO Number	9399765
Call Sign	A8PX4	Port of Registry	Monrovia
Flag	Liberia	Type of vessel	Container
Built	2008 (China)	Builders	Zhoushan Shipyard
Gross Tonnage	32,984	Net Tonnage	13,452
Length	225 m	Breadth	31 m
Depth	19.7 m		

The ship is at anchor off shore Malta, and will be sold TALE QUALE, AS AND WHERE SHE LIES.

For further information please contact:

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N.B. Bidders for the vessel will be required to provide valid authorisation to bid as well as appropriate bank references from reputable bankers.

Bank of America
Merrill Lynch
International DAC

V

MV Andes

Enforcing its mortgage
For circa 35 million



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Bank of America
Merill Lynch
International DAC

V.

MV Algarrobo

Enforcing its mortgage
For circa 35 million



JUDICIAL SALE BY AUCTION M.V. ALGARROBO

On the application of **Dr Ann Fenech for and on behalf of Bank of America Merrill Lynch International DAC v MV Algarrobo**, the First Hall of the Civil Court of Malta has ordered the Judicial Sale by Auction of the vessel **Algarrobo** to be held on **Wednesday, 30th September, 2020, at 11 am** in Room Number 78, near the Archives, Level -1, The Law Courts, Republic Street, Valletta, Malta. The vessel has the following details:

Name of Vessel	ALGARROBO	IMO Number	9399789
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Once you reach this unfortunate stage, what is the most important thing?

1. That the judicial sale takes place in a well organised, fair and transparent manner.
2. That it takes place as smoothly as possible in the interests of all especially the crew remaining on board
3. That the vessel fetches the best possible price for the creditors as well as the original owner

4. That the buyers can deregister her and re-register her in the jurisdiction of their choice
5. That the vessel's previous debts get transferred to the proceeds of the sale
6. That the mortgages, hypothecs and privileges are deleted to enable the re registration of new mortgages, privileges and hypothecs
7. That the vessel is free in the hands of the buyer who can go anywhere in the world without any concern of re-arrest

This is only possible if the vessel is indeed sold
Free and Unencumbered

and it is THIS which distinguishes it from a normal private sale

It is precisely why maritime law practitioners advise on a judicial sale *vs* a private sale.

The questions that arise:

* When a vessel is sold free and unencumbered in a Judicial sale is that effect guaranteed in other jurisdictions?

* Can this title be challenged?

* What happens to the new owners when this occurs?

* What happens to the rights of the new financiers when this occurs?

- * What do flag registries do when this title is challenged?
- * What happens if a jurisdiction fails to recognise the free and unencumbered title
- * Does this mean that the new mortgagees are still competing with the old mortgagees?
- * What happens if old creditors decide to arrest the vessel following a judicial sale.

* What happens if such a title is challenged but in the meantime, the competition of creditors would have taken place in the state of judicial sale and some of the creditors like crew would have gotten paid out of the proceeds of the sale?

* How does that effect the new charterers of such a vessel.

* How does that effect the cargo owners being carried on ships in the hands of new owners

- * How are financiers expected to finance such ships? Are lenders happy with the situation?
- * Is the sale price in judicial sales effected by this uncertainty?
- * Does this lead to certainty in international trade?

Result: Chaos and Confusion in an area which demands certainty considering that over 90% of world's trade is carried by

The *Sam Dragon 2012*, was the case of a judicial sale in Belgium and the difficulties encountered by the buyer to delete the mortgagees interests in the vessel as it was registered in Korea

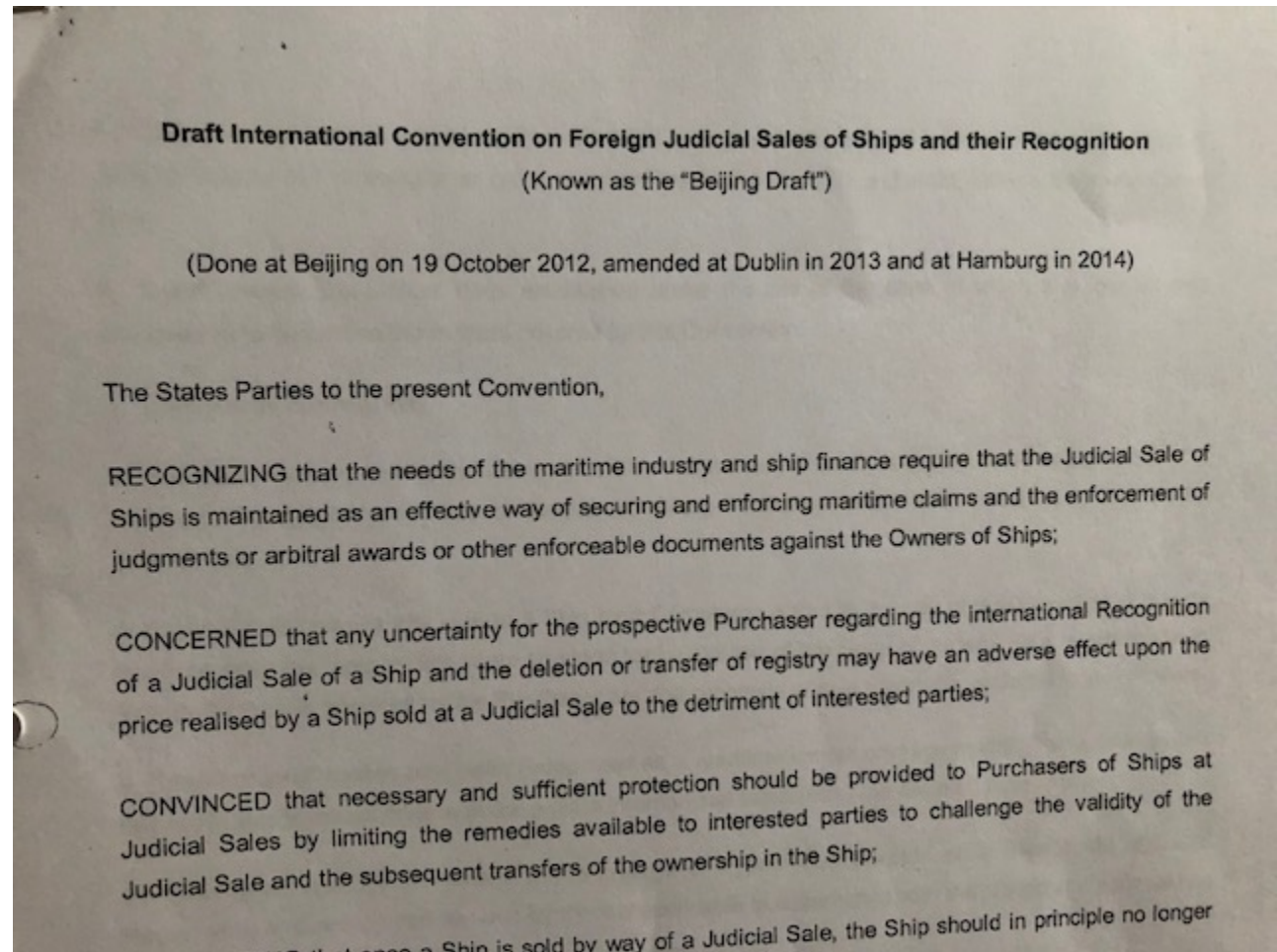
The *Galaxias 1988*, related to the difficulties in the recognition by Greece of a Judicial Sale in Canada

The *Pelamis No 68*, related to the difficulties an Australian buyer of a vessel in a judicial sale in Singapore had, because the Taiwanese authorities where the ship was registered refused to recognise him a a new buyer.

ENTER the COMITE MARITIME INTERNATIONAL

1. Professor Henry Li from the China Maritime Law Association raised the alarm
2. International Working Group was formed in 2014
3. IWG had numerous meetings and produced the *“Draft International Convention on Foreign Judicial Sales and their recognition.”*

This is referred to as the *Beijing Draft* because it was agreed to in Beijing in 2012, it was amended in Dublin in 2013 and finalised in Hamburg in 2014.



The Draft Convention in its original form had 10 Articles dealing with the following:

- Scope of Application
- Notice of Judicial Sales
- Effects of Judicial Sales
- Issuance of Certificates of Judicial Sales
- Deregistration and Registration of Ships
- Recognition of Judicial sales
- Circumstances in which recognition may be suspended or refused.

* Approaches to IMO – surprisingly it concluded that there existed no compelling need to go in that direction.

* Approaches were also made to UNCITRAL and the secretariat at UNCITRAL encouraged the CMI to test the market suggesting the holding of a Colloquium attended by the Industry.

CMI Malta Colloquium 29th of February 2018 at the Chamber of Commerce.



The aim was to have a discussion amongst as many industry players as possible.

Interesting statistic about the colloquium

- 180 delegates
- From over 52 Countries
- Representing ship owners, banks and financiers, ship brokers, provision suppliers, bunker suppliers, tug operators, pilots, ship yards, Ambassadors representing their countries, members of the Maltese and Dutch judiciary, BIMCO, FONASBA, ITF, Institute of Shipbrokers

International panel of speakers to speak about the problem

- Stuart Hetherington President of the CMI
- Ryan Harrington from UNCITRAL
- Camila Mendes Vianna Cardoso from Kincaid Vianna Advogados – Rio de Janeiro
- Jan Erik Poetschke from Ahlers and Vogle - Hamburg
- Lawrence Teh from Dentons, Rodyk and Davidson - Singapore
- Charles Buss from Watson Farley and Williams - London
- Brooke Shapiro from Winston Strawn - New York

- Alex Von Zeigler Exco Member of the CMI and Delegate for Switzerland at UNCITRAL
- Tilman Stein from Deutsche Bank - Hamburg
- Peter Laurijssen from CMB - Belgium
- Ivan Sammut the Registrar of Maltese vessels
- Norman Martinez from the International Maritime Law Institute
- Cornelia Zammit German from Falzon Fuels
Bunker suppliers



Camilla Muscat
James Carbone

Ann Fenech

Lawrence Tili

Charles Dinos

Brooke Shapiro



ADHLE CAMILLER
Tassew 1911
President 1914-1915







Those present representing the entire cross section of the maritime industry concluded that:

1. With 90% of international trade carried by sea this demanded certainty.
2. The defaulting owners needed to maximise the price in the hope that if there was anything left over after paying the creditors they would be able to take home something too.
3. The larger the sale price the better the chances for the creditors to get paid.

4. Financiers of defaulting owners needed to maximise the value of the assets they had financed in the event of default.
5. Without legal certainty on the free and unencumbered title, that would most certainly drive the price down.
6. Financiers of buyers in judicial sales on the other hand needed to ensure a free and unencumbered title meaning that the vessel and all previous mortgages and creditors would be released from the vessel and these would look towards the proceeds of the sale.

7. No financier would lend in the knowledge that previous mortgagees and creditors remained hanging on to the vessel

8. Shipowners interested in purchasing in a judicial sale would only pay top dollar if they had legal certainty in the free and unencumbered title given to them, that the ships they purchased would not be re-arrested for the old debt, which would in turn guarantee their ability to obtain finance

9. That registrars of ships need certainty in effecting changes in ownership, deletions of registrations and deletions of existing mortgages as well as registrations of vessels under new ownership and registrations of new mortgages

10. Crew on board defaulting vessels needed the certainty that the judicial sale would go through smoothly obtaining the best possible price to ensure the payment of their outstanding salaries as soon as possible.

Following the Colloquium, the Government of Switzerland presented a Proposal to UNCITRAL entitled:

“Proposal by the Government of Switzerland on possible future work by UNCITRAL on cross-border issues related to the judicial sale of ships.”

Referring to the Malta Colloquium and the conclusions of these conclusions of the Colloquium attaching the CMI Beijing Draft

UNCITRAL agreed to put this item on the agenda at its fifty first meeting in New York on the 29th of June 2018

United Nations

A/CN.9/927/Rev.1



General Assembly

Distr.: General
2 May 2018

Original: English

**United Nations Commission
on International Trade Law**
Fifty-first session
New York, 25 June–13 July 2018

Provisional agenda, annotations thereto and scheduling of meetings of the fifty-first session

I. Provisional agenda

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of instruments on international commercial settlement agreements resulting from mediation.
5. Consideration of issues in the area of micro-, small- and medium-sized enterprises (MSMEs):
 - (a) Finalization and adoption of a legislative guide on key principles of a business registry;
 - (b) Finalization and adoption of a document entitled “ Adopting an enabling legal environment for the operation of micro, small and medium-sized enterprises (MSMEs)”;
 - (c) Progress report of Working Group I.
6. Commemoration of the sixtieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”).
7. Investor-State dispute settlement reform: progress report of Working Group III.
8. Electronic commerce: progress report of Working Group IV.
9. Security interests: progress report of Working Group VI.
10. Work programme of the Commission.
11. Date and place of future meetings.
12. Consideration of issues in the area of insolvency law:
 - (a) Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgements and its guide to enactment;
 - (b) Progress report of Working Group V.

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Please recycle



Swiss proposal on Judicial Sales was presented by Prof. Alexander von Ziegler and CMI's position was presented by the then President of the CMI Stuart Hetherington and myself.



Ultimately and after much deliberation, the decision of the Commission was announced and it was decided that:

“In support of the proposal, it was noted by the Commission that, that issue had the potential to affect many areas of international trade and commerce, not simply the shipping industry with several examples of that impact being provided.”

So the Beijing Draft on Judicial Sales found itself being debated at the 35th Session of Working Group V1 in New York in June 2019.



The experience of this first session

Composition of the state delegations

Much explaining to be done

Several discussions and much deliberation

Resulting in an Annotated First Revision of the Beijing Draft to be deliberated at the next Working Group V1 meeting in Vienna in November 2019 – the 36th meeting.

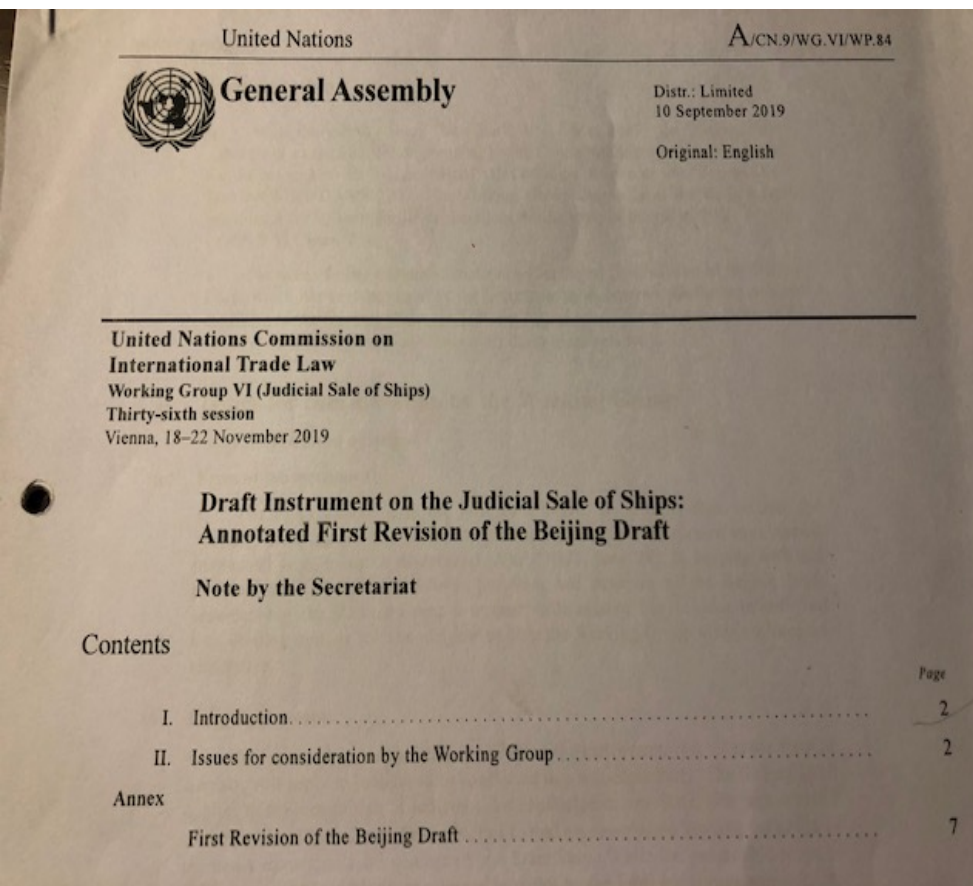
Before the 36th meeting CMI :

- * Meeting Notes for Vienna 2019

- * Substantial effort and work had been done by the national maritime law associations and other organisations such as the ICS, BIMCO, the IBA , the International Association of Judges, Law Asia, in encouraging their States and organisations to prepare for the session and to encourage the participation of maritime professionals.

- * More and more states particularly flag states started to appreciate the importance of participating at this forum with persons with the right expertise because what was at stake was a very important thing for international maritime trade.

As result, the 36th meeting was a huge success with a truly invigorating and interesting debate and thanks to the insight, preparedness, diplomacy and hands on experience of the Secretariat the working group was able to overcome a number of hurdles.



- * There was broad consensus with only one dissenting voice - Iran - on the need for the instrument to take the form of a Convention rather than a Model law;
- Broad agreement was reached on the Scope of Application making it clear that the Convention would apply only to those Judicial Sales of vessels:
 - * which were physically within the jurisdiction of the State of judicial sale at the time of the sale.
 - * when under the laws of that state the judicial sale confers clean title to the ship on the purchaser

- Broad agreement was reached on the need for the State of Judicial Sale to be the State which had to ensure that all the criteria were satisfied because it would be issuing the Certificate of Sale including
 - a. the physical presence of the ship in the state of judicial sale,
 - b. that under the law of that state the judicial sale confers clean title to the ship and
 - c. that the sale was conducted in accordance with the law of the state of judicial sale

- There was thus broad support for the State of Judicial Sale having exclusive jurisdiction to decide on the validity of the Judicial sale except and only if the judicial sale went against the public policy of any other state party
- There was a deep understanding on the certainty which must accompany all judicial sales leading to the elimination of any form of “qualified sales”

- Substantial improvements were made to the provision regarding the notice of judicial sale and the persons who should be in receipt of such a notice striking a very sensible balance between the interests of those with legitimate expectations whilst ensuring that the procedure would not be abused of.
- There was support for the notice of the judicial sale to be given to a Repository which shall make such notices public – thus satisfying the concerns of those who rightly believe that there should be adequate notification of an impending Judicial Sale.

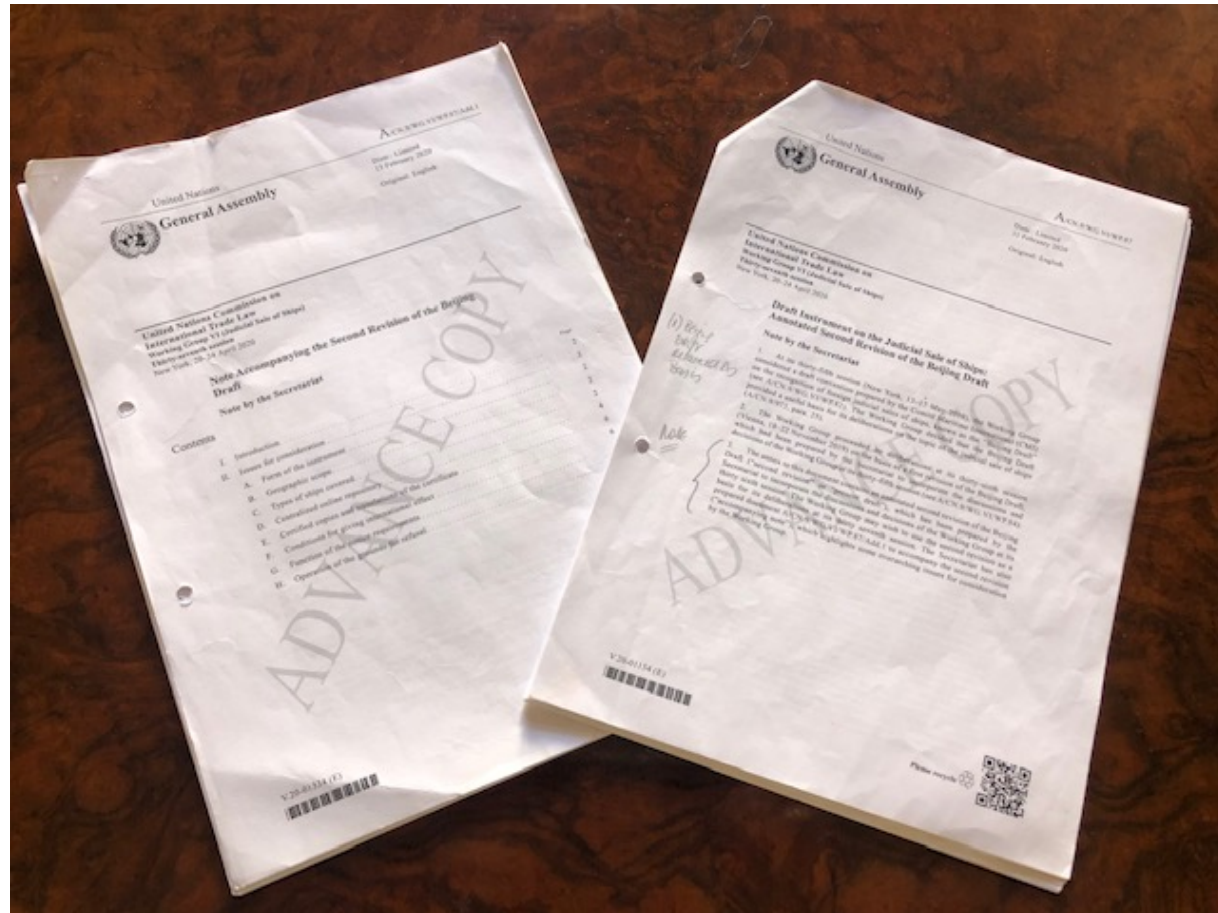
- Substantial improvements were agreed to the content of the Certificate of Judicial Sale which must now attest to the fact that:
 - * the vessel was physically in the jurisdiction of the court of the state of judicial sale
 - * that the sale was conducted in accordance with the law of the state of judicial sale
 - * that the notice requirements were satisfied
 - * that the purchaser acquired clean title.





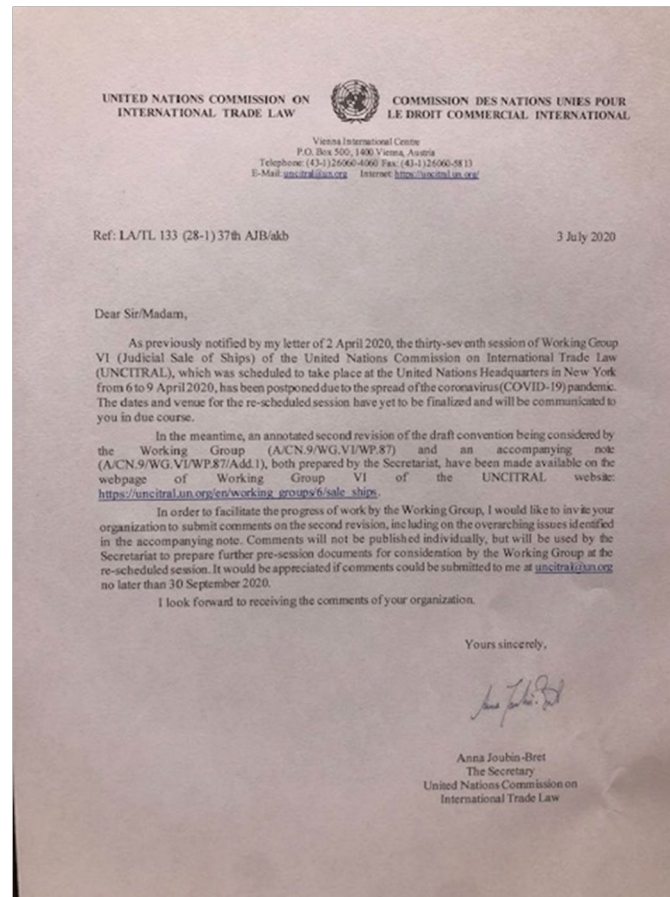


- The result of Vienna 2019 is a Second Annotated Revision of the Beijing Draft before us now for discussion at the 37th session in December 2020



Special thanks to the Secretariat for this 2nd Annotated Revision of the Beijing Draft AND The Accompanying Notes

Secretariat's invitation for comments:



On our part the CMI has been studying this draft and Notes and similarly to what we did prior to the Vienna 2019 meeting we have prepared meeting notes for Vienna 2020 which we circulated in September.



COMITE MARITIME INTERNATIONAL

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

Vienna 14th - 18th December 2020

1st September 2020

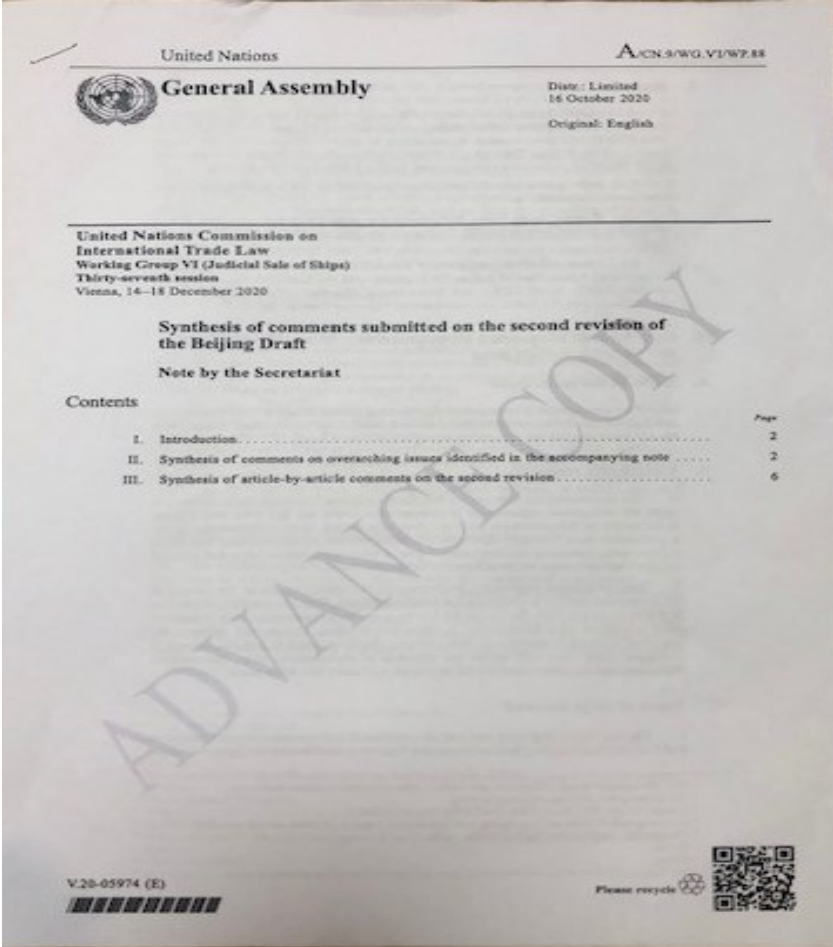
Scope

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 UNCITRAL 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.

The CMI was not the only party which replied with comments: Candada, China, El Salvador, the EU, Malta , Germany, Lebanon, Mexico, the United States, the International Association of Judges, the Law Association for Asia and the Pacific, the ICS in coordination with BIMCO all presented comments and the Secretariat put these comments circulated a Synthesis of these comments a few weeks ago:



Whilst all of this is going on is this still relevant
Absolutely - The experience of the *Bright Star* in
Malta



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MarineTraffic.com

Bright Star

- Vessel under the name of Trading Fabrizia was arrested by the mortgagee and sold in a Judicial sale *free and unencumbered* in January 2018.
- The vessel was purchased by Greek owners for 10.3 million dollars which were deposited in court.
- In June she loaded a cargo of milled wheat from Kavkaz for discharge in Venezuela and as she proceeded through the Mediterranean she stopped off Malta for bunkers.
- Immediately she was arrested by the previous mortgagee of the old Trading Fabrizia
- It turned out that although 3 million dollars had been reserved for the mortgagee in Jamaica the mortgagee had not pursued it.

Bright Star

- This could not be done in Malta because section 37 D of the Merchant Shipping Act states:

“ ..where a ship has been sold pursuant to an order or with the approval of a competent court within whose jurisdiction the vessel was at the time of the sale, the interest of the mortgagees as well as of other creditors in the ship shall pass on to the proceeds of the sale of the ship”

The arrest of the vessel meant:

- Huge blow to the owners who had purchased the vessel free and unencumbered 6 months earlier for 10.3 million
- The vessel had been time chartered so there was a disruption of the charter
- The vessel was fully loaded with maize the arrival of which in Venezuela was going to be seriously delayed.
- This raised serious concerns with the vessel's new financiers
- The Vessel's P & I Club had to get involved to give the member their assistance.

- We therefore filed an emergency summary application requesting the immediate withdrawal of the warrant but the court said, “*not so fast.*” This is not a precautionary warrant of arrest but an executive warrant of arrest because this person is claiming to be the mortgagee of the ship and is enforcing the mortgage.
- So failing the immediate withdrawal of the arrest in order to get the ship out we had to put up security of some Euro 800,000 and commence instead a full blown action on the merits to have this money paid by the new owners returned to them.

Perfect example of utmost Bad Faith on the part of the mortgagee who knew:

- a. The arrest was illegal
- b. Who knew that he needed to pursue his claim from the proceeds of the sale in Jamaica
- c. Who knew that the Jamaican court had actually reserved for the mortgagee the sum of 3 million dollars from the price of 10.3 million
- d. Who for reasons of his own refused to do all of that and instead chase the ship that had been sold free and unencumbered in the hands of the new owners.

- With some Euro 800,000 deposited in court for a claim which was not his, the new owner was and is suffering a huge injustice at the hands of a mortgagee who has exhibited very bad faith indeed.
- We commenced an action on the merits asking the court to declare the arrest illegal and to hold the arresting parties liable for damages.
- The bad faith of the mortgagee was further accentuated when after having arrested the vessel in Malta in the hope of a quick fix he then started to drag his feet and refused for months the service of our action on the

- After we finally served the action on the merits, since then to date the owner has found himself involved in no less than **71 separate proceedings** most of which relate to resisting repeated attempts by the mortgagee before the first court and the court of appeal to get his hands on this money and out of Malta.
- In the meantime the lawyers acting for the mortgagee have now abandoned the brief and the mortgagee is currently unrepresented.

- However the same pursuer has not given up and because it was not getting very far in Malta last year arrested the same vessel in Ghent for some Euro 400,000 plus costs and interest
- The Arrest was effected and further security paid up. However this Arrest was eventually overturned by the Court of Appeal in Ghent in September of this year and the court ordered the withdrawal of the injunction, ordered the return to the owners of the monies they had paid into court.

What has this meant in the context of a purchase of a vessel free and unencumbered?

- Suddenly having to put up and finance a deposit of Euro 800,000
- Disruption of the charter and the delivery of the cargo
- Chasing the defendants for the purposes of service
- Incredible expense in fighting these extensive and exhausting procedures
- Having to go through obtaining expert evidence and the procedures associated with a full blown action.
- Effect of this on the existing mortgagee.
- Effect of this on the vessel's P & I Club

NOTHING SHORT OF CHAOS, CONFUSION AND
INSTABILITY.

The moral of the story is that:

When a vessel is sold Free and Unencumbered that effect must be recognised world wide in the interest of the purchaser who is expected to pay top dollar, in the interest of the defaulting owner himself and in the interest of the creditors all of whom have an interest in ensuring the best possible price for the vessel.

It is for this reason that we most certainly need a Convention on the International Effects of Judicial Sale of Ships and that it cannot come quick enough.



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N.B. Bidders for the vessel will be required to provide valid authorisation to bid as well as appropriate bank references from reputable bankers.

Current status of the Draft:

- IMO Legal committee 107 meeting of this very week week and the issue of the Repository:

“Chair concludes that the LEG takes note of the I information provided in note LEG 107/16/1 and supports inviting the IMO secretariat to make necessary arrangements to host repository under the draft UNCITRAL instrument as an additional GISIS module and to provide an update to LEG 108.

Current status of the Draft:

- Perfect timing in preparation for the Vienna meeting starting 14th December to 18th December
- Further deliberation of the 2nd Draft.
- Numerous comments made including by the ICS very ably represented by Peter Laurijssen.
- CMI would like to thank most especially Peter and Elle de Soomer from the Belgian Ship Owners Association and the Belgian delegation which at last Vienna meeting was made up of the Registrar of Belgian Shipping Registry Anne Catherine for their continuous support.

**Thank you.
Ann Fenech
Managing Partner**

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