Meeting Notes for the 36th Session of UNCITRAL Working Group V1 Judicial Sales

Vienna 18th to 22nd November 2019

29th October 2019

Scope

The CMI IWG on the international recognition of judicial sales has considered the Annotated First Revision of the Beijing Draft as circulated by the Secretariat in the document bearing identification number A/CN.9/WG.V1/WP.84. It has also met to consider the document during the CMI Colloquium in Mexico City. As a result it was decided that it could be of benefit to annotate and share some preliminary considerations through these meeting notes in preparation for the 36th Session of UNICTRAL Working Group V1 on Judicial sales in Vienna between the 18th and 22nd November 2019.

Considerations

1. Convention or Model Law

As annotated in paragraph 1 (a) on page 2 of the above mentioned document, the Beijing Draft is in the form of a treaty. The First Revision of the Beijing Draft provides for an alternative in the form of a Model law by including an italicized text providing for this option.

It is the considered view of the CMI 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. 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 to harmonize the procedure of a judicial sale in principle in order to create legal certainty for the parties involved in the judicial sale. It would have been a complete waste of time and resources and would not reflect the comments received from the various national maritime law associations, if after such an extensive study, lengthy and detailed deliberations of all the various state 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 dilemma 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. It is the firm view of a number of parties so far involved that these problems and challenges can only be resolved by a binding international instrument signed up by signatory states.

2. The Position of Maritime Lien Holders

During the first working group meeting, numerous delegations raised the issue of the maritime lien holder being unable to challenge the judicial sale as per the original Beijing Draft. This led to an interesting debate and the following points were made:

- The Secretariat was sensitive to this mood and introduced the maritime lien holder in article 9 para 4 (c) which now reads: "***For the purposes of paragraph 1, the persons which may make a claim or application to avoid or suspend the effects of the judicial sale are: (c) any holder of a maritime lien entitled to notice under article 3***"

- If one looks at article 3 this states that "***Prior to a judicial sale of a ship, a notice of the sale shall be given to (c) all holders of any maritime lien, provided that the court or other authority ordering the judicial sale has received notice of the claim secured by the maritime lien.***" Therefore in terms of order, one would have the following:

  a. Maritime lien holder would notify the court of the country where the vessel would be arrested and the judicial sale would be held.
  b. Only those Maritime Lien holders who notify the court of such a claim would be entitled to receive notice of the judicial sale.
  c. Only those Maritime lien holders would be entitled to challenge the sale

3. Grounds upon which one can challenge a Judicial sale.

On careful consideration of both Article 7 paras 3 and 4 of the original Beijing Draft and the current Article 9 of the revised draft, neither lay down the actual grounds upon which a challenge can be made.

It is being proposed that to ensure clarity and certainty, an additional paragraph be inserted in Article 9 of the revised draft to deal specifically with the grounds upon which a challenge can be made.

It is therefore being recommended by CMI that an additional paragraph be introduced which would reflect the criteria in article 4 (3) as well as the applicable criteria in Article 10. Thus a new paragraph 5 to article 9 could read as follows:

"A judicial sale may be challenged if:

a. The vessel was not physically within the jurisdiction of the Sate of judicial sale at the time of the sale.

Or

b. The Judicial sale was NOT conducted in accordance with the law of the State of Judicial Sale and the notice requirements in article 3 were not honoured.

Or

c. The sale was procured by fraud committed by the purchaser.

One should make sure that the reasons to challenge the judicial sale (and only this is at stake here, not anything relating to the procedure of arrest / distribution of funds, etc) is limited to grounds that affect directly the party seeking access to court. It cannot be that a challenge is instituted on grounds that have not affected the person seeking such challenge.

4. Issues relating to Article 4 (2) and the notion of "qualified judicial sales"

Article 4 (2) in square brackets is meant to deal with the concerns of those states who wish to see the state of the judicial sale retain the rights to see that a number of charges survive a judicial sale. The foot note states: "this paragraph together with articles 5 (2) (h), 7(2) and 8(3), has been included for the consideration of the Working Group, recalling that no decision has been taken as to whether "qualified" judicial sales should be accommodated in the instrument."

It is the view of CMI that this article in square brackets clearly defeats the object of the exercise of having an international instrument recognising judicial sales as being free and unencumbered and giving the purchaser a clean title. The conclusion is that such an instrument cannot accommodate any qualified judicial sales otherwise this would run counter to the very aim and raison d'être of the instrument.

5. Article 7 (2)

Article 4 (2) refers to Article 5 (2) (h), 7 (2) and 8(3).

If one considers article 7 (2), it becomes apparent that article 7(2) is in fact much wider than 4(2). 7(2) states: "***The registrar may refuse to take any actions specified in paragraph 7 if: the holder of the registered mortgage or charge has not given its consent to the action"*** This therefore appears to be a blanket generic provision (irrespective of any rights given by the law of the state where the judicial sale was held to which article 4 (2) refers), giving rights to mortgagees in states where the vessel which was sold in a judicial sale was registered. This article means that any mortgagee can effectively stop the deregistration of a vessel in country A, purely because that mortgagee has not given his consent to the actions specified in paragraph 1 such as deleting the mortgages attached to the ship, registering the vessel in the name of the new purchaser etc. This goes way beyond the already unattractive proposition

contained in Article 4 (2) which is talking about charges declared as surviving a judicial sale in the state where the judicial sale is held.

Therefore 7 (2) will also need a radical overhaul.

Conclusions and preliminary action points

i. What is required is a convention and not a model law.
ii. The entire thrust of the international instrument in which the bottom line is certainty in international trade must be that a judicial sale in the relative country is indeed free and unencumbered.
iii. The international instrument must protect the innocent purchaser who pays good money failing which vessels sold in judicial sales will never be sold for their true value but at great undervalue leading to more unpaid creditors.
iv. There needs to be a careful consideration of Article 3 as drafted to ensure that it offers sufficient safeguards.
v. There needs to be a careful consideration of Article 9 to ensure there are sufficient safeguards.
vi. Thought should be given to the introduction of an article clearly listing the specific grounds upon which a challenge to a judicial sale can be made.

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