

Memo

To: MLAANZ New Zealand Branch
Committee

From: Neil Beadle

Date: 21 May 2014

Beijing Convention

- 1 The Beijing Convention has the simple objective of requiring States to recognise the foreign judicial sale of a ship.
- 2 The purpose of the recognition is for the sufficient protection of purchasers of a ship through judicial sale. Particularly, for the ship to be sold free of all liens, mortgages and encumbrances.
- 3 The objective at Hamburg is to debate and finalise the text of the Draft Beijing Convention. The draft Convention has been prepared by a special working group of CMI, been debated, and undergone a number of iterations.
- 4 At Taupo, following the AGM and during the course of conversation with Stacey and Bevan, they 'volunteered' to assist me in reviewing the draft Beijing Convention with a view to briefing the NZ Committee on the Convention, essentially as to whether it is worthy of the support of our local MLA. Because the Convention is concerned with mutual recognition of judicial process, I also co-opted Alan Sherlock in this task on the premise that he has recently been deeply involved in litigating issues arising out of the UNCITRAL Model Law on Cross Border Insolvency.
- 5 We met and agreed that Bevan would instruct one of his students to brief us on the notice provisions, as there is a reservation in the draft Convention, so there appeared to be some controversy we needed to understand.
- 6 The **attached** memo prepared by Sophie Merkin sets out the main reasons for the introduction of the Beijing Convention and the article provisions. Bevan instructed one of his bright students to:
 - Review Sophie's memo, draft convention, 2 x Li papers
 - Focus on the footnoted issue to article 3(4) of the draft convention
 - Provide us with a memo on why this issue has arisen, what the key arguments for and against the suggested wording are, drawing on whatever materials he could find from the CMI website (eg country reports) and further afield.
- 7 Jacob Meagher has prepared two memos on the potential issues, both **attached**. We have met and considered them.

Potential objections - Article 3

- 8 The Article 3 memo sets out the issues regarding the new requirement of 30 days' notice given to third parties, but this do not seem to be problematic for New Zealand:
- 9 The High Court Rules do not specifically provide for notice to be given for the appraisalment and sale of arrested property (r 25.51) but notice is given as a matter of practice. The proceeding is served on the vessel, but this does not necessarily include notification to third parties with an interest, eg the bank, particularly where the third party is situated overseas.
- 10 In our view the notification clause is beneficial for New Zealand in two ways:
- 10.1 Parties interested in New Zealand vessels arrested overseas must be notified; and
- 10.2 So far as vessels sold by the court in New Zealand is concerned, the procedural requirement is not onerous to ensure greater certainty of recognition of the judicial sale in an overseas jurisdiction.

Potential objections - Articles 8 and 9

- 11 Exceptions to the convention undermining the objective were identified:
- 11.1 Article 8(1) challenge to the sale where the vessel was not physically within the jurisdiction of the arresting state.
- 11.1.1 Prevents rogue nations from purporting to sell when they have no jurisdiction.
- 11.2 Article 8(3) challenge to the sale where it is contrary to public policy may undermine the objective of the convention.
- 11.2.1 Standard clause that appears in many other conventions eg New York Convention.
- 11.3 Article 9 issue where a later convention will supersede the terms of the Beijing Convention.
- 11.3.1 Standard clause included in most conventions.
- 12 The exceptions are acceptable limitations and these concerns do not render the convention objectionable from New Zealand's perspective.

Conclusions

- 13 We resolved that this is a balanced Convention and that, if committee members agree, the NZ Committee might recommend support from New Zealand members of MLAANZ. It would follow, that assuming the Convention is finalised at Hamburg, we should consider recommending it be ratified by New Zealand. Primary legislation would be required as well as amendments to the High Court Rules.