**International Working Group**

**Ship Finance Security Practices**

**Minutes of the International Sub-Committee meeting**

**Held at Reed Smith on Thursday 7th November 2018**

1. ***Members of the IWG:***

***Present:*** Ann Fenech – Chair (Malta)

David Osborne – Rapporteur (England)

Camila Mendez Vianna Cardoso (Brazil)

Andrea Berlingieri (Italy)

Armstrong Chen (China)

Haco van der Houven van Oordt (Netherlands)

Excused: Allen Black (USA)

Stefan Rindfleisch (Germany)

Andrew Tetley (France)

Souichiro Kozuka (Japan)

1. ***Attendees:***

Ann Fenech asked all attendees to leave a visiting card so that the IWG would have details of attendees for the purposes of keeping them informed. Most left a visiting card, however it is likely that a number did not and thus remain unrecorded for that reason:

Argentina: Nelida Beatriz Angelotti

Belgium: Benoit Goemans

Vincent Fransen

Brazil: Luis Felipe Galante

Marcelo Frazao

Larissa Toledo

Canada: Marc Isaacs

William Sharpe

China: Chu Beiping

Yu Shihui

Lijun (Liz) Zhao

England: Charles Buss (WFW)

Elaine Ashplant (WFW)

Philip Chope (WFW)

France: Arthur Gibson

Germany: Rolf-Jurgen Hermes

Greece: Deucalion Rediadis

Yiannis Timagenis

Maria-Angeliki P. Vlachou

Hong Kong: Liang Zhao

India: Shardul Thacker

Italy: Massimiliano Musi

Dardani jnr

Marco Manzone

Lorenzo Fabro

Filippo Cassola

Giuseppe Duca

Corrado Bregante

Japan: Mitsuhiro Toda

Malta: Suzanne Shaw

Stefan Piazza

Adrian Attard

Martina Farrugia

Netherlands: Robert Hoepel

Van Hoek

Harmen Hoek

Nigeria: Damilola Osinuga

Romania: Adrian Cristea

Ciprian Cristea

Augustin Zabrautanu

Carmen Zabrautanu

Andrei Murineanu

Spain: Diego de San Simon

Sweden: Paula Blackden

Malin Hogberg

Turkey: Emine Vazicioglu

Sertac Sayhan

Cansu Yildirim

Ukraine: Evgeniy Sukacev

United States: Frank Nolan

David J. Farrell Jnr

1. ***Proceedings:***

Ann Fenech thanked all those present for attending in such large numbers. No less than 21 jurisdictions were represented and at least 57 people attended. It was standing room only in the room made available by Reed Smith for the meeting. She briefly explained the origins of this project and explained the differences between the International Working Group and its members and the International sub committee. She went through the Discussion Paper which had been made available well in advance of the meeting and which is being attached hereto. She reminded the participants that the entire object of the exercise was to hear the views of as many national maritime law associations as possible. She explained that it was now important to hear the views of those present on whether they were aware of dissatisfaction expressed by financiers around ship mortgages under current arrangements and generally what they thought about a possible Protocol to the Cape Town Convention dedicated to shipping.

David Osborne developed on the above theme, explaining further the ideas behind the questionnaire, giving some insight into the discussion which had taken place at the Cape Town Academic Symposium at Oxford in 2016 and giving further background on the current developments in ship finance, particularly the growth of lease finance. He also noted that responses to the questionnaire from India, Japan and the United States had arrived after the Discussion Paper had been prepared (and that the response from China was imminent).

The following countries made the following points:

***China***

Armstrong Chen explained how the Chinese leasing business has been developing substantially. He commented on the fact that there was not much if anything at all by way of international legislative support for the lessors in financial leasing structures. He further added that he and others were interested to see what CMI could contribute to global legislation in this field, and how this in turn might address the traditional reluctance of Chinese leasing companies to pursue business in differing jurisdictions.

Prof. Chu Beiping advised on the recent updates related to Maritime Law in China and on the New Chinese maritime code.

***Malta***

Suzanne Shaw stated that as a jurisdiction which came into contact with a cross section of financiers from all over the world registering mortgages against vessels, experience showed that the mortgage system worked well, that mortgagees were by and large satisfied by the manner in which their security rights were protected and thus Malta did not see any need for a protocol to the Cape Town Convention related to shipping. She added however that Malta would like to make the point that there was no international instrument which sought to deal with the rights of lessors in leasing structures and was advocating that research should be undertaken with lessors to see if there was appetite to pursue an international instrument which would deal with leasing. She concluded by saying that, such an instrument would be totally separate and distinct from Cape Town.

***The Netherlands***

Robert Hoeple stated that there was no strong opinion in favour of such a shipping protocol given that generally speaking the existing system worked well.

Haco van der Houven van Oordt expressed his personal view that his main concern about a shipping protocol was that it added a layer of confusion in an area which should strive to make things clearer and not more complex.

He explained how one of the main stumbling blocks was most certainly the fact that the maritime law of most jurisdictions provided protection through non consensual liens to numerous creditors including crew, harbour authorities and suppliers of provisions. He noted that whilst article 39 and 40 provided for states to state on signing that they had such non consensual rights which pre ranked, and came before mortgagees, contrary to Cape Town, he questioned what was going to happen when most of the jurisdictions made such a reservation.

***Brazil***

Camila Mendes Vianna Cardozo explained that whilst issues of non consensual rights certainly gave rise to practical problems she explained the huge frustration encountered by financiers when their mortgages were not recognised as what occurred with the FPSO *OSX 3* case. She added that that matter was appropriately resolved, however it showed that more had to be done to develop a clear legal framework in respect of national maritime law and ensure consistent application by a suitably experienced judiciary. At the same time she acknowledged that there did exist problems on the ground relating to non consensual rights of creditors particularly crew.

***Nigeria***

Damilola Osinuga, also from the World Maritime University, felt that there was no need for a shipping protocol to the Cape Town Convention. He explained how in Nigeria, whilst enforcement may take some time, he added that the Judges making up the bench in Nigeria were not specialised Admiralty judges and it had taken them already some time to get accustomed to the special maritime rules regarding liens and priorities and he felt it would be rather problematic to get these judges to accept and adjust to a totally new regime. Furthermore he felt that any system which would appear to be interfering with traditionally accepted priority rights such as those reserved for crew would be problematic.

***Italy***

Andrea Berlingieri advised that the Italian Maritime Law Association had not yet taken a formal position on the matter. He advised that given the recession since 2008, the Italian ship finance sector had suffered however what remains works relatively well. Banks are used to granting loans which are secured through traditional mortgages. He added that the relationship between the entry of the mortgages in traditional registries and in the central register could be problematic especially when it came to the traditional maritime creditors who have historically always been protected such as crew. He cautioned that before any suggestion could be made a proper analysis of how such a protocol would effectively interfere with the traditional maritime rights had to be undertaken.

***Romania***

Adrian Cristea expressed the view that having an international convention on the international recognition of judicial sales would be of great benefit to the maritime sector and international trade generally and would give financiers greater peace of mind. Separately and when asked specifically on ship finance security practices and Cape Town, he added that in his view a protocol on shipping subject to further research and study, would strengthen the protections generally sought by the financier.

***Belgium***

Benoit Goemens stated that he did not have an official position of the Belgian Maritime Law Association and was therefore speaking from a personal perspective.

He was of the view that rather than focus on a shipping protocol, there was scope for a protocol to cover containers – totally separately from ships. He was of the view that the stumbling blocks to implementing a protocol in respect of ships would not arise in respect of containers. He highlighted the potential utility of a protocol in protecting security rights in containers by way of two examples.

First, he referred to recent prevalence of bankruptcy of large operators. Drawing on the recent Hanjin bankruptcy, he noted there were 950,000 containers in use in over 900 locations leased to Hanjin by the owners of the containers. Leasing companies of these containers were still struggling, or finding it impossible, to enforce their security and recover the containers. One example of difficulties faced was the impounding of such containers by terminals, which would then demand payment of "release monies" as a pre-requisite to recovery. Such "release monies" could total most or all of the intrinsic value of the containers.

Secondly, he referenced frequent cases of fraud, whereby "investment companies" would raise funds from innocent investors by claiming ownership of containers which were in fact owned by non-related companies or, indeed, entirely fictional.

Following such examples, he advocated the protection of such container owners and 3rd parties through a similar international instrument such as a protocol to Cape Town which would, inter alia, provide a central registry of ownership. He added that he felt that Cape Town was ideal for containers.

***Greece***

Deucalion Rediadis advised that answering the Questionnaire had enabled them to focus very clearly on the subject. He stated that Greece was a country of ship owners and of course there was a fair amount of finance. He added that from his personal opinion, it appeared highly unlikely that there would be any appetite for such a protocol. This was due to a number of reasons. First because banks had other issues to worry about right now related to their very survival and secondly because there was no discussion related to any need to have finance securities in the maritime sector regulated in any other way other than in the traditional way.

He added however that thanks to the setting up of this International Working Group to discuss this very subject of ship finance security practices, it has succeeded in bringing together two diverse yet related and interdependent sectors of the same industry being the ship finance lawyers who would be engaged in advising clients at the beginning of any sale and purchase transaction, and the marine litigation lawyers who would get involved when owners default and when the financiers need to have their rights protected and enforced.

He was of the view that even if it was decided that there was no scope for a protocol, the existence of this IWG should be maintained as a forum and platform for these two important sectors of the maritime industry to discuss issues which related to this important sector.

***The United States of America***

Frank Nolan, President of the USMLA, stated that in his view, there was no need for a shipping protocol to the Cape Town Convention. He stated that most of the leading shipping registries in the world had a very efficient infrastructure related to mortgages and their enforcement and provided adequate and satisfactory remedies.

He added that leases did have to be catered for by a new regime and mentioned that there existed provisions on leasing in Liberian and Marshall Islands ship registration law (which he had been instrumental in drafting) and which financiers such as Chinese leasing companies were already starting to make use of.

He added that the situation in the maritime sector is very different from say aviation. He stressed that in aviation there had been a legal vacuum which needed to be plugged due to imperfect mechanisms for perfecting security across differing jurisdictions. However there is no such vacuum in shipping, where there are effective and practical provisions for registration and perfection of security in national registries, which are well-understood by the relevant parties involved therefore he saw no point whatsoever in such a protocol.

Speaking again later, Frank Nolan, fully supported the idea of having a protocol dedicated and related solely to containers. He agreed that there was a vacuum at an international instrument level relating to security rights and interests in containers and it was a good idea to think about it.

***India***

Shardul Thacker gave a very clear exposition of the position in India.

He addressed the fact that there was no doubt in his mind how the greatest challenge in Cape Town for ships was indeed the rights which Indian Law gave to other creditors, first and foremost crew. He acknowledged that this was not just an Indian issue, but an issue likely to effect most jurisdictions. He therefore questioned how things would pan out if most jurisdictions exercised the rights given by article 39 and 40 of the Cape Town convention, effectively nullifying the primary aim of Cape Town which was to give the internationally registered Cape Town interest priority rights over all creditors. He asked what would happen if different jurisdictions therefore applied their own order of ranking which would differ one from the other and certainly differ from Cape Town. That would render a Cape Town protocol on shipping irrelevant. He added that India had a very sophisticated and highly developed general body of maritime law similar to that of England which offered protection to a number of other creditors.

He further explained how the Indian flag was used by only a handful of Indian owners and how Indian flagged vessels only carried around 4% of the trade from and to India. He added how Indian law therefore recognises mortgages entered against foreign registered vessels and how according to Indian law, the mortgagee would get his money after the crew get paid, and that cannot be disturbed by any other law or instrument. India is essentially a nation of sea farers.

He concluded by saying that given that there is little ship financing originating in India and given that, the political priority was the protection of seafarers and, there would be no appetite whatsoever for a protocol on shipping. It was thus most unlikely that an Indian Government would support such a protocol.

***Canada***

William Sharpe stated that the Canadian Admiralty courts enforce both local as well as foreign mortgages under a similar framework to that of the UK. He stated that it would be of benefit if further work is done in the area of insolvency reorganisation, however he saw that as a separate and distinct matter to a Cape Town protocol on shipping. He added that ship financing generally was underdeveloped in Canada and therefore it was felt that there would be no important financial institutions to speak of who would register any interest in, or provide impetus to, such a project.

***Sweden***

Paula Blacked advised that the Swedish MLA was not aware of any interest whatsoever shown by financial institutions in Sweden in such a protocol. She advised that the subject was not discussed at all which indicated that the generally applied current system was not being debated or questioned, whether by financiers or operators.

***Turkey***

Sertac Seyhan explained that Cape Town was not known at all in Turkey. As far as the rights of the mortgagee were concerned these are quite well protected in Turkey especially since the amendments to the Maritime Code. Prior to the amendments there were circa 15 other maritime creditors which ranked prior to the mortgagee. Today following the amendments these have been reduced to 6. He advised that banks are now placed in position number 7 in the order of priorities which is not a bad position. Of course there remains the danger at times that if a vessel is sold the mortgagee may risk getting nothing. Therefore speaking theoretically, the financier would stand to gain by Cape Town, but the reality is that no Turkish government would agree to remove the rights currently enjoyed by other maritime creditors. Any unsettling of generally developed rights in Admiralty would be a red line. Maritime law contains well developed norms for an entire body of maritime creditors including financiers - there are numerous interests which cannot but be taken into account.

***Croatia***

Representatives of Croatia were not present during the meeting however Gordon Stankovic, President of the Croatian Maritime Law Association sent the views of the Croatian Maritime Law Association in writing.

“We have considered the brilliantly written discussion paper on Ship Finance Security Practices and our views are that:

We at the Croatian MLA do not see a “compelling need” (if we may use the IMO language so close to our hearts) of developing a shipping protocol to the Cape Town Convention. Moreover, we think that Croatia would probably be extremely reluctant to let go of the traditional dual function of its ship register. Also, introducing another type of interest (“the Cape Town Interest”) in addition to the registered mortgages and (unregistered) maritime liens would in our opinion increase the complexity of the whole matter.

Having said the above, the Croatian MLA supports the proposals set out in caption 4.12 of the Discussion Paper.”

***David Osborne***

As rapporteur of the group, David Osborne made a number of interventions at various stages of the discussion as follows:

1. He stated that whilst there was a degree of nervousness related to change in this sector this did not and does not exist in other areas. He explained how the major difference was that Cape Town was originally driven by the aviation industry and its financiers, particularly the manufacturers of aircraft and US Eximbank. That drive for reform was not present in shipping or had not yet manifested itself.
2. He agreed that the “legal vacuum” as Frank Nolan put it in relation to aircraft which had been a driving factor behind Cape Town indeed did not have a direct equivalent in the case of ships. Ship registries traditionally address proprietary issues alongside regulatory issues to a greater extent than aircraft registers.
3. He noted that in any ship mortgage enforcement the jurisdiction of enforcement, ie where the ship arrested, is crucial to the amount and speed of recovery by the mortgagee. A financier might be able to take steps to enforce in a favourable jurisdiction but this would often not be the case, with potentially disastrous consequences. Any Cape Town protocol for ships would most likely not be a panacea for local procedural difficulties and delays.
4. He stressed that the ship finance scenario today was facing a number of changes, principle among which were the various ship leasing structures, especially those coming out of China. Cape Town addresses leasing specifically.
5. He was of the view that it would be worth looking at the ways in which leases could be addressed from an insolvency perspective (noting the Aircraft Protocol in this context). Generally, any review of ship security interests should take full account of insolvency regimes, in particular the UNCITRAL Model Law on Cross Border Insolvency and the Recast EU Insolvency Regulation.
6. He stated that in his anecdotal experience, post the 2008 financial crisis, resort to the traditional method of ship mortgage enforcement has been comparatively rare when taking account of the overall scale of distressed shipping loans.
7. He underlined how the Cape Town Convention provides for a number of self help remedies irrespective of any applicable law in the relevant jurisdiction which could potentially be an advantage of a shipping protocol.
8. He was of the view that a shipping protocol could have the effect of making registries in certain countries more acceptable to financiers by providing financiers with the ability to rely on a Cape Town international interest rather than an inadequate domestic ship mortgage.
9. In response to the concerns expressed regarding one of the main challenges, which was how to deal with the regimes in most countries which grant non-consensual priority rights to different categories of traditional maritime creditors, he underlined the possibility of Articles 39 and 40 of Cape Town being deployed to preserve the priority status of applicable non-consensual rights.
10. He explained that he had already floated the idea of how containers (more easily and less controversially than ships) lent themselves to a Cape Town protocol at the Cape Town meeting in Oxford in September 2016
11. In response to the view that there may be parts of Cape Town which could work for shipping which however did not justify a protocol on shipping but perhaps instead a separate instrument, he reminded the meeting that each and every protocol (on aviation, space assets, rolling stock, and mining and agricultural equipment) was or would be sector specific and different, which could be the same for shipping.

***Ann Fenech***

As Chair of the group, Ann Fenech, also made a number of interventions at various stages of the discussion.

1. She underlined the importance of maintaining a sense of objectivity throughout the entire discussion paper drawing attention to the fact it had referred to a number of learned articles which held different views regarding the subject matter.
2. She explained that the Maltese experience possibly having much do with the fact that Malta is bang in the middle of one of the busiest shipping lanes in the world saw its fair share of traditional mortgage enforcement in all the post 2008 bankruptcies and insolvencies with a record number of judicial sales by auction or court approved private sales during the past 5 years meaning that financiers were still ultimately seeking traditional enforcement measures which were very efficient.
3. Whilst acknowledging that one of the tenets of the Cape Town Convention was indeed the self help remedies she raised the point that in terms of the same article 8 of the Convention, these self help remedies only existed: “to the extent that the chargor has at any time so agreed.” Thus these self help remedies only existed in so far as the relevant documents actually granted contractually such self help remedies to the chargee.
4. She observed that if one put the general idea of whether it was a good thing or a bad thing to have a shipping protocol to one side and if one were to look at the Convention line by line, it was of concern to note that there were a number of matters which she feared may create more problems than solve. One such example is the constant reference to “the court” as in for instance Article 9 and the definition of same leading to the unsatisfactory situation where different contracting states would refer the matter to a different court. This in her view would be a major stumbling block and lead to a great deal of uncertainty.
5. She agreed that whilst Articles 39 and 40 gave contracting states the ability to opt out of the absolute priority ranking to the mortgagee, this very fact would give rise to much uncertainty if each country would be entitled (as they are ) to apply its own ranking and priority. It appears that this would defeat the object of the exercise.
6. She was of the view that whilst each protocol can be designed to suit the subject matter she reminded the meeting that there was a limit to how different to the actual convention the protocol could be, referring to Prof. Francesco Berlingieri’s article in which he had stated: “***Nevertheless what is described by Mr. Stanford as “core rules” must be substantially preserved otherwise there would be no “core” at all and each protocol would become an independent convention almost unrelated to the other protocols. If this were the ultimate result the very purpose of this exercise would obviously be defeated.”***
7. ***Conclusions.***

The meeting lasted from 9 am to 11 am. In conclusion Ann Fenech thanked all those present for their interest and active participation in the discussion which was vital to enable the IWG to decide on the next steps that should be taken.

She advised that detailed minutes of the meeting will be prepared and presented to the Executive Council. Furthermore the IWG will keep everyone present and everyone who had participated in the International Sub-Committee fully informed of further work going forward.

She concluded by saying that the views expressed during the meeting would be referred to Exco which would then need to consider these views vis – a – vis the next steps recommended at the end of the Discussion Paper.

Ann Fenech

Chairman

International Working Group

Ship Finance Security Practices