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| **Marine Financing** |
| **Source:** MLA **Date:** October 1, 1999 **Committee:** [MARINE FINANCING](http://www.mlaus.org/committee-profile.ihtml?id=150)   **FORMAL REPORT OF THE COMMITTEE ON**  **MARINE FINANCING**    Charles D. Brown, Chairman, called the meeting of the Marine Finance Committee ("Committee") to order on October 14, 1999. Introductory remarks were made by the Chair who then proceeded to introduce our guest, Dr. Eduardo de Alba, a renowned partner in the Panamanian Law firm of Messrs. Arias, Fabrega & Fabrega. The agenda for the meeting together with an attendance list are attached to the original of these Minutes as Exhibit A.    **I. Chair Report**    Mr. Brown gave an overview of the draft UNIDROIT Convention on Moveables and the proposed draft Protocol for containers and other maritime equipment. Charley Donovan will head the drafting of the proposed Protocol. The aircraft working group has already prepared the Convention as well as a Protocol for aircraft and aircraft parts which may come into effect next year. High value mobile equipment such as airframes, aircraft engines, containers, helicopters, oil rigs, railway rolling stock, registered ships and space property were originally to be covered by the Convention. The CMI's present position is that since ship mortgage financing "works," the Convention should not include "registered vessels" at this time. Mr. Brown stated that the problem is that the conventions for ship mortgages and practice do not work all the time, and do not or may not cover containers and other equipment used aboard vessels, and secondly the Convention on Moveables may be the way of the future for the efficient financing of ships. In many industrial countries there is no way to finance mobile equipment because of problems of enforcement, repossession and sale. With the Convention there are no hidden maritime liens--only electronically registered liens at a central register against highly identifiable equipment where first in time to register wins and all registered liens on such a piece of moveable equipment whether located in space, in the air, on a plateau or on the seas can be instantly viewed by computer. Undue delay in the repossession and sale of the equipment will not be permitted. The base Convention only comes into effect if there is an equipment specific Protocol. Every time new equipment comes in by Protocol, a new wheel does not have to be made because the Convention is there. The Convention plus a Protocol governs. Working groups for aircraft, space property and rolling stock have already drafted Protocols. We should draft a Protocol for containers and seagoing property not covered by ship mortgages.  Mr. Brown reported that there is an assault or attack if you hold the Jones Act and the Passenger Vessel Acts sacred and not to be tampered with or, on the other hand, a movement to rebuild and revitalize shipping by permitting foreign flag cruise vessels to ply Jones Act ports (H.R. 1510) or to induce foreign flag shipowners to redocument their vessels under the United States Flag by obtaining a Vessel International Registry Endorsement (VIRE) under the discussion draft presently being worked on by the Senate Staff which as an incentive for such a flag, exempts the new breed of vessels from certain income tax and gives the crew of such vessels an $80,000 deduction from income tax. We should monitor and comment on such new legislation and find out how we can truly revitalize our fleet. Copies of such legislation were distributed at the meeting. The present proposed legislation may not make it to the floor of the Senate.    Marad has come up with a simplified set of documents for a non-trustee type of financing. Mr. Brown stated that banks and lawyers who usually take part in Title XI financing will not push such simplification because it may kill the golden goose. There will be no trustees' fees or underwriters' fees or large legal fees. There may not be the make-whole covenants or other restrictive provisions. Shipowners must recognize that such documentation is available and ask for them. So far nobody has done a Title XI financing with such simplified documentation because nobody asked for them.    There is a war going on: Which flag shall I use? With the LISCA-IRI split in Liberia, flag states are baiting their hooks with new legislation or simplified procedures for documentation: my flag is better than your flag. It looks like Mobil will transfer its fleet to the Marshall Islands. New legislation to modernize flag statutes and regulations must be examined. Mr. Brown reported that new flags like St. Kitts and Jamaica have surfaced.    **II. Discussion Topics**    A. Panama    Dr. Eduardo de Alba stated that Panama is having a watershed year with the largest open registry in the world, with its first woman president elected by popular vote, handles a million TEU's and growing with new container ports and roll-on roll-off facilities. Panama takes over the Canal on December 31,1999. Eduardo is participating in new legislation for the Canal. Attached as Exhibits B, C and D to the original of these Minutes are three papers prepared by Dr. de Alba entitled Registration of Vessels in Panama, Registration of Title and Mortgages on Panamanian Vessels and Synthetic Lease Financing of Panamanian Vessels. Panama ship financing laws have been annealed by fire and water. Eduardo has participated in the Adriatic fleet realization of security and mortgages have been used successfully to secure ship loans. Liens under Panamanian law have priorities generally set forth in the Brussels Convention of 1926 and Panama uses the law of the flag to determine priorities of liens on foreign flag vessels. The English language text of a ship mortgage governs even if a Spanish version is also recorded.    B. Synthetic Charters and Securitized Receivables    Sandy Knapp gave us a definition of a synthetic charter. A stock bareboat can be used provided two new paragraphs containing magical wordage used by accountants and tax lawyers are inserted. Dr. de Alba gave examples of how to structure a synthetic lease in Panama by use of a Panamanian trustee as owner and a U.S. trustee as mortgagee. By using a synthetic lease, an owner can treat the lease as an operating lease if you closely follow accounting guidelines, and as a conditional sale if you follow Internal Revenue guidelines. In other words, a loan is a lease. Dr. de Alba has done more than U.S.$800 million in vessel synthetic leasing and Sandy Knapp reported that she is working on several such leases. Sandy explained exactly how to use the statement of Financial Accounting Standards No. 13C (FASB 13) to obtain the operating lease treatment and the conditional sale treatment from IRS. There is a problem with ship finance: you may wind up with a "synthetic" or a phony mortgage which is subject to equitable subordination or piercing of the corporate veil if the lender is both the owner or controls the owner and also is the mortgagee either directly or indirectly. It is unfortunate one cannot record charters with the U.S. Coast Guard as a protective or precautionary filing. The solution is legislation if the use of synthetic leases is to continue. The Committee will draft legislation for next spring's meeting. We need a legislative fix.    Sandy also went through the process of securitizing receivables - financing the earning stream from vessels usually generated in the United States.    C. Yachting    Bob McIntosh brought us up to date with the Vessel Identification System. Some 20 states are non-title states and hence will not be able to participate in the System for preferred ship mortgages. To rectify this problem the Coast Guard is considering disseminating software that will spoon feed these states into the title system based on the Model Boat Title Laws. Although all states both title and non-title may participate in the VIS program, only title states can elevate its ship mortgages to preferred status when the VIS goes into effect in such state. The problems of title surrender, hull identification number, title number and registration number, are still being worked out. A draft copy of the combined Builders Certificate and MCO is attached as Exhibit E to the original of these Minutes. Current status of Coast Guard's Certificate of Title Surrender Regulation, Surrender of Certificate of Title, surrendering electronic certificate of title, merging a BC with an MCO, new Coast Guard regulations requiring discharges of preferred mortgages to be filed directly with Coast Guard, will probably come into effect early next year. Registration of maritime liens for yachts was briefly discussed. Bob also went over self-help and replevin actions in connection with notice of non-judicial remedies. All agreed that a notice of self-help before action will be taken, was not a good idea.    D. Registration of Maritime Liens    There is movement to permit the registration with the Coast Guard of any maritime lien whether or not there is a preferred ship mortgage. Legislation should be drafted by the Maritime Lien and Mortgage Subcommittee to permit such registration.    E. Y2K    Tom Willis sent the Chair a current example of what a Y2K problem will cause. Some new vehicle holders in Maine received a title for horseless carriages as computers misread 2000 as the year 1900.    F. Arrests    Bob Zapf briefly went over the 1999 Arrest Convention and kept us current with recent developments.    G. American Fisheries Act    Bruce King advised that the new regulations are about to be promulgated and that comments must be made promptly. The regulations may be final before our next meeting. Comments should be sent to Bruce King.    H. Fair Debt Collection Act    Bruce presented a revised draft amendment to the Fair Debt Collection Practices Act (15 U.S.C. § 1692i) and commentary which is attached as Exhibit F to the original of these Minutes. The original exclusion was for vessels only. Because of pressure from auto groups, "personal property" was substituted for "vessels," with the thought that the amendment can go to Congress as a technical correction next spring. By motion approved by all of the members of the Committee present at the meeting, the proposed amendment and commentaries were approved by the Committee. Bruce will take the amendment and commentaries to the Board for Board approval and direction.    There being no further business, the meeting was adjourned by the Chair, Mr. Brown, at 5:00 p.m.    Respectfully submitted,    Sandra L. Knapp, Secretary |