United Nations A/CN.9/1110

General Assembly

Distr.: General
11 May 2022

Original: English

United Nations Commission on International Trade Law
Fifty-fifth session
New York, 27 June–15 July 2022

Draft explanatory note on the Convention on the international effects of judicial sales of ships – Part I*

Note by the Secretariat

Contents

* Part II may be found in document A/CN.9/1110/Add.1. Part III may be found in document A/CN.9/1110/Add.2.

V.22-02914 (E) 180522 190522

2202914

I. Overview of the convention

A. Objective

1. In many States, courts have the authority to order the sale of a ship to satisfy a claim that is brought against the ship or shipowner. Such a claim is typically brought to foreclose a ship mortgage (in the event of default in repayment) or to enforce a maritime lien against the ship. The judicial sale procedure is typically preceded by the arrest of the ship.

2. While the international community has achieved significant progress in harmonizing rules on the arrest of ships,[1] much less progress has been achieved in harmonizing rules on the judicial sale of ships.[2] As such, it remains for each State to prescribe the rules governing the procedure and legal effect of judicial sales ordered by its courts, although in many States the judicial sale has the legal effect of conferring "clean title" on the purchaser (i.e. it extinguishes all rights and interests that were previously attached to the ship, including mortgages and maritime liens). It also remains for each State to prescribe the rules governing the legal effect within its jurisdiction of foreign judicial sales.

3. The [Convention on the International Effects of Judicial Sales of Ships] (hereinafter "convention") harmonizes the latter rules. Put in another way, it establishes a harmonized regime for giving international effect to judicial sales, while preserving domestic law governing the procedure of judicial sales and the circumstances in which judicial sales confer clean title. By ensuring legal certainty as to the title that the purchaser acquires in the ship as it navigates internationally, the convention is designed to maximize the price that the ship is able to attract in the market and the proceeds available for distribution among creditors, and to promote international trade.

B. Outline

4. The basic rule of the convention is that a judicial sale conducted in one State Party which has the effect of conferring clean title on the purchaser has the same effect in every other State Party (article 6). The basic rule is subject only to a public policy exception (article 10).

5. The convention regime prescribes additional rules which manifest how a judicial sale is given effect after completion. The first is a requirement that the ship registry deregister the ship or transfer registration at the request of the purchaser (article 7). The second is a prohibition on arresting the ship for a claim arising from a pre-existing right or interest (i.e., a right or interest extinguished by the sale) (article 8). The third is the conferral of exclusive jurisdiction on the courts of the State of judicial sale to hear a challenge to the judicial sale (article 9).

6. To support the operation of the regime and to safeguard the rights of parties with an interest in the ship, the convention provides for the issuance of two instruments – a notice of judicial sale (article 4) and a certificate of judicial sale (article 5). It also establishes an online repository of those instruments which is freely accessible to any interested person or entity (article 11).

---

[1] See, e.g., the International Convention Relating to the Arrest of Seagoing Ships (1952), United Nations, *Treaty Series*, vol. 439, No. 6330, and International Convention on Arrest of Ships (1999), United Nations, *Treaty Series*, vol. 2797, No. 49196 (hereinafter the "Arrests Conventions").

[2] Efforts to harmonize rules on the recognition and enforcement of maritime liens and mortgages have addressed judicial sales. See, e.g., article 9 of the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1926), League of Nations, *Treaty Series*, vol. CXX, No. 2765, and articles 11 and 12 of the International Convention on Maritime Liens and Mortgages (1993), United Nations, *Treaty Series*, vol. 2276, No. 40538.

7. The convention regime is “closed”, in the sense that it applies only among States Parties (article 3). Yet it is “not exclusive”, in the sense that it does not displace other bases for giving effect to judicial sales (article 14).

C. Drafting history

8. The convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) between 2019 and 2022.

9. The project originated in a proposal by the Comité Maritime International (CMI) to the fiftieth session of the Commission (Vienna, 3-21 July 2017) for possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/923). The proposal drew attention to problems arising around the world from the failure to give recognition to foreign judgments ordering the sale of ships. It was stated that a short, self-contained instrument along the lines of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[3] could provide a solution to those problems by enabling clean title to vessels to be recognized across borders. While swift resolution of the questions raised by the proposal was encouraged, it was agreed that additional information in respect of the breadth of the problem would be useful.[4]

10. The Commission therefore requested the CMI to develop and advance the proposal by holding a colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course. The Commission further agreed that UNCITRAL, through its secretariat, and States would support and participate in the Colloquium and to revisit the matter at a future session.[5] To that end, following a request from the Government of Malta, the UNCITRAL secretariat extended a formal invitation to all Member and Observer States of UNCITRAL to participate in a high-level technical colloquium in respect of the cross-border judicial sale of ships.

11. The colloquium, which took place in February 2018, resulted in a number of findings. It was agreed that the “lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer” led to problems in the de-registration process in the country of the former flag. It was also agreed that the lack of legal certainty created obstacles in respect of the clearance of all former encumbrances and liens, which in turn created a risk of costly and lengthy proceedings, thereby interrupting trade and shipping. Finally, there was broad agreement that the gap could be filled from a legal perspective by providing an instrument on the recognition of judicial sales of ships.

12. At its fifty-first session (New York, 25 June–13 July 2018), the Commission considered a proposal from the Government of Switzerland on possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/944/Rev.1), which summarized the outcomes and conclusions of the colloquium and requested that UNCITRAL undertake work to develop an international instrument on foreign judicial sale of ships and their recognition.

13. In support of the proposal, it was noted that the lack of recognition of the judicial sale of ships 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. In support of work being undertaken by UNCITRAL, various parallels were drawn between the work being undertaken in Working Group V on recognition of insolvency-related judgments and a possible instrument on the judicial sale of ships.[6]

[3] United Nations, *Treaty Series*, vol. 330, No. 4739.

[4] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), paras. 456-465.

[5] Ibid., para. 464-465.

[6] Ibid., *Seventy-third Session, Supplement No. 17* (A/73/17), para. 243.

14. The Commission considered the proposal together with other suggestions for future work in the context of its deliberations on its work programme at its fifty-first session. After discussion, it was agreed that the topic of judicial sale of ships should be added to the work programme of the Commission.

15. At its thirty-fifth session (New York, 13–17 May 2019), the Working Group considered the topic for the first time (A/CN.9/973), and decided that the draft convention on the recognition of foreign judicial sales of ships, prepared by the CMI and approved by the CMI Assembly in 2014 (known as the "Beijing Draft"), would provide a useful basis for discussion (ibid., para. 25). At its fifty-second session (Vienna, 8–19 July 2019), the Commission expressed its satisfaction with the progress made by the Working Group.[7]

16. At its thirty-sixth session (Vienna, 18–22 November 2019), the Working Group continued its work on the basis of a first revision of the Beijing Draft (A/CN.9/WG.VI/WP.84), which had been prepared by the Secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-fifth session (A/CN.9/1007). The Working Group considered several key provisions of the first revision (ibid., paras. 11–98) and expressed a preliminary view that the instrument should take the form of a convention, while agreeing that a final decision on the matter should be made at a future session (ibid., para. 99). At the resumed fifty-third session of the Commission (Vienna, 14–18 September 2020), support was expressed for the instrument taking the form of a convention, with the observation being made that only a convention was capable of ensuring the level of uniformity needed to affirm the international effects of judicial sales of ships.[8] The Commission confirmed that the Working Group should continue its work to prepare an international instrument on the topic.[9]

17. At its thirty-seventh session (Vienna, 14–18 December 2020), the Working Group continued its work on the basis of a second revision of the Beijing Draft (A/CN.9/WG.VI/WP.87), which had been prepared by the Secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-sixth session (A/CN.9/1047/Rev.1). The Working Group proceeded with an article-by-article consideration of the second revision (ibid., paras. 19–109) and agreed to continue working on the assumption that the instrument would take the form of a convention (ibid., para. 15). At its thirty-eighth session (New York, 19–23 April 2021), the Working Group considered several outstanding issues from its thirty-seventh session on the basis of a third revision of the Beijing Draft (A/CN.9/WG.VI/WP.90), as well as proposals relating to the grounds for avoidance and defining the time of judicial sale (A/CN.9/1053). At the fifty-fourth session of the Commission (Vienna, 28 June–16 July 2021), satisfaction was expressed with the progress made by the Working Group.[10]

18. At its thirty-ninth session (Vienna, 18-22 October 2021), the Working Group proceeded with a further article-by-article review of the draft convention on the basis of a fourth revision of the Beijing Draft (A/CN.9/WG.VI/WP.92), and made progress in its consideration of several open issues, including (a) dealing with clean title sales, (b) the content and function of the notice requirements for judicial sales benefiting from the recognition regime under the draft convention, (c) the content and issuance of the certificate of judicial sale, and (d) the functioning of the proposed repository mechanism (A/CN.9/1089).

19. At its fortieth session (New York 7–11 February 2022), the Working Group completed a further article-by-article review of the substantive provisions of a draft convention and considered the preamble and final clauses of the draft convention on the basis of a fifth revision of the "Beijing Draft" that had been prepared by the secretariat (A/CN.9/WG.VI/WP.94). The Working Group requested the secretariat to

[7] Ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 189.
[8] Ibid., *Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 47.
[9] Ibid., para. 51(f).
[10] Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 211.

revise the draft convention to reflect its deliberations and decisions during the session, and to transmit the revised draft to the Commission for consideration and possible approval at its fifty-fifth session (A/CN.9/1095). The Working Group also requested the secretariat to circulate the revised draft to all Governments and relevant international organizations for comment, and to compile the comments received for the consideration of the Commission. [*To be completed*]

II. Article-by-article remarks

A. Preamble

20. [*To be completed*]

B. Article 1. Purpose

21. Article 1 declares – in positive terms – the basic operation of the convention. It contrasts with article 3, which delimits the substantive scope of the convention.

22. Article 1 makes it clear that the convention is concerned only with the "effects" of a judicial sale and thus not with the conduct of the judicial sale itself. This is confirmed in article 4(1), although the provisions of the convention dealing with the notice of judicial sale may have an "indirect" impact on the procedure of the judicial sale (see remarks on article 4(1)).

23. Article 1 makes it clear that the convention is concerned only with the effects of "judicial sales" and thus not with the effects of judgments in respect of such sales (e.g. decisions of a court ordering, approving or confirming a judicial sale). This is confirmed in article 6 (see remarks on article 6).

24. Article 1 also makes it clear that the convention is concerned only with judicial sales that (already) confer "clean title". Unlike the International Convention on Maritime Liens and Mortgages (1993), the convention does not address the question as to whether a judicial sale confers clean title, which is left to the law of the State of judicial sale. In some legal systems, a judicial sale within the meaning of the convention will always confer clean title, whereas in other legal systems, it will not (see remarks on article 2(c)). Because article 3 does not address clean title as a matter of substantive scope, the convention leaves it to its substantive provisions – notably article 6 – to limit its regime to judicial sales that confer clean title.

25. Unlike the title of the convention, article 1 does not refer to the "international" effects of a judicial sale. This acknowledges that aspects of the convention regime (especially articles 7 and 8) can apply equally in the State of judicial sale.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 34 and 48
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 19–20
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 11, 40–42, 46–47
Report of the fortieth session of Working Group VI	A/CN.9/1095, paras. 45, 94

Document	*Reference*
Note by the Secretariat on the interaction between a future instrument on the judicial sale of ships and selected HCCH Conventions	A/CN.9/WG.VI/WP.85, paras. 3–7

C. Article 2. Definitions

1. Order of definitions

26. Article 2 defines key terms that are used in the convention. The definitions are not presented in alphabetical order, but rather in order of the prominence of the defined term to the operation of the convention and its relationship with other defined terms. Accordingly, article 2 starts by defining the meaning of a "judicial sale" of a "ship" that confers "clean title", before defining the component elements of clean title (i.e. "mortgage or hypothèque" and "charge", as well as "registered charge" and "maritime lien" that are particular types of charges), followed by selected parties involved in the judicial sale (i.e. "owner", "purchaser" and "subsequent purchaser").

References to preparatory work

Document	*Reference*
Report of the fortieth session of Working Group VI	A/CN.9/1095, paras. 45, 94
Cover note by the Secretariat to the fifth revision of the Beijing Draft	A/CN.9/WG.VI/WP.94, para. 6

2. Definition of "judicial sale" (article 2(a))

27. The term "judicial sale of a ship" is used throughout the convention. The term defines the scope of application of the convention and is the focus of its substantive provisions. The term "ship" is defined in article 2(b).

28. A judicial sale is a device used in many legal systems to allow a creditor to seek the assistance of a court or other judicial authority to force the disposal of an encumbered asset in order to liquidate the asset and satisfy the creditor's right to payment of a monetary sum through access to the proceeds of sale. In effect, the judicial sale converts a claim against the asset into a claim against the proceeds, according to applicable priority rules.

29. The definition of "judicial sale" recognizes two key features of judicial sales:

(a) The first feature is that, despite differences in procedure among legal systems, a judicial sale is conducted with the involvement of a court. This feature is reflected in subparagraph (i) of the definition;

(b) The second feature is that a judicial sale is essentially a device that supports the enforcement of private rights. This feature is reflected in subparagraph (ii) of the definition.

(a) Subparagraph (i)

30. Subparagraph (i) recognizes that a judicial sale may be conducted under the authority of either a court or other public authority. The convention does not itself confer that authority, which is commonly sourced from the laws of civil or admiralty procedure of the State of judicial sale. Jurisdiction to conduct judicial sales may be conferred on a single court or on multiple courts; the convention does not interfere with a State's internal allocation of jurisdiction.

31. The term “other public authority” is not defined in the convention. It is not limited to a judicial authority (cf. article 8, in which the term “court” is used in apposition to “judicial authorities”), even if international practice indicates that judicial sales are usually conducted under the authority of a court.[11] Accordingly, a sale does not fail to satisfy subparagraph (i) merely because it is conducted under the authority of a public authority that does not exercise exclusively adjudicative functions. In particular, subparagraph (i) is not intended to narrow the meaning of “judicial sale” beyond the “forced sales” that are addressed in articles 11 and 12 of the International Convention on Maritime Liens and Mortgages (1993). However, the nature of the authority and the functions that it exercises may be indicative of a sale that does not satisfy subparagraph (ii).

32. Subparagraph (i) recognizes that a judicial sale may be “ordered, approved or confirmed” by the relevant authority. Those words are designed to accommodate the different procedures for conducting judicial sale among legal systems, according to which the relevant authority may be required to intervene at different stages of proceedings (e.g. in some legal systems, a judicial sale is not subject to confirmation).

33. Nevertheless, the judicial sale must be carried out either by “public auction” or by “private treaty”.[12] The convention does not prescribe how either type of sale is carried out, which is left to the law of the State of judicial sale.[13] International practice indicates that public auction is the more common – and in some legal systems the only – means by which a judicial sale is carried out.[14] In some legal systems, a public auction may involve a call for sealed bids as part of a public tender (in which case, the reference to the “anticipated date, time and place of public auction” in item 11 of appendix I is understood to refer to the anticipated date, time and place of “submission of bids”), while in other legal systems a public tender is part of the private treaty process.

34. A judicial sale by “private treaty” is not the same as a private sale negotiated between the owner (or mortgagee) and prospective purchaser, but rather a sale that is carried out “under the supervision and with the approval of a court”. For this reason, it is sometimes referred to as a “hybrid sale”. In some cases, a private treaty sale may result from a public tender process that is ordered by the court, while in other legal systems, the sale may result from direct arrangements between the mortgagee and prospective purchaser.

35. A public auction is typically held by a judicial officer or other person appointed by the court. In legal systems that recognize private treaty sales, that officer or appointed person may also intermediate in the sale process (e.g. by holding the public tender). The term “other public authority” in subparagraph (i) (and in item 3 of appendix I and item 3.1 of appendix II) does not refer to the officer or appointed person that holds the public auction or public tender. Moreover, if the judicial sale proceedings are commenced on the basis of an enforceable title issued by another authority (e.g. a judgment or arbitral award), the term “other public authority” does not refer that other authority. Accordingly, a sale does not fail to satisfy subparagraph (i) merely because the enforceable title is not issued by a “public authority”.

36. In some legal systems, a judicial sale may be ordered and conducted prior to final determination of the claim on the basis of which the judicial sale proceedings

[11] A 2010 survey carried out by the CMI on the judicial sale of ships indicated that judicial sales in the jurisdictions surveyed were always conducted either by a court or under the control or supervision of a court: see synopsis of replies to question 1.4 in the CMI Yearbook 2010, available at https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf, pp. 267–271.

[12] In earlier drafts of the convention, “judicial sale” was defined to include a sale carried out by “any other way provided for by the law of the State of judicial sale”.

[13] Some elements of each type of sale can be gleaned from items 11 and 12 of appendix I.

[14] See synopsis of replies to question 1.5 in the CMI Yearbook 2010, available at https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf, pp. 267–271.

were commenced. The definition of judicial sale is intended to accommodate such sales.

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 20 and 90–91
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 16 and 18
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 31–33
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 18–23

(b) Subparagraph (ii)

37. Subparagraph (ii) is designed to distinguish forced sales for which the proceeds form part of government revenue, as may be the case in sales of ships that are seized in the enforcement of public law, such as tax, customs or criminal law.

38. The convention does not define the term "creditor". Typically, the term includes a person with a right to payment of a monetary sum that is secured by mortgage, maritime lien or other charge that is attached to the ship (i.e. the mortgagee or holder of the maritime lien or charge). Although a judicial sale is essentially a device that supports the enforcement of private rights, a sale does not fail to satisfy subparagraph (ii) merely because a public authority has a claim against the proceeds. For example, a maritime lien within the meaning of article 2(g) may secure a claim by a port authority for unpaid port dues. Moreover, a sale does not fail to satisfy subparagraph (ii) merely because it follows seizure of the ship by a public authority (e.g. seizure by tax or customs authorities).

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 19, 89–90
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 35–39
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 30, 34–35
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 49–50

3. Definition of "ship" (article 2(b))

39. As noted above (para. 27), the term "judicial sale of a ship" defines the scope of application of the convention and is the focus of its substantive provisions. If the definition of "judicial sale" in article 2(a) delimits that term by reference to the rights and procedures involved in the forced disposal of an asset, the definition of "ship" in article 2(b) further delimits the term by reference to the type of asset involved.

40. The concept of a "ship" at law differs between legal systems and depends on the context in which it is used. The term "ship" has evaded international attempts to

define its intrinsic features,[15] and the present convention does not attempt to formulate such a definition. The definition of "ship" in article 2(b) is designed to be broad and does not seek to delimit the types of vessels to which the convention applies.

41. The definition does not defer to the meaning of "ship" under the law of a particular State. Accordingly, the term should be given an autonomous meaning in accordance with the rules of treaty interpretation. Nevertheless, the requirement for a vessel to be "registered" and the requirement for the vessel to be "subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale" suggests that, in practice, only a vessel that falls within the meaning of the law of both the State of judicial sale and the State of registration will be a "ship" for the purposes of the convention.

42. Unlike other maritime law conventions, the present convention does not draw a distinction between "seagoing vessels" and "inland navigation vessels", and the term "ship" is intended to cover both types of vessels. Nevertheless, the requirement for the vessel to be "registered" and for the register to be "open to public inspection" means that, in practice, some inland navigation vessels will fall outside the definition of "ship". Moreover, an inland navigation vessel may fall outside the convention regime altogether by virtue of article 13(1).

43. The term "ship" is not limited to vessels used for commercial navigation and therefore would typically cover pleasure craft (e.g. yachts and recreational boats), provided that the other requirements of article 2(b) are satisfied. Note, however, that article 3(2) excludes from scope warships and certain other State-owned or operated vessels that may be used for non-commercial navigation.

44. The convention acknowledges that different types of vessels within the meaning of "ship" may be entered in different registers (e.g. registers for pleasure craft, registers for inland navigation vessels, registers for seagoing vessels) and therefore does not assume the existence of a single register of ships in each State. This is confirmed by the definition of "owner" in article 2(h) and other provisions of the convention which recognize that the ship may be registered in the "register of ships" or "equivalent register". Accordingly, a vessel does not fall outside the meaning of the term "ship" merely because of the identity of the register of ships.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 22, 28–32
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 26–28
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 30–31
Note by the Secretariat accompanying the second revision of the Beijing Draft	A/CN.9/WG.VI/WP.87/Add.1, paras. 4–9

4. Definition of "clean title" (article 2(c))

45. The concept of "clean title" is key to the basic rule of the convention (i.e. that a judicial sale conducted in one State Party which has the effect of conferring clean title on the purchaser has the same effect in every other State Party). This is operationalized by article 6 (pursuant to which only a judicial sale for which a

[15] For instance, neither the International Convention Relating to the Arrest of Seagoing Ships (1952), International Convention on Maritime Liens and Mortgages (1993) or International Convention on Arrest of Ships (1999) defines the term "ship".

certificate of judicial sale issued has international effect) and article 5(1) (pursuant to which only a judicial sale that confers clean title is issued with a certificate).

46. The concept of "title" refers to property rights in the ship that are vested in the purchaser. That title is "clean" if all other property rights in the ship that were vested in another person immediately prior to the judicial sale (i.e. encumbrances, rights "in re aliena") are extinguished, and if all pre-existing mortgages, hypothèques or charges cease to attach to the ship. A sale does not fail to confer "clean title" merely because it does not extinguish a pre-existing right that is not a "charge" (e.g. a right of use that cannot be asserted against the ship).

47. As noted above (para. 24), whether a judicial sale confers clean title is a matter for the law of the State of judicial sale. In some legal systems, a judicial sale will only extinguish pre-existing property rights in the ship that are vested in lower-ranking creditors according to applicable priority rules (i.e. it will not extinguish property rights that have priority over the right of the creditor who commenced judicial sale proceedings). A sale that preserves pre-existing property rights does not confer "clean title" within the meaning of the convention.

48. In some legal systems, title only becomes effective (in the sense of being opposable against others) once additional formalities are taken (e.g. registering the ship in the name of the purchaser). As the convention does not address the transfer of ownership, whether a judicial sale confers "clean title" within the meaning of the convention does depend on whether those additional formalities are taken.

49. The convention is concerned with clean title "to the ship", and not with property rights in assets which are not comprised in the "ship". As noted above (para. 41), the term "ship" should be given an autonomous meaning in accordance with the rules of treaty interpretation.

50. Unlike the International Convention on Maritime Liens and Mortgages (1993), the convention does not provide for the preservation of pre-existing mortgages or hypothèques or of charges that are "assumed by the purchaser". If, under the law of the State of judicial sale, a pre-existing mortgage, hypothèque or charge remains attached to the ship, there is no conferral of "clean title" within the meaning of the convention, and therefore the basic rule of the convention does not apply. Conversely, whether or not the judicial sale extinguishes rights other than property rights in the ship (e.g. personal rights that may be enforced by a claim brought against the former shipowner) has no bearing on whether clean title has been conferred. This is reinforced by article 15(1)(b).

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 33, 81
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 15, 49
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 37–38

5. Definition of "mortgage or hypothèque" (article 2(d))

51. The term "mortgage or hypothèque" is one component of the definition of "clean title" in article 2(c). It is also used (a) to designate the persons to whom the notice of judicial sale is to be given under article 4 (i.e. "all holders of any mortgage or hypothèque" referred to in article 4(3)(b)), and (b) to designate the actions to be taken under article 7 (i.e. action to "delete any mortgage or hypothèque … attached to the ship" referred to in article 7(1)(a)).

52. Mortgages and hypothèques are essentially two different devices that create property rights in a ship to secure payment of a monetary sum. The security rights that each device creates differ between legal systems, and international efforts to harmonize rules on the recognition and enforcement of mortgages and hypothèques have not sought to define those rights. Moreover, either device may be unknown to the law in some legal systems (e.g. mortgages are more commonly associated with common law legal systems, while hypothèques are more commonly associated with civil law legal systems). Despite those differences, both a mortgage and a hypothèque attach to the ship and may be enforced by judicial sale regardless of change in shipowner.

53. The convention does not attempt to define "mortgage or hypothèque" by reference to their intrinsic features nor does the definition in article 2(d) defer to devices recognized as such under the law of a particular State (cf. definition of "maritime lien"). Instead, it is sufficient for the purposes of the convention for the term "mortgage or hypothèque" to be defined by reference to the fact of registration in the State of registration (e.g. entry in the register of ships or separate register of security interests), which will produce the same result regardless of the State in which the issue of the existence of a "mortgage or hypothèque" arises. In practice, that issue will arise in the State of judicial sale (i.e. in determining the persons to whom the notice of judicial sale is to be given) and in the State of registration (i.e. in identifying the registrar to take action to delete the mortgage or hypothèque). In both cases, the fact of registration delimits the scope of the term in a manner that is both suitable and workable.

54. The convention acknowledges that a mortgage or hypothèque may be registered in a different register to the register in which the ship is registered. For example, a State may maintain a separate register of security interests in which ship mortgages are registered. This is confirmed by the definition of "registered charge" in article 2(f) and other provisions of the convention (e.g. article 4(7)(b)), and accommodated by the reference in article 7 to action taken by a registrar or "other competent authority".

55. The convention refers to "mortgage or hypothèque" as a single defined term, rather than defining "mortgage" to include a hypothèque or applying the same definition to either "mortgage" and "hypothèque" as two defined (yet synonymous) terms. Referring to "mortgage or hypothèque" as a single defined term acknowledges that, in some languages, it may be sufficient to refer to a single device.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 21 and 97
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, paras. 45–48
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 16–17

6. Definition of "charge" (article 2(e))

56. The term "charge" is the other component of the definition of "clean title" in article 2(c). It is also the basis for designating two types of charges – maritime liens and registered charges – whose holders are entitled to notification of the judicial sale under article 4. Singling out maritime liens and registered charges reflects their special treatment in other maritime law conventions.

57. The definition of charge is broad and is designed to cover any property right in the ship. The concept of charge is not limited by how it is denominated (as indicated

by the non-exclusive list set out in the definition) or by how it may be asserted against the ship (e.g. by arrest or attachment). While a mortgage or hypothèque (and the rights it creates) would typically fall within the definition of "charge", the definition expressly excludes those devices to reflect their separate treatment in other maritime law conventions.

58. Unlike the definition of "maritime lien" (a particular type of charge), the definition of "charge" does not defer to charges recognized as such under the law of a particular State. As the basic rule of the convention is for a judicial sale that confers clean title in one State Party to confer clean title in every other State Party, and as clean title involves extinguishing all "charges", it is neither necessary nor appropriate for the definition to involve a conflict of law analysis. Accordingly, a pre-existing charge recognized under the law of a State Party other than the State of judicial sale will not continue to attach to the ship merely because the particular type of charge is unknown to the law of the State of judicial sale.

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 78–80
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 12–14
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, paras. 39–42
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 13

7. Definition of "registered charge" (article 2(f))

59. As noted above (para. 56), a "registered charge" is a special type of "charge" within the meaning of the convention. The term is used (a) to designate the persons to whom the notice of judicial sale is to be given under article 4 (i.e. "all holders of … any registered charge" referred to in article 4(3)(b)), and (b) to designate the actions to be taken under article 7 (i.e. action to "delete … any registered charge attached to the ship" referred to in article 7(1)(a)). As such, a registered charge is treated like a mortgage or hypothèque for the purposes of the convention.

60. The definition of "registered charge" is formulated differently to the definition of "mortgage or hypothèque" so that it does not cover charges that are registered in any register, but only (a) the register in which the ship is registered, or (b) any other register in which mortgages or hypothèques are registered. Delimiting the scope of the term by reference to those registers is designed to ensure a greater connection between the registered charge and the ship registry or court of judicial sale (or other public authority conducting the judicial sale), and thus make the requirements of the convention regarding notification and deletion more workable (see remarks on article 4(3)(b)).

References to preparatory work

Document	*Reference*
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, para. 43
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 28–29

8. Definition of “maritime lien” (article 2(g))

61. As noted above (para. 56), a “maritime lien” is a special type of “charge” within the meaning of the convention. The term is used to designate the persons to whom the notice of judicial sale is to be given under article 4 (i.e. “all holders of any maritime lien” referred to in article 4(3)(c)).

62. A maritime lien is a device that is peculiar to maritime law. In essence, it is a right to payment of a monetary sum that is secured against a ship in connection with which the right arises, whether by services provided to it, or by loss caused by it, regardless of change in ownership or operation of the ship. Unlike a “registered charge”, a maritime lien is not subject to registration. Unlike a “mortgage or hypothèque”, it is not subject to any formality or expression of consent on the part of the owner or operator of the ship at the time of its creation.

63. Despite international efforts to harmonize the circumstances in which a maritime lien arises (e.g. the types of services provided to, and types of losses caused by, the ship), maritime liens differ between legal systems. Accordingly, the law of one State may create a maritime lien in circumstances that do not give rise to a maritime lien under the law of another State. This is particularly relevant in international shipping, where maritime liens could potentially attach to a ship under the law of the various States through which the ship navigates, giving rise to conflict of law issues.

64. The definition of “maritime lien” accepts the status quo, and thus defers to the law applicable in the State in which the issue of the existence of a maritime lien arises, including its conflict of law rules. In practice, that issue will arise in the State of judicial sale (i.e. in identifying the persons to whom the notice of judicial sale is to be given (i.e. “all holders of any maritime lien”). By deferring to applicable law, the convention makes it clear that the term “maritime lien” should not be given an autonomous meaning.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 19–20
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, para. 44
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 14

9. Definition of “owner” (article 2(h))

65. The term “owner” is used to designate the persons to whom the notice of judicial sale is to be given under article 4 (i.e. “the owner of the ship for the time being” referred to in article 4(3)(d)). Certain particulars of the owner are also part of the minimum information to be contained in the notice of judicial sale (article 4(4)) and the certificate of judicial sale (article 5(2)(h)). In all cases, the term “owner” refers to the owner prior to judicial sale, in contrast to the “purchaser”.

66. Determining ownership of a ship at law differs between legal systems. For the purposes of the convention, it is not necessary to resort to a conflict of law analysis to identify the “owner”. Instead, it is sufficient for the term “owner” to be defined by reference to the fact of registration (or recordation) as the owner in the register in which the ship is registered (or entered). This may be more than one person.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, para. 22
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 24

10. Definition of "purchaser" (article 2(i))

67. The term "purchaser" is used to designate the person to whom the judicial sale confers clean title to the ship, as well as the person entitled to request action on registration under article 7. Certain particulars of the purchaser are also part of the minimum information to be contained in the certificate of judicial sale (article 5(2)(i)).

68. As noted above (para. 66), determining ownership of a ship at law, including passage and opposability of title, differs between legal systems. As the convention does not address the transfer of ownership, it is not necessary for the definition of "purchaser" to involve a conflict of law analysis or to refer to ownership. Instead, it is sufficient for the purposes of the convention for the term "purchaser" to be defined by reference to the fact that the ship was disposed to the purchaser.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 25–27
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 27

11. Definition of "subsequent purchaser" (article 2(j))

69. The term "subsequent purchaser" is used only to designate the persons entitled to request action on registration under article 7. For a discussion on accommodating subsequent purchasers, see remarks on article 7.

70. While the ship may be disposed to another person in a variety of ways, the definition of "subsequent purchaser" covers only persons who have "purchased" the ship.

References to preparatory work

Document	*Reference*
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 34–38
Report of the fortieth session of Working Group VI	A/CN.9/1095, paras. 18–21

12. Definition of "State of judicial sale" (article 2(k))

71. The term "State of judicial sale" is used throughout the convention. The definition is not limited to States Parties, although the use of the term in the convention suggests that it refers only to States Parties.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, para. 33
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 33

13. Other terms not defined

(a) "Bareboat charter registration"

72. Several provisions of the convention refer to the "bareboat charterer", the "bareboat charter registrar", "bareboat charter registration" and the "bareboat charter registry". None of those terms is defined in the convention. The United Nations Convention on Conditions for Registration of Ships (1986)[16] defines a "bareboat charter" as a "contract for the lease of a ship, for a stipulated period of time, by virtue of which the lessee has complete possession and control of the ship, including the right to appoint the master and crew of the ship, for the duration of the lease". The lessee is referred to as the "bareboat charterer".

73. The practice of bareboat charter registration is recognized under the law of many States. There are two aspects of bareboat charter registration. The first aspect is the practice whereby a State permits its registered ship to fly a foreign flag. This practice is commonly referred to as "flagging out" or "bareboat charter-out" registration. The second aspect is the practice whereby a State permits a foreign-registered ship to fly its flag temporarily (i.e. for the period of the charter). This practice is commonly referred to as "flagging in", or "bareboat charter-in" registration. In some States, the law provides only for bareboat charter-in registration. The law in other States does not provide for either aspect of bareboat charter registration.

74. The procedures to give effect to bareboat charter registration differ between States. The United Nations Convention on Conditions for Registration of Ships (1986) seeks to harmonize some of the procedures and terminology relating to bareboat charter-in registration among States that recognize the practice. The present convention does not seek to contribute to those harmonization efforts. It does, however, seek to refer to procedures and use terminology consistent with other maritime law conventions. The convention does not require a State Party to recognize the practice of bareboat charter registration under its law.

Reference to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, para. 99

(b) "Person"

75. The term "person" is used in the convention primarily to define the "owner" and "purchaser" of a ship. Consistent with other legislative texts prepared by UNCITRAL, the convention does not define the term, which should be understood broadly to encompass both legal and natural persons, as well as States and State entities.

[16] The text of the convention is contained TD/RS/CONF/23.

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 23–24
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 25–26

(c) "Register", "registrar" and "registry"

76. In provisions concerning registration, the convention seeks to use terminology that is consistent with other maritime law conventions. Accordingly, the convention uses the terms "register", "registrar" and "registry" as follows:

(a) The term "register" refers to the record in which particulars of a ship, mortgage, hypothèque or (registered) charge are recorded;

(b) The term "registry" refers to the entity which maintains the register; and

(c) The term "registrar" refers to the person who administers the registry.

77. The convention uses the term "register of ships" but does not define the term. It does, however, distinguish the "register of ships" from an "equivalent register" in which a ship is registered. The reference to "register of ships" and "equivalent register" acknowledges the broad definition of the term "ship", which, further to the remarks on article 2(b), covers vessels that are entered in registers other than what might be named or commonly regarded as the "register of ships".

References to preparatory work

Document	*Reference*
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, para. 33
Report of the fortieth session of Working Group VI	A/CN.9/1095, paras. 95 and 104

(d) "State of registration"

78. Several provisions of the convention refer to the "State of registration". Article 4(3)(b) uses the term to refer to the State in which the mortgage, hypothèque or registered charge is registered, while article 7(c) uses the term to refer to the State in which the ship is registered. By virtue of the definitions of "mortgage or hypothèque" and of "registered charge", these are one and the same State.

(e) "Time of judicial sale"

79. Several provisions of the convention refer to the time of judicial sale. The convention purposefully does not define the time of judicial sale but instead defers to the law of the State of judicial sale on that issue (see further remarks on article 4(1)).

D. Article 3. Scope of application

80. Article 3 delimits the scope of the convention. Article 3(1) prescribes certain judicial sales to which the convention does not apply by reference to (a) whether the State of judicial sale is party to the convention (the "geographic scope"), and (b) whether the ship was physically present within the territory of the State of judicial sale (the "physical presence requirement"). Article 3(2) excludes State-owned or operated vessels.

1. Geographic scope (article 3(1)(a))

81. By virtue of article 3(1)(a), the convention establishes a "closed" regime that applies only among States Parties. Nothing in the convention prevents a State from giving effect – under its domestic law – to judicial sales conducted in a non-State party on terms similar to those provided for under the convention.

82. A judicial sale of a ship does fall outside the scope of application merely because the ship is registered in a State that is not party to the convention. Admittedly, that State would not be bound, as a matter of international law, to give effect to the judicial sale or to take action on the registration of the ship upon presentation of the certificate of judicial sale issued under article 5 of the convention, which would limit the protections that the convention could provide to the sale.

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 47, 52–53
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 16–18
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, para. 39
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 32, 39–42

2. Physical presence requirement (article 3(1)(b))

83. The physical presence requirement in article 3(1)(b) recognizes that, in practice, the judicial sale of a ship is typically preceded by the arrest of the ship which, under the harmonized rules established in the Arrests Conventions, can only occur in the territory of the State in which the arrest is made. The requirement does not apply at the time of arrest but "at the time of the sale".

84. The purpose of the physical presence requirement is to ensure a jurisdictional link between the court (or other public authority) under whose authority the judicial sale was conducted and the ship. The convention purposefully does not define the time of judicial sale but instead defers to the law of the State of judicial sale on that issue (see article 4(1)). Nonetheless, the words "at the time of the sale" in article 3(1)(b) need to be understood in the context of the convention, in particular the definition of "judicial sale" in article 2(a) and article 4(2), which acknowledges that notification of a judicial sale occurs "prior to the judicial sale". Just as the procedure for a judicial sale differs between legal systems, so does the time at which the court of judicial sale (or other public authority) exercises jurisdiction over the ship. Some legal systems may consider jurisdiction to be exercised over a period (e.g. from the commencement to the conclusion of the judicial sale proceedings), while other legal systems may consider jurisdiction to be exercised at a particular time (e.g. when the court orders, approves or confirms the disposal of the ship to the purchaser, or upon completion of the judicial sale). In all cases, article 3(1)(b) requires the physical presence of the ship at the final stage of the judicial sale procedure, when the ship is awarded to the successful purchaser.

85. The physical presence requirement is not intended to prevent existing practices by which (a) proceedings for the arrest of a ship or other proceedings leading to a judicial sale can be commenced before the ship enters territorial waters, or (b) the ship is released from arrest pending its judicial sale.

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, para. 28
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 50 and 83
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 22–25, 82
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, paras. 50–56

3. Exclusion of State-owned or operated vessels (article 3(2))

86. Like the International Convention on Maritime Liens and Mortgages (1993), the convention excludes State-owned or operated vessels from scope. The wording of article 3(2) is based on article 16(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).[17]

87. Article 3(2) specifies that the exclusion of a State-owned or operated vessel other than a warship or naval auxiliary that is used only on government non-commercial service applies if the vessel is so used "immediately prior to" the time of judicial sale. Referring to a time immediately prior to the time of sale is designed to ensure that the exclusion is given full effect in practice. Specifically, it acknowledges that, by the time of the sale itself, the ship would be within the jurisdiction of the court of judicial sale (or other public authority conducting the sale) and thus not capable of being used "only on government non-commercial service".

88. The exclusion in article 3(2) may find little application in practice given that (a) such vessels are already immune from arrest under the harmonized rules established in the Arrests Conventions, and (b) the definition of "ship" requires the relevant vessel to be capable of being "the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale".

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, para. 40
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 40–42
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, para. 46
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, para. 48

4. Matters of substantive scope not addressed in article 3

(a) Clean title sales

89. As noted above (para. 24), the convention leaves it to the substantive provisions to limit its scope to judicial sales that confer clean title. This approach acknowledges that, for some jurisdictions, the notice requirements in article 4 are applicable at a time in the judicial sale proceedings at which it is not yet known whether the sale will

[17] The text of the convention is contained in the annex to A/RES/59/38.

result in the conferral of clean title. It also avoids potential difficulties of introducing a requirement to ascertain the content of foreign law (i.e. whether a judicial sale confers clean title) in order to determine the substantive scope of the convention.

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 35–38, 92–93
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, para. 43
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 36, 39–45
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053, paras. 13–15
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 43–47

(b) Forced sales in the enforcement of tax, customs or criminal law

90. Concerns were expressed during the preparation of the convention about applying its regime to the sale of ships that are seized in the enforcement of public law, such as tax, customs or criminal law. However, it was felt that it would not be appropriate to address those concerns by excluding such sales from scope, particularly given that, in some jurisdictions, a ship so seized could still be sold by judicial sale with proceeds made available to creditors. Instead, those concerns are addressed in the definition of "judicial sale", particularly the requirement in subparagraph (ii) for the proceeds of sale to be made available to creditors (see remarks on article 2(a)).

References to preparatory work

Document	*Reference*
Report of the thirty-fifth session of Working Group VI	A/CN.9/973, paras. 18–19, 79, 90
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007, paras. 35–39
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1, paras. 30, 34–35
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089, paras. 49–50