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Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-eighth session (Vienna, 19–23 April 2021)

Contents

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I. Introduction

1. At its thirty-eighth session, the Working Group continued its work preparing an international instrument on the judicial sale of ships in accordance with a decision taken by the Commission at its resumed fifty-third session (Vienna, 14–18 September 2020).[1] This was the fourth session at which the topic was considered. Further information on the earlier work of the Working Group on the topic may be found in document A/CN.9/WG.VI/WP.89, paragraphs 4–7.

II. Organization of the session

2. The thirty-eighth session of the Working Group was held from 19 to 23 April 2021. The session was organized in accordance with the decision of the States members of the Commission on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19) pandemic, adopted on 19 August 2020 and extended by decision adopted on 9 December 2020 (see annex I of document A/CN.9/1038 and A/CN.9/LIII/CRP.14). Arrangements were made to allow delegations to participate in person at the Vienna International Centre and remotely.

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Canada, Chile, China, Côte d'Ivoire, Croatia, Czechia, Dominican Republic, Ecuador, France, Germany, Indonesia, Iran (Islamic Republic of), Italy, Japan, Malaysia, Nigeria, Pakistan, Peru, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Armenia, Bulgaria, Cyprus, Denmark, Egypt, Greece, Iraq, Luxembourg, Madagascar, Malta, Paraguay, Portugal, Qatar and Slovenia.

5. The session was attended by observers from the Holy See and from the European Union.

6. The session was attended by observers from the following international organizations:

(a) *United Nations system*: International Maritime Organization (IMO);

(b) *Intergovernmental organizations*: Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS);

(c) *International non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), Ibero-American Institute of Maritime Law (IIDM), International and Comparative Law Research Center (ICLRC), International Association of Judges (IAJ), International Bar Association (IBA), International Chamber of Shipping (ICS), International Union of Judicial Officers (UIHJ), International Union of Marine Insurance (IUMI) and Law Association for Asia and the Pacific (LAWASIA).

7. In accordance with the above-mentioned decisions (see para. 2), the following persons continued their office:

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Vikum DE ABREW (Sri Lanka)

[1] *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 51(f).

8. The Working Group had before it the following documents:

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.89);

(b) An annotated third revision of the Beijing Draft [2] prepared by the Secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-seventh session (A/CN.9/WG.VI/WP.90) ("third revision").

9. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.

2. Adoption of the agenda.

3. Future instrument on the judicial sale of ships.

III. Deliberations and decisions

10. The deliberations and decisions of the Working Group on the topic are contained in chapter IV below.

11. The Working Group focused its deliberations on the following issues: (a) dealing with clean title sales; (b) provisions relating to the certificate of judicial sale; (c) provisions of article 9 not considered at the thirty-seventh session; and (d) definitions not considered at the thirty-seventh session. In view of the reduced meeting times owing to limitations arising from the format of the session, informal consultations were held during the session to exchange views on those issues, as well as on proposals put forward during the session on other issues.

12. Differing views were expressed on the merits of the informal consultations. It was observed that, while it was legitimate to use informal consultations to make progress given time constraints, not all delegations had taken part in the informal consultations during the session, and work had been advanced on certain issues without those issues being fully deliberated in the meetings of the Working Group. It was added that the Working Group should not proceed with its work on that basis. In response to those observations, it was noted that the informal consultations had been useful by giving participants in the Working Group session additional time to exchange views on various matters, which had allowed the Working Group to cover all the issues that had been put forward for deliberation. It was pointed out that the informal consultations had been open to all delegations via remote participation and had attracted a relatively large number of delegates. It was added that no decision had been made through informal consultations, and that the views exchanged during the consultations had been consistently reported back to the meetings of the Working Group, where delegates had the opportunity to reiterate views expressed during the consultations. Informal consultations were a common practice in various international bodies, including within the United Nations, and States were always free to exchange views and consult with one another on matters of common interest.

IV. Future instrument on judicial sale of ships

A. Dealing with clean title sales

13. The Working Group was reminded of its deliberations at the thirty-seventh session on the role of clean title in defining the scope of application of the draft convention (A/CN.9/1047/Rev.1, paras. 39–45). It was recalled that the issue had arisen due to the operation of the notice requirements in article 4 in States in which it might not be known at the start of a judicial sale procedure whether the sale would

[2] In this document, the term "Beijing Draft" or "original Beijing Draft" refers to the draft convention on the recognition of foreign judicial sales of ships, prepared by CMI and approved by the CMI Assembly in 2014, the text of which is set out in A/CN.9/WG.VI/WP.82.

result in the conferral of clean title, and therefore whether the sale fell within the scope of the convention under article 3(1)(b). It was added that the issue was also linked to the function of the notice requirements, and brought into play article 6, which gave international effect only to clean title sales that were conducted in accordance with the notice requirements.

1. Article 3(1)(b)

14. The Working Group considered a proposal to delete article 3(1)(b), and to amend articles 5 to 10 to include a condition that they applied only if the judicial sale conferred clean title on the purchaser. It was explained that the proposal was based on an assumption that the preference of the Working Group was for the notice requirements to function as a stand-alone requirement that applied to all judicial sales, regardless of whether they conferred clean title on the purchaser, and not merely as a condition for the recognition regime under the draft convention (cf. A/CN.9/1047/Rev.1, para. 42). The Working Group heard an alternative suggestion to redraft article 3(1)(b) to declare that the convention applied if the State of judicial sale issued a certificate of judicial sale conferring clean title on the purchaser. It was explained that this would clarify that the effect of the judicial sale was a matter for the law of the State of judicial sale, and that the notice requirements only came into play if the sale conferred clean title.

15. While some support was expressed for the proposal, the prevailing view in the Working Group was that article 3(1)(b) should be retained in its present form. The Working Group agreed, however, that it would be desirable to clarify that articles 5 to 10 only applied to judicial sales that conferred clean title, which could be done by inserting references to the certificate issued in accordance with article 5, as the certificate itself presupposed the conferral of clean title.

2. Function of the notice requirements

16. Differing views were expressed on the operation of the notice requirements. On one view, the notice requirements should apply to all judicial sales, regardless of whether they conferred clean title on the purchaser. It was suggested that the chapeau of article 4(1) could be amended to clarify this by referring to “any” judicial sale. On another view, it was felt that the draft convention should not impose notice requirements on judicial sales to which the recognition regime did not apply; notification of those sales should be left entirely to the law of the State of judicial sale. It was observed that the model notice form contained in Appendix I presumed that a notice would only be given if the sale conferred clean title, and would need to be reviewed to ensure that it reflected the operation of the notice requirements.

17. The prevailing view in the Working Group was that the notice requirements did not serve as a stand-alone requirement but needed to be read together with article 5 and the provisions that followed.

3. Content of the notice requirements

18. A question was raised as to whether the court of judicial sale was required to make its own enquiries with the registry to determine the persons to be notified in accordance with article 4(1)(b), or whether article 4(1) was merely concerned with listing the persons to be notified, such that any requirement to make enquiries, obtaining the information necessary to give notice, and the responsibility for effectively notifying those persons was left to the domestic law of the State of judicial sale. In response, it was noted that the original Beijing Draft provided for the notice of judicial sale to be given either by the court of judicial sale or the parties to the proceedings and that that provision was not reproduced in the first revision and subsequent revisions on the understanding that the identity of the notice giver would be left to domestic law. Accordingly, the requirement for the giver to make enquiries, obtaining the information necessary to give notice, and the responsibility for

effectively notifying those persons was also left to the domestic law of the State of judicial sale. Support for this understanding was expressed in the Working Group.

4. Article 6

19. The Working Group turned its attention to the proviso in article 6 that the judicial sale was conducted in accordance with the notice requirements in article 4. A concern was raised that the proviso would expose a judicial sale to challenge outside the State of judicial sale in a manner inconsistent with article 9 (which conferred exclusive jurisdiction on the courts of the State of judicial sale to hear challenges relating to the judicial sale procedure) and article 10 (which only provided for the international effect of the judicial sale to be refused on public policy grounds). Accordingly, it was suggested that the proviso should be deleted.

20. It was observed that the issue of inconsistency with articles 9 and 10 was not raised by the alternative formulation for article 6 that was presented in the third revision. It was recalled that the alternative formulation followed a request to link the international effect of a judicial sale to the production of the certificate of judicial sale (A/CN.9/1047/Rev.1, para. 83). Some support was expressed for the alternative formulation, although it was noted that it repeated what was already provided for in article 5, and could imply an obligation to establish a regime for the recognition of foreign certificates. It was suggested that the link could instead be established more simply within existing article 6 by referring to the international effect of a judicial sale "for which a certificate has been issued". Broad support was expressed for that suggestion in preference to the alternative formulation, and the Working Group agreed to amend article 6 accordingly and not to proceed with the alternative formulation. It was added that there could still be value in supplementing article 6 with an express reference to the recognition of the certificate, which could pick up the language in paragraph (a) of the alternative formulation.

21. It was added that the amendment should assuage the concerns that motivated support at the thirty-seventh session for retaining the proviso in article 6. It was explained that, by conditioning article 6 on the issuance of a certificate of judicial sale, the notice requirements would not be irrelevant to the international effect of the judicial sale because, by virtue of article 5(1)(a), the certificate would only be issued if the requirements were met. While some support was expressed for retaining the proviso, the preponderant view in the Working Group was to delete the proviso, and therefore for article 6 to be further amended to delete the words "provided that the judicial sale was conducted in accordance with the notice requirements in article 4".

B. Provisions relating to the certificate of judicial sale

1. Finality of judicial sale (article 5(1))

22. Differing views were expressed on the two options presented in article 5(1). On one view, option B was acceptable, although it was noted that the concept of "ordinary review" would need to be elaborated, including its relationship with the concept of "review" in article 5(6). It was added that option B enhanced the value of the certificate as it indicated that the sale was no longer subject to avoidance. On another view, neither option was acceptable. It was added that the production of documents contemplated in option A would already be addressed in the "regulations and procedures" of the issuing authority, while the completion of the sale was already assumed by article 5(1)(c), which required the certificate to record that the purchaser had acquired clean title to the ship.

23. Broad support was expressed for the view that the finality of a judicial sale was a matter for the law of the State of judicial sale. Alternative proposals were put forward to reflect the need for finality as a basis for issuing the certificate. One proposal was to refer to the "completion" of the sale, while another was to refer to the sale order being "effective and enforceable". It was clarified that the notion of "completion" did not refer to the performance of all actions that a purchaser might

wish to take in reliance on the judicial sale, such as the deregistration and reregistration of the ship.

24. It was suggested that the certificate of judicial sale should be issued automatically and not "at the request of the purchaser". Broad support was expressed for that suggestion.

25. A question was raised as to the need to retain the requirement for the issuing authority to issue the certificate "in accordance with its regulations and procedures". It was suggested that the requirement was superfluous as the issuing authority would always act according to its regulations and procedures. However, it was recalled that the words had been originally inserted to capture matters such as the payment of fees for obtaining the certificate (cf. A/CN.9/WG.VI/WP.87, footnote 19). It was added that retaining the requirement was not inconsistent with the automatic issuance of the certificate.

26. After discussion, the Working Group agreed to amend the chapeau of article 5(1) along the following lines:

> "Upon completion of the sale to the purchaser under the law of the State of judicial sale, the public authority designated by the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that:"

2. International effect of certificate if judicial sale avoided (article 5(6))

27. The Working Group was reminded of its deliberations on article 5(6) at the thirty-seventh session (see A/CN.9/1047/Rev.1, para. 74). It was explained that an application to avoid a judicial sale would be accompanied by an application to annul the certificate, as contemplated in article 9(1), and that the avoidance of the judicial sale would therefore result in the annulment of the certificate under the law of the State of judicial sale. It was added that applications to avoid a judicial sale after issuance of the certificate of judicial sale would be exceedingly rare. It was also noted that the amendments agreed by the Working Group to article 5(1) (see para. 26 above), by which the certificate would only be issued upon completion of the sale, would further reduce the likelihood of such applications.

28. While there was broad agreement within the Working Group on the effect of avoidance on the *domestic* effect of the certificate, differing views were expressed on the effect of avoidance on the *international* effect of the certificate (i.e. its effect in a State other than the State of judicial sale). On one view, the international effect of the certificate depended on the continuing validity of the judicial sale. It was observed that the Working Group never conceived of the certificate itself as the instrument that conferred clean title but rather as evidence of clean title conferred by the judicial sale, as article 5(5) made plain. It was added that publishing the judgment avoiding the judicial sale in the repository would assist in implementing that approach. Another mechanism could be the issuance of a certificate of avoidance, which would be recognized under the convention as prevailing over the certificate of judicial sale. Yet another mechanism could be to add avoidance of the judicial sale as a ground for refusal under article 10. On another view, the international effect of the certificate should continue even if the judicial sale were avoided in the State of judicial sale. It was added that the only way to deny that effect would be to apply the public policy ground in article 10. It was also added that that approach avoided potential complexities associated with the recognition and enforcement of a foreign judgment avoiding the judicial sale, as previously cautioned in the Working Group (see A/CN.9/1047/Rev.1, para. 105). It was added that the public policy ground could conceivably be invoked by the court referred to in article 7(5) or article 8(4) to repeal the international effect of a certificate that had been annulled in the State of judicial sale.

29. On yet another view, while the international effect of the certificate of judicial sale should continue regardless of the avoidance of the judicial sale, the convention

could provide for limited exceptions. It was suggested that the exceptions could be based on bad faith by the purchaser in connection with the sale, such as committing fraud to procure the sale, or engaging in some other form of wrongdoing. An alternative view was that, rather that serving as grounds for not giving effect to the certificate, the exceptions should serve as grounds for avoiding the judicial sale, which the convention would then prescribe exhaustively. It was added that formulating a single ground based on the sale being contrary to the public policy of the State of judicial sale might afford greater flexibility to the court addressed. In response, it was suggested that the convention should leave the grounds for avoidance to the domestic law of the State of judicial sale. It was also queried whether it was appropriate for the conduct of the judicial sale to be reviewed by the courts in the State of judicial sale through a public policy lens.

30. While the Working Group did not reach consensus on how the convention should deal with the international effect of the certificate in the event that the sale was avoided, broad support was expressed for the following propositions that might frame further discussions on the issue: first, there were at least some circumstances in which the certificate should be denied international effect; second, the registrar should not be required to make enquiries beyond the matters recorded in the certificate or to resolve competing claims with respect to the ship; third, the issue, currently addressed in article 5(6), should be dealt with in the context of article 9; fourth, the complicated task of reversing actions that had already been taken upon production of the certificate, which might involve multiple registrars, was a matter for the domestic law of each State concerned. It was further noted that, to put those further discussions into context, avoidance of the judicial sale was not the only remedy available to an aggrieved party. Moreover, it was noted that the certificate of judicial sale was of limited value to subsequent purchasers, who would ordinarily rely on the bill of sale to establish title in the ship and to seek relief against the prior owner (e.g. the purchaser in the judicial sale) in the event of invalidity further up the chain of title.

31. It was suggested that, if the avoidance of a judicial sale after issuance of the certificate would be an exceedingly rare event, the convention should not seek to find a solution. To that end, it was suggested that provisions of the convention dealing with the effects of avoidance should be deleted (e.g. articles 5(6), 9(3) and 9(4)), and that a new provision should be inserted acknowledging that the effect of avoidance was a matter for the domestic law of the State concerned. In response, it was stated that some States might find value in the issue being resolved in the convention itself. The Working Group agreed that the various options deserved further consideration. For the time being, the Working Group agreed to put article 5(6), 9(3) and 9(4) in square brackets, and to keep article 5(7) in square brackets, and asked the secretariat to propose text for the new provision. It was indicated that, if article 5(7) were to be retained, the Working Group should consider the need to refer to the purchaser or subsequent purchaser, as those parties would not have an interest in publication of the judgment avoiding the judicial sale.

3. Verification of certificate (article 5(4))

32. The Working Group was reminded that the verification procedure contained in article 5(4) had been proposed as an alternative to establishing the repository. Recalling the support for establishing the repository at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 77), the Working Group agreed to delete article 5(4).

4. No legalization of certificate (article 11(1))

33. Broad support was expressed for retaining article 11(1). It was observed that legalization was a time-consuming process that was not suited to the expediency required in the context of the judicial sale of ships. It was also noted that a provision removing any requirement of legalization or similar requirement (such as the issuance of an Apostille) was in keeping with trends in modern treaties on legal cooperation.

34. A question was raised as to whether it would be realistic to require registrars to accept the certificate without any assurance as to its authenticity. It was observed that the law in some States required all foreign public documents to be authenticated, and that the convention should respect that requirement. It was added that the publication of certificates in the online repository was not an adequate substitute to provide assurance of authenticity. As a compromise, it was proposed that the convention could give States the option to declare, when joining the convention, that they would not apply article 11(1) or, conversely, that States would retain their existing requirements, such as the issuance of an Apostille, but article 11(1) would be available to States on an opt-in basis. The Working Group did not consider that proposal any further. A view was expressed in support of maintaining the requirement for copies produced at the request of the registrar in accordance with article 7(4) to be certified, and of the importance of translating the certificate into the official language of the State in which the certificate was produced (art. 7(3)).

5. Electronic certificate (articles 11(2) and 11(3))

35. It was noted that article 11(3) was redundant as article 11(2) already recognized the use of electronic certificates. It was also queried whether article 11(2)(c) should require the method to "prevent", rather than "detect", any alteration.

36. It was explained that articles 11(2) and 11(3) were based on existing UNCITRAL texts dealing with electronic communications. While article 11(2) was based on a combination of functional equivalence provisions contained in article 9 of the United Nations Convention of the Use of Electronic Communications in International Contracts (2005) ("ECC"), article 11(3) was based on the non-discrimination provision contained in article 8(1) of the ECC. It was explained that article 11(3) did not prevent an electronic certificate from being rejected on the ground that it did not comply with the requirements of article 11(2).

37. Broad support was expressed for retaining a provision on the use of electronic certificates, and for formulating the provision on the basis of existing UNCITRAL texts. The Working Group agreed to retain articles 11(2) and 11(3).

6. Placement of article 11

38. The Working Group was reminded of a proposal at its thirty-seventh session to incorporate article 11 into article 5 (see A/CN.9/1047/Rev.1, para. 75). The proposal received broad support, and the Working Group asked the secretariat to relocate the provisions of article 11 either in article 5 or in a separate adjacent article.

C. Definitions

1. "Charge" (article 2(a))

39. It was recalled that the term "charge" was a component of "clean title" (as defined in article 2(b)), and that it should be given a broad meaning (cf. A/CN.9/1007, para. 13). The Working Group acknowledged that the definition did not require the charge to be registered.

40. It was observed that, while it included a maritime lien, the definition of "charge" was not qualified by reference to applicable law as was the definition of "maritime lien" in article 2(d). A question was raised as to whether, absent that qualification, the definition of "charge" could be interpreted as comprising only those rights that were recognized by the law of the forum. The Working Group decided that there was no need to amend the definition to refer to charges recognized under applicable law.

41. A view was expressed that the definition should not confuse the substance of a charge (i.e. the "right") from the procedure for its enforcement (i.e. by "arrest" or "attachment"). Accordingly, it was proposed that the words "whether by means of arrest, attachment or otherwise" should be deleted. No support was expressed for the proposal.

42. It was recalled that not all the examples listed in the English version of the definition were readily translatable into other languages (see A/CN.9/973, para. 80). It was suggested that attention should be paid to that issue.

43. Attention was drawn to references in the text to "registered charges"; article 4(1)(b) provided for the notification of holders of a "registered charge", while article 7(1)(a) provided for the deletion of any "registered charge" attached to the ship. It was recalled that article 1(o) of the original Beijing Draft had defined the term "registered charge" to mean "any charge entered in the registry of the ship that is the subject of the judicial sale". It was explained that the definition had been removed in subsequent revisions in an effort to minimize the number of definitions without elaborating its substance in the provisions in which it was used (see A/CN.9/973, para. 76). Broad support was expressed for reinserting a definition of the term "registered charge" that would specify the relevant registry along the lines of the original Beijing Draft, and the Working Group agreed to amend the text accordingly.

2. "Maritime lien" (article 2(d))

44. It was recalled that the definition of "maritime lien" had been revised to address a concern raised at the thirty-sixth session of the Working Group (A/CN.9/1007, para. 19), and that the revised definition had not yet been considered by the Working Group. A question was raised as to whether it was clear to which law the words "applicable law" referred. It was noted that those words would accommodate an application of the private international law rules of the forum. The Working Group agreed to retain the revised definition without further amendment.

3. "Mortgage" (article 2(e))

45. It was observed that, even though the term "mortgage" was defined in the English version of the text to mean "any mortgage or *hypothèque*", it would still be useful to refer to "*hypothèque*" alongside "mortgage" in the definition of "charge". A proposal followed by which the formulation "mortgage or *hypothèque*" should be used throughout the text – including as the defined term in article 2(e) – instead of "mortgage". It was added that a similar approach should be adopted in the French version of the text, in which the term "*hypothèque*" was defined to mean "*toute hypothèque ou tout « mortgage* »". While a view was expressed that the proposed formulation was neither necessary nor desirable, it was observed that a similar formulation was used throughout the International Convention on Maritime Liens and Mortgages (1993) ("MLMC 1993"). After discussion, the Working Group accepted the proposal and agreed to amend the text accordingly, noting that the amendment was a matter of drafting and not of substance.

46. It was noted that the origin and scope of a "mortgage" differed from that of an "*hypothèque*", and that the difference had raised challenges with respect to the recognition of foreign mortgages or *hypothèques* in jurisdictions in which one or the other was unknown. It was therefore proposed that the convention should refer not only to "mortgage or *hypothèque*" but also to any other right of a similar nature. No support was expressed for the proposal.

47. Questions were raised as to whether it was appropriate to qualify the term "mortgage" in subparagraph (ii) of the definition by reference to the law of the State of judicial sale. It was noted that clean title would thus not be recognized under the convention if the law of the State of judicial sale did not recognize a mortgage registered abroad under subparagraph (i). A proposal was put forward to amend subparagraph (ii) so as to refer to the law of the State of registration. In response, it was noted that the amended subparagraph (ii) would become redundant, as it would be assumed that a mortgage registered in the State of registration was recognized by the law of that State. It was observed that, in any event, it was unnecessary for the convention to address the recognition of foreign mortgages as it was not concerned with the distribution of proceeds or other matters in which the issue of recognition might be consequential. It was added, for instance, that recognition was not necessary

to apply the requirement to notify mortgage holders under article 4(1)(b). Although some support was expressed for retaining subparagraph (ii), there was broad support for its deletion.

48. It was noted that, while the definition referred to a mortgage being "registered or recorded" in the State of registration, article 4(1)(b) only referred to a mortgage being "registered". It was suggested that the text should refer only to a mortgage being "registered", which would ensure consistency with the MLMC 1993. It was explained the inclusion of the words "registered or recorded" had been agreed by the Working Group at its thirty-sixth session (A/CN.9/1007, para. 21). The Working Group heard that different terminology was used in different States, and even within the same State, to refer essentially to the same process, and that it was sufficient to use the word "registered" to cover that process. The Working Group agreed to amend the text accordingly. It was added that, while it was important to ensure that the definition of "mortgage" and article 4(1)(b) were drafted in consistent terms, efforts to align the two provisions should be careful not to remove the proviso in article 4(1)(b) that the registry be open to public inspection.

49. The point was made that the definition of mortgage was linked to the definition of "ship". It was suggested that the Working Group might wish to consider limiting the convention to ships that are registered in a State party, and thus to mortgages registered in a State party. In response, a view was expressed that the convention should not be so limited. The Working Group did not consider the suggestion or the definition of "ship" any further.

D. Other issues

1. Time of judicial sale

50. The Working Group heard a proposal to clarify in an explanatory note the meaning of the words "time of the [judicial] sale", as they appeared in article 3(1)(a). It was also proposed that the note should state that the time of the sale covers the period from the time of the notice of judicial sale to the time at which ownership in the ship is transferred to the purchaser.

51. The Working Group was reminded of its deliberations on the issue at its thirty-seventh session (A/CN.9/1047/Rev.1, paras. 22–24), at which no consensus was reached as to the precise meaning of the words "time of the [judicial] sale". It was nevertheless recalled that there had been general agreement in the Working Group that the words required the physical presence of the ship at the final stage of the procedure when the ship was actually awarded to the successful purchaser. It was added that the final stage of the procedure corresponded with the "completion of the sale", as reflected in the agreed amendments to the chapeau of article 5(1) (see para. 26 above).

52. There was broad support for clarifying the meaning of the words, particularly given their role in defining the scope of application of the convention. It was added that different interpretations of the time of sale could result in States exercising conflicting jurisdiction over the ship. There was also broad support for not including a definition in the text of the convention itself or for amending article 3(1)(a). It was observed that the words also appeared in article 5. It was added that the Working Group should be cautious about defining the term under the guise of an explanatory statement.

53. Some support was expressed for the view that the time of the sale should be understood to cover a period of time, and alternative views were expressed as to when that period would start and end. One alternative put forward was that the period should start when the court orders the sale, which occurred prior to notification, while the period should end when the ship is delivered to the purchaser. It was noted that defining the sale by reference to the transfer of "ownership" would not promote clarity, given that ownership passed at different times under domestic law, including

upon registration of the purchaser as the new owner. It was added that it might also make the convention impossible to apply.

54. Conversely, some support was expressed for the view that the time of sale should be understood not to cover a period of time but rather a moment in time. It was recalled that, in some States, the ship might be allowed by the court to continue sailing pending the actual judicial sale, and that article 3(1)(a) should not be interpreted so as to restrict that practice. Differing views were expressed as to when the moment occurred. On one view, it coincided with the completion of the sale. On another view, it coincided with the court of judicial sale assuming jurisdiction over the ship. On either view, the relevant moment in time was to be determined by reference to the law of the State of judicial sale, and it was queried how far an explanatory note could go to define that moment with greater specificity, bearing in mind the previous deliberations of the Working Group.

55. It was noted that the exercise of jurisdiction was central to the understanding of article 3(1)(a), whose purpose was to ensure that, at the time that the State of judicial sale exercised its jurisdiction, the ship was within the territory of that State. It was also an important reminder that the convention needed to operate within the rules under the United Nations Convention on the Law of the Sea (1982). It was added that article 3(1)(a) was effectively a manifestation of the requirement of a "genuine link" in the context of the judicial sale of ships. It was suggested that, rather than clarify the precise moment in time or period of time covered by the words "time of the [judicial] sale", it was more useful for an explanatory statement to explain the purpose of article 3(1)(a).

56. After discussion, the Working Group agreed to retain the words "time of the [judicial] sale" in article 3(1)(a) and not to include a definition in the text of the convention. It also agreed that any explanatory notes on the convention should clarify the meaning of the words and that the Working Group would consider the issue further in the preparation of those notes. It was indicated that, rather than formulating a specific definition by reference to a moment in time or period of time, the eventual notes would be guided by the general agreement reflected in the report of the thirty-seventh session (A/CN.9/1047/Rev.1, para. 24) and (i) explain the purpose of article 3(1)(a), (ii) clarify that the ship was not required to be in the territory of the State of judicial sale for the entire judicial sale procedure, and (iii) take a flexible approach to identifying instances in which the ship would be required to be in the State of judicial sale.

2. Grounds for avoidance

57. The Working Group heard a proposal to amend article 9(1) of the convention to require the courts of the State of judicial sale to "hear appeals brought by the persons referred to in article 4 for non-compliance with the provisions of that article relating to notice of judicial sale". It was explained that, to safeguard the interests of creditors, it was important for the convention to guarantee the availability of a judicial remedy in the event of non-compliance with the notice requirements.

58. In response, it was noted that article 9 was concerned with exclusive jurisdiction to avoid the judicial sale and not with the grounds for avoidance. The view was reiterated (see para. 29 above) that the convention should leave the grounds for avoidance to the domestic law of the State of judicial sale. It was added that the convention should avoid as much as possible intruding into procedural matters in the State of judicial sale. It was also observed that nothing in article 9 affected the jurisdiction of a State other than the State of judicial sale to hear claims seeking judicial remedies other than avoidance, including an *in personam* claim for damages against the purchaser.

59. Broad support was expressed for the need to safeguard the interests of creditors acting in good faith, and that judicial remedies should be available under domestic law to those creditors who were aggrieved by the conduct of the judicial sale. At the same time, broad support was expressed for maintaining the focus of article 9 on

jurisdiction and not to amend article 9(1) as proposed. It was added that the proposed repository, together with other online tools allowing ships to be tracked in real time, offered creditors additional opportunities to find out when a ship had been arrested and when it was being put up for judicial sale, and therefore to protect their interests. It was also noted that explanatory notes on the convention could address the availability of judicial remedies.

60. As a general remark, it was noted that the Working Group had not accepted several proposals put forward during the session that aimed at ensuring that the requirements of the convention would be respected. A concern was expressed that the Working Group was placing too much reliance on domestic law to enforce compliance with the requirements of the convention.