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Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-ninth session (Vienna, 18–22 October 2021)

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I. Introduction

1. At its thirty-ninth 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 fifty-fourth session (Vienna, 28 June–16 July 2021).[1] This was the fifth 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.91, paragraphs 4–7.

II. Organization of the session

2. The thirty-ninth session of the Working Group was held from 18 to 22 October 2021. The session was held in line with the decision taken by the Commission at its fifty-fourth session to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session.[2] Arrangements were made to allow delegations to participate in person and remotely.

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Libya, Mexico, Pakistan, 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, Venezuela and Viet Nam.

4. The session was attended by observers from the following States: Angola, Bulgaria, Cambodia, Denmark, Egypt, El Salvador, Greece, Jordan, Kuwait, Luxembourg, Malta, Mauritania, Morocco, Myanmar, Nepal, Panama, 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) and World Maritime University (WMU);

(b) *Intergovernmental organizations*: Cooperation Council for the Arab States of the Gulf (GCC);

(c) *International non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), Baltic and International Maritime Council (BIMCO), Barreau de Paris, China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), 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).

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 214(f).

[2] Ibid., para. 248.

7. In accordance with the decision of the Commission (see para. 2), the following persons continued their office:

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Vikum DE ABREW (Sri Lanka)

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

(a) An annotated provisional agenda (A/CN.9/WG.VI/WP.91);

(b) An annotated fourth revision of the Beijing Draft [3] prepared by the secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-eighth session (A/CN.9/WG.VI/WP.92) ("fourth 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 Working Group focused its discussions on articles 1 to 5 of the draft convention, as set out in the fourth revision. The deliberations and decisions of the Working Group are contained in chapter IV below.

IV. Future instrument on judicial sale of ships

A. Article 1. Purpose

11. The Working Group agreed to retain the text of article 1 without amendment (see also paras. 42 and 47 below).

B. Article 2. Definitions

1. Order

12. It was observed that the definitions were presented in alphabetical order based on the English version. It was proposed that the definitions should be presented in a more logical order. For instance, it was proposed to group the definitions of "registered charge" and "charge" and the definitions of "subsequent purchaser" and "purchaser". The Working Group asked the secretariat to look into reordering the definitions for the next revision of the draft convention.

2. "Charge" and "maritime lien"

13. It was observed that the term "charge" was defined to include a right of use. It was recalled that in some jurisdictions a judicial sale did not extinguish rights of use under a registered lease or a bareboat charter. The judicial sale would therefore not confer title that was free and clear of all charges and would thus fall outside the scope of the convention by virtue of article 3(1)(b). It was pointed out that the definition still required the right of use to be "asserted against a ship", and that in some jurisdictions a bareboat charter might not give rise to a right of use that could be asserted against the ship.

[3] 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.

14. It was observed that the term “charge” was defined to include a “maritime lien”, while article 2(d) now referred to the term “maritime lien” as a “charge”. On one view, this created a circular definition. To address the issue, it was proposed to avoid referring to “charge” by referring simply to any maritime lien or privilège maritime recognized under applicable law. Alternatively, it was proposed to delete the definition of maritime lien altogether, which in any case was vague on account of its reference to “applicable law”. On another view, defining “maritime lien” as a charge did not create circularity but rather clarified that a maritime lien was a specific type of charge. It was added that the reference to “applicable law” added value by acknowledging that maritime liens differed among jurisdictions. By doing so, the definition clarified that the term “maritime lien” was not to be given an autonomous meaning. A proposal was made to qualify the definition of “charge” by reference to “applicable law”, although it was observed that careful drafting would be needed and that the reference added little value.

15. The Working Group agreed to retain the definitions of “charge” and “maritime lien” without amendment.

3. “Clean title” and “mortgage”

16. The Working Group recalled that there was broad support at its thirty-eighth session to delete subparagraph (ii) of the definition of “mortgage” (A/CN.9/1053, para. 47). In support of retaining subparagraph (ii), it was observed that the term “maritime lien” was defined by reference to applicable law, and that determining what constitutes a mortgage also involved a conflict of law analysis. After discussion, the Working Group agreed to delete subparagraph (ii).

17. The Working Group recalled the discussions at its thirty-eighth session regarding a proposal to use the term “mortgage or hypothèque” throughout the text (A/CN.9/1053, para. 45). It was observed that the revised text defined both “mortgage” and “hypothèque” to mean a “mortgage or hypothèque”, and therefore gave each term the same meaning. It was cautioned that difficulties could arise when the text was translated into other languages. In response, it was observed that mortgages and hypothèques, while similar, were not identical and that the draft convention should retain both terms. The Working Group therefore agreed to use the term “mortgage or hypothèque” throughout the text, including as the defined term in article 2(e). In particular, it agreed to define the term “clean title” in article 2(b) to mean “title free and clear of any mortgage or hypothèque and of any charge”.

4. “Judicial sale” and the meaning of “other public authority”

18. The Working Group was reminded of a proposal made at the thirty-seventh session to clarify the meaning of the term “other public authority” as it was used in article 2(c)(i) (A/CN.9/1047/Rev.1, para. 32). There was broad agreement that the meaning should be clarified. Several proposals were put forward to that end.

19. First, it was proposed to insert a new definition. As a starting point, the Working Group was invited to consider article 2(2) of Directive 2003/4/EC of the European Union, which defined a public authority to include “government or other public administration, including public advisory bodies, at national, regional or local level” and “any natural or legal person performing public administrative functions under national law”. It was noted that the definition was of limited assistance in the context of a judicial sale. It was also cautioned that the Working Group should avoid importing a legal definition from a particular jurisdiction and that any definition should be formulated by reference to international instruments.

20. Second, it was proposed that each State party could notify the depositary of the authorities competent in its jurisdiction to conduct judicial sales. It was observed that a similar mechanism was already contemplated in article 5(1), and that the final clauses of the convention would provide the necessary machinery for making and modifying notifications. It was also observed that such a mechanism would be very helpful in practice for the courts and registrars of States parties, for instance, to

confirm the authenticity of a certificate of judicial sale. A question was raised about the feasibility of maintaining such a mechanism. In particular, it was observed that the courts in some jurisdictions might have wide discretion in deciding who would carry out the judicial sale, while in States with non-unified legal systems there might be many different authorities competent to conduct judicial sales.

21. Third, it was proposed to amend article 2(c)(i) by inserting the words "legally empowered to do so" after the words "other public authority". While some support was expressed for the proposal, it was pointed out that an authority should be assumed to act only within its legal powers and that, in any case, the same qualification should apply to a "court".

22. Finally, it was proposed that the meaning of the term "other public authority" could be elaborated in an eventual explanatory note. Some support was expressed for that proposal.

23. The Working Group agreed that explanatory material that might accompany the future convention could clarify the meaning of the term "other public authority" using some elements of the various proposals. For the time being, the Working Group agreed to retain the definition of "judicial sale" without amendment.

5. "Owner"

24. The Working Group agreed to retain the definition without amendment.

6. "Person"

25. Broad support was expressed for deleting the definition. The view was expressed that the definition was of little value to determining the meaning of the term "person". It was observed that the term was used in the text essentially to identify who could own a ship. It was added that UNCITRAL instruments tended not to define the term. It was also observed that the definition referred to a "partnership", which did not have a uniform meaning across legal systems.

26. The point was made that the definition was useful in that it clarified that a State could be the owner of a ship, which might not otherwise be evident from the term "person". In response, it was observed that article 3(2), which excluded State-owned ships from scope, presupposed that a State could be the owner of a ship. The Working Group agreed to delete the definition.

7. "Purchaser"

27. While there was some support for the view that the definition was unnecessary, it was observed that drawing a distinction between owner and purchaser was important for some legal systems, particularly because the definition suggested that the sale process needed to be completed for a bidder to be a "purchaser", but that such person might not yet legally be the "owner" of the ship. The Working Group agreed to retain the definition and to remove the square brackets.

8. "Registered charge"

28. Broad support was expressed for respecting different practices among jurisdictions regarding the registration of charges. Several proposals were put forward to simplify the definition of "registered charge". One proposal was to refer to a charge that was "registered in the registry where mortgages or hypothèques are registered", although it was observed that that proposal did not capture the practice in some jurisdictions of registering charges in a registry other than the registry of ship mortgages. Another proposal was to refer to a charge that was registered in the manner provided by the law of the State of registration. Yet further proposals were put forward to work with the existing definition, including a proposal to replace the words in square brackets with "or in any different registry where mortgages or hypothèques are registered" and a proposal to retain the words in square brackets but to delete the words "in the State in whose registry of ships or equivalent registry the ship is

registered". It was observed that the definition of the term "mortgage or hypothèque" in article 2(e) made those words redundant.

29. After discussion the Working Group agreed to retain the definition, to remove the square brackets, and to delete the words "in the State in whose registry of ships or equivalent registry the ship is registered".

9. "Ship"

30. It was pointed out that the words in square brackets established two requirements: first, a requirement for the ship to be registered; second, a requirement for the registry to be open to public inspection. The Working Group recalled that it had agreed to insert the words at its thirty-seventh session in the context of discussions about inland navigation vessels (A/CN.9/1047/Rev.1, paras. 26 to 28). The view was reiterated that the definition included inland navigation vessels.

31. While there was broad support for retaining the first requirement, diverging views were expressed on the second requirement. On one view, the requirement effectively excluded from scope the judicial sale of ships registered in a State with a closed registry. It was opined that maintaining the second requirement would allow such a State, as a party to the convention, to benefit from the convention without having its ships subject to the convention, since judicial sales in that State of foreign ships registered in open registries would be within scope. It was queried whether that result was appropriate. In response, it was noted that, while most registries of seagoing vessels were open, inland navigation vessel registries might not be. A question was therefore raised as to whether it was desirable to limit the scope of the convention in that manner, which might dissuade States from joining. On another view, the requirement was fundamental to the protection of creditors. It was observed that the notification requirements depended on access to information set forth in the registry of ships. It was added that the requirement should not be characterized as a scope issue. After discussion, the Working Group agreed to retain both requirements, and thus to retain the definition and to remove the square brackets.

32. A proposal was reiterated to limit the convention to ships that are registered in a State party (see A/CN.9/1053, para. 49). It was added that the effectiveness of the recognition regime depended on action by the registrar under article 7, which would not be obligatory if the State of registration was not party to the convention. In response, it was noted that the proposal did not go to the content of the definition of "ship".

10. "State of judicial sale"

33. The Working Group agreed to retain the definition without amendment.

11. "Subsequent purchaser"

34. It was observed that the definition assumed that a person could only acquire a ship after its judicial sale by purchasing it, which ignored other means of transferring ownership. It was proposed to delete the definition and to use the term "subsequent owner".

35. While some support was expressed for expanding the types of transfers covered by the definition, it was recalled that earlier discussions within the Working Group had highlighted difficulties associated with referring to "ownership" in the text (see A/CN.9/1007, para. 25).

36. The view was expressed that it was dangerous to extend the protection of the convention to an unlimited chain of subsequent purchasers, which could favour fraudulent transactions and would make it difficult for the registrar to ascertain the regularity of transfers when faced with a request for deregistration or new registration. In support of retaining the provision, it was noted that the subsequent purchase might result from an entirely legitimate transaction and sometimes even be the necessary

consequence of the laws in the State of registration, for example when a purchaser was required to establish a local legal entity to which the ship needed to be transferred.

37. The point was made that the term "subsequent purchaser" was used in the text essentially to define the actions that a registrar was required to take in article 7 upon production of the certificate of judicial sale. In that context, it was proposed that the definition should refer to a person who "has purchased" the ship. It was also observed that the definition covered not only the first subsequent purchaser but also later purchasers (see A/CN.9/1007, para. 27), but there was some support for limiting the protection only to the first subsequent purchaser in order to permit verification of the regularity of the chain of transfers by the registrar.

38. The Working Group agreed to retain the definition without amendment, and to further consider the application of the convention to subsequent purchasers in its consideration of article 7.

C. Article 3. Scope of application

1. Geographic scope

39. The Working Group heard a proposal to insert a new subparagraph before article 3(1)(a) in the following terms: "(a bis) The judicial sale was conducted in a State party". It was recalled that the Working Group had agreed at its thirty-seventh session that the recognition regime under the convention should only apply between States parties (A/CN.9/1047/Rev.1, para. 18), and that that agreement was reflected in article 1.

40. While some considered the proposed new subparagraph superfluous in view of article 1, the prevailing view was that the additional text provided clarity by expressly making the place of the judicial sale an element of the geographic scope of application of the convention. An additional proposal was put forward to consider how the different elements of articles 1 and 3(1) could be better allocated among the preamble, the purpose provision (article 1) and the scope of application provision (article 3).

41. There were, however, expressions of concern about the restrictive impact of the new subparagraph, which might imply that a State party could not recognize the effects of a foreign judicial sale merely because the State in which the sale was conducted was not a State party. In response, the view was reiterated that a State party would retain the ability to treat such a sale in substantially the same manner as a convention sale under its domestic law, although the practicalities of doing so were again questioned, particularly given that there would be no obligation on the foreign State to issue a certificate complying with the requirements of the convention (see A/CN.9/1047/Rev.1, para. 17). It was added that certainty as to the residual application of domestic law recognition regimes would allay the concern.

42. The Working Group agreed to recast the geographic element in article 1 as a matter of scope of application, and asked the secretariat to formulate drafting proposals for reallocating the remaining elements of articles 1 and 3. The Working Group also agreed to defer further discussion of the residual application of domestic law recognition regimes to its consideration of article 13.

2. Dealing with clean title sales

43. The Working Group heard a proposal to amend article 3(1)(b) as follows: "Under the law of that State, a judicial sale may confer clean title to the ship on the purchaser". It was added that the amendment made it clear that the convention would also apply to States where a judicial sale might not always necessarily lead to granting free and unencumbered title to the purchaser. It was explained that the proposal addressed not only concerns previously expressed in the Working Group about applying the notification requirements in article 4 in States in which it might not be known at the start of the judicial sale procedure whether a particular sale would result in the conferral of clean title, but also concerns about the challenges that the parties

would face in a scenario in which the courts of another State had to ascertain the content of foreign law in order to determine whether the substantive provisions of the convention actually applied. An alternative proposal was again put to the Working Group to delete article 3(1)(b) entirely and to amend articles 5 to 10 to include a condition that they applied only to clean title sales. It was acknowledged that the proposals reopened discussions held at the thirty-eighth session (A/CN.9/1053, paras. 13 to 15) and advanced an "abstract" approach to the role of clean title in defining the scope of application that had been discussed at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 44).

44. Broad support was expressed for the view that the convention should only govern the recognition of clean title sales. Concerns were therefore raised about the implications of amending or deleting article 3(1)(b) as proposed. In response, it was explained that, even without article 3(1)(b), the substantive provisions of the convention establishing the recognition regime were already limited in their terms to clean title sales. Specially, it was observed that the certificate of judicial sale, which was the centrepiece of the recognition regime, could only be issued under article 5(1) if the issuing authority determined that the purchaser had acquired clean title to the ship. Moreover, articles 6, 7 and 8 applied only once a certificate had been issued. It was further observed that the revised chapeau of article 4(1) clarified that the notification requirements in article 4 served as a condition for the issuance of the certificate of judicial sale, rather than a stand-alone requirement. As a result, while the notification requirements might have an "indirect" impact on the judicial sale procedure, new article 4(1 bis) clarified that the procedure for judicial sales, including as regards notification, was governed by domestic law, and therefore was not subject to a determination of whether the procedure would result in a clean title sale.

45. Nevertheless, it was observed that article 9 of the convention was not limited in its terms to clean title sales. While it was observed that article 9 reflected a general principle that the courts in one State are not competent to review the acts of a foreign State within the latter's jurisdiction, it was noted that applying article 9 to judicial sales that did not confer clean title would require further consideration. It was added that consideration could also be given to limiting article 9 to judicial sales for which a certificate of judicial sale had been issued.

46. It was further observed that structural changes might need to be made to the text to clarify that the substantive provisions of the convention establishing the recognition regime only applied to clean title sales. In this regard, it was proposed that, if the geographic element in article 1 were to be recast as a matter of the "scope of application" of the convention, the principle that the convention only governed the recognition of clean title sales could be reflected in the purpose provision.

47. While the proposal to amend article 3(1)(b) attracted little support, broader support emerged for the proposal to delete article 3(1)(b) and to rely on the substantive provisions of the convention to limit its application to clean title sales. For the time being, the Working Group agreed to delete article 3(1)(b) and asked the secretariat to consider how best to reflect the underlying principle in the preamble or in article 1 when formulating the drafting proposals contemplated in paragraph 42 above.

3. Exclusion of State-owned ships

48. It was observed that article 3(2) focused the enquiry on use "at the time of judicial sale". It was proposed that those words should be replaced with "immediately prior to the time of judicial sale" on the basis that, at the time of the judicial sale, the State-owned ship would be within the jurisdiction of the court of judicial sale and thus not capable of being used "only on government non-commercial service". In response, it was observed that the proposed wording was vague, and an alternative proposal was put forward to delete the reference to time altogether. The prevailing view, however, was that article 3(2) should retain a reference to time, and that it was

preferable to focus the enquiry on use “immediately prior to the time of judicial sale”. The Working Group agreed to amend article 3(2) accordingly.

4. Forced sales in connection with criminal proceedings

49. The Working Group heard a proposal to insert a provision expressly excluding forced sales in connection with criminal proceedings from the scope of the convention. It was noted that, in some jurisdictions, the proceeds of a forced sale of a ship seized in connection with law enforcement activities could be made available to creditors, in which case the sale would fall within the definition of “judicial sale”, in particular the element reflected in subparagraph (ii) of article 2(c). It was added that, by virtue of the different authorities and procedures involved, it was not desirable to include those sales within scope, in particular as the competent authorities might not consider it expedient to apply the procedures of the convention.

50. In response, it was observed that the Working Group had been presented with several proposals in previous sessions to expressly exclude forced sales in connection with criminal proceedings, and that none had been accepted. The view was therefore expressed that there was little value in attempting to formulate the kind of provision proposed. It was also recalled that subparagraph (ii) of article 2(c) was purposefully inserted to address the forced sale of ships seized in connection with law enforcement activities and that, to the extent that the proceeds were paid into the State treasury, the forced sale would not be a judicial sale for the purposes of the convention. The view was expressed that, even if the proceeds were made available to creditors, differences in procedure did not alone justify denying the purchaser the protections afforded by the convention, although it was observed that, so far as those procedures departed from the notification requirements in article 4 or did not result in the conferral of clean title, the recognition regime under the convention would not apply in any case.

D. Article 4. Procedure and notice of judicial sale

1. Heading

51. It was noted that, even with the insertion of paragraph 1bis, article 4 did not contain substantive rules on the procedure for conducting a judicial sale. The Working Group accepted a proposal to reinstate the previous heading of article 4: “Notice of judicial sale”.

2. New article 4(1 bis)

52. While it was observed that inserting a provision to that effect had not previously been discussed, the Working Group welcomed an explicit statement of the principle that the convention should not govern the procedure for conducting judicial sales. It was pointed out that article 4 did not seek to harmonize rules regarding notification but rather established minimum standards that served as a condition for the issuance of the certificate of judicial sale. It was added that, as such, non-observance of the notice requirements in article 4 would not in itself constitute a breach of the convention, but rather lead to the non-issuance of the certificate. It was proposed that the convention should include a clear statement about the function of the notice requirements. It was also proposed to remove the words “including as regards notification” in the first sentence of article 4(1 bis).

53. The view was expressed that, because the convention did not contain substantive rules on procedure, article 4(1 bis) was unnecessary and should be deleted altogether. The prevailing view, however, was that there was value in retaining an express provision preserving the application of the law of the State of judicial sale.

54. A concern was expressed that the first sentence of article 4(1 bis) might prevent a State from applying procedures originating from sources other than its own domestic law, such as relevant international conventions. The prevailing view, however, was

that references to the "law" of a State were usually understood to encompass all provisions of relevant international conventions accepted by a State and incorporated into its legal system or to which its laws referred. Therefore, the current formulation did not prevent the application of such other provisions.

55. It was noted that, in some language versions, the second sentence could be interpreted as imposing an obligation for the law to make provision for determining the time of the judicial sale. In response, it was proposed to formulate the sentence in the indicative rather than the imperative mood in all language versions. The Working Group agreed to that proposal.

56. The view was expressed that a statement acknowledging that the time of the judicial sale was to be determined by the law of the State of judicial sale raised the need for guidance on dealing with parallel judicial sale proceedings in States whose laws determined the time of sale differently. The Working Group recalled its earlier discussions on ascertaining the meaning of the time of judicial sale (see A/CN.9/1053, paras. 50 to 56) and heard that, in practice, parallel judicial sale proceedings were unlikely to arise, particularly given the requirement for the ship to be physically within the territory of the State of judicial sale. The prevailing view was that the statement accurately reflected the understanding of the Working Group, and that it was unnecessary for the convention to address parallel proceedings.

57. The Working Group agreed to retain article 4(1 bis) with the amendment to the second sentence. It also asked the secretariat to review the drafting of article 4 generally to ensure that it clearly reflected the function of the notice requirements.

58. The Working Group affirmed the principle that the law of the State of judicial sale could not override the notice requirements in article 4. Concerns were raised that the introductory words of article 4(1) did not sufficiently give effect to that principle, and that the meaning of those words varied among the different language versions. Several proposals were made in response. One proposal, which did not receive further support, was to delete the introductory words in the chapeau of article 4(1) and to replace the first sentence of article 4(1 bis) with the following:

> "In the event of any inconsistency between the Convention and the law of the state of judicial sale as regards the conduct of a judicial sale, the Convention shall prevail to the extent of the inconsistency."

59. An alternative proposal was for article 4(1 bis) to be qualified as "without prejudice to paragraphs 1 to 4". It was noted that a similar formulation was contained in article 2 of the International Convention on Maritime Liens and Mortgages (1993) ("MLMC 1993"). While the proposal received some support, it was observed that it did not reflect the function of the notice requirements as understood by the Working Group, and might be read as mandating the procedures set out in paragraphs 2 to 4 even for sales that would not lead to the issuance of a certificate. Thus, it was said, the introductory words in the chapeau of article 4(1) better reflected the function of the notice requirements in the convention. Nevertheless, it was observed that, if the current wording were to be retained, the text would still need to clarify that they operated to address incompatibility concerning not only matters addressed in article 4(1) but also matters addressed in the remaining paragraphs of article 4.

60. The Working Group agreed that it was preferable to address the relationship between the notice requirements and the law of the State of judicial sale along the following lines:

> "1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale. The law of the State of judicial sale determines the time of the sale for the purposes of this Convention.
>
> "2. Notwithstanding paragraph 1, if a certificate is to be issued in accordance with article 5, prior to the judicial sale of a ship, a notice of the sale in accordance with paragraphs 3 to 5, shall be given to:"

61. The Working Group asked the secretariat to align the introductory words across all language versions and to formulate additional drafting proposals to clarify the relationship among those basic principles and the remaining provisions in article 4.

3. Identity of notice giver

62. It was recalled that the original Beijing Draft provided for the notice to be given by the competent authority or by a party to the proceedings, and that the provision had subsequently been removed in deference to the law of the State of judicial sale. It was suggested that States in which the law did not offer a clear answer to that question might find it beneficial to obtain a clear indication from the convention. The prevailing view, however, was that it was not necessary or desirable for the convention to identify the notice giver.

4. Persons to be notified

63. A request for clarification in explanatory material as to whether article 4(1)(b) required inspection of extracts from the registry was not taken up by the Working Group.

64. The Working Group agreed to amend article 4(1)(c) to refer to “other public authority”.

65. A concern was raised that the words in square brackets in article 4(1)(c) could be interpreted as requiring the State of judicial sale to establish regulations and procedures. It was proposed to replace those words with “if provided for by the regulations and procedures of the State of judicial sale”. The prevailing view, however, was that article 4(1)(c) did not impose any such requirement but instead had the effect that the requirement to notify did not arise if no regulations or procedures existed. A proposal to clarify that position by reformulating article 4(1)(c) so as not to specify which person was to notify the court was not taken up.

66. The view was expressed that the words in square brackets were superfluous in light of article 4(1 bis). In response, it was observed that article 4(1 bis) only concerned the procedure for judicial sales, while the regulations and procedures contemplated in article 4(1)(c) concerned the distribution of proceeds, and therefore that the words should not be deleted. It was added that the words were important to avoid requiring the court of judicial sale to act on informal ad hoc notices. The Working Group agreed to remove the square brackets and retain article 4(1)(c) without any further amendment.

67. The Working Group heard a proposal to include holders of an unregistered charge to the list of persons to be notified in article 4(1). Recalling its consideration of a similar proposal at the thirty-seventh session (A/CN.9/1047/Rev.1, para. 52), the Working Group did not take up the proposal. The Working Group also heard a proposal to give the notice to the consul of the State of registration so as to allow that State to monitor the fate of its registered ships. While some support was expressed for the proposal, which reflected the practice in some jurisdictions, it was noted that the State of registration, including States with large registries, might not have a consular post in the State of judicial sale, and that there were other ways in which the State could monitor its registered ships. The prevailing view in the Working Group was that the proposal should not be taken up.

68. A proposal was made to simplify the drafting of article 4(1)(e) by referring to the “bareboat charter registry” rather than the “registry of ships or equivalent registry”. The Working Group was informed that some jurisdictions housed the bareboat charter registry within the ship registry, while others maintained a separate registry, and that the simplified wording was intended to cover both practices. The Working Group agreed to amend article 4(1)(e) accordingly.

5. Language requirements

69. It was broadly acknowledged that the notice of judicial sale would be issued in the official language of the court of judicial sale, and that the convention could not impose any other language on the court. Nevertheless, the Working Group heard several proposals for introducing a language requirement for giving the notice under the convention.

70. One proposal was for the notice to be given in the language of the State of registration or at least in English. Another proposal was for the convention to establish a mechanism by which a State party could declare that notices given in its territory were to be in the official language of the State (or accompanied by a translation into that language). Yet another proposal was for the notice to be in one of the official languages of the United Nations.

71. Concerns were raised about introducing any language requirement into the convention, which risked imposing unnecessary costs and burdens on the judicial sale procedure and deterring States from joining the convention. It was observed that no language requirement was contained in the MLMC 1993, and that the convention should not impose a language requirement that did not apply to the notification of judicial sales under domestic law. It was observed that, as an integral part of the convention, the model notice form would already be in all official languages of the United Nations. It was added that the information to be completed for each judicial sale was limited, and that a person receiving the notice based on the model form would not have difficulty understanding it. It was recalled that the language requirements were connected to the functionality of the repository (see A/CN.9/1047/Rev.1, para. 64). It was added that the language requirements were also connected to the content of the model form.

72. While reservations were widely held about including a language requirement, it was acknowledged that English was the language of the global maritime community. Broad support emerged for a proposal that the notice should be given in the official language of the State of judicial sale and, if that language was not English, accompanied by a translation into English. It was observed that the proposal struck a fair balance between the interest of the notice giver in following its usual procedures and the interest of the notice recipient in receiving information in a language that they would likely understand. However, it was also observed that, by privileging one language over all others, the convention was establishing a requirement for which there was little international precedent. In that regard, it was observed that a more acceptable position was for the notice to be given in the official language of the State of judicial sale and, if that language was neither of the two working languages of the United Nations Secretariat, being English and French, accompanied by a translation into one of those two working languages. The Working Group agreed to consider reflecting that position in the text.

6. Model notice form

73. It was acknowledged that the content of the model form depended on the purpose of the notice. While it was acknowledged that the notice could be used to attract potential bidders, which in turn could help to maximize the eventual proceeds available to creditors, the prevailing view was that its primary purpose was to alert creditors to the impending sale and distribution of proceeds. There was broad agreement that the content of the model form could therefore be confined to the essential information that a creditor would need to exercise its rights.

74. On that basis, it was proposed to delete information regarding the time, place and terms of the sale and conferral of clean title, and to substitute the contact details for the court (or other public authority) for further enquiries. It was added that the information in the notice needed to be regarded in the context of the proposed repository and other online tools that allowed creditors to track ships in real time. It was also pointed out that creditors should not be treated as ordinary consumers.

75. In response, it was queried whether enquiries to the court should be encouraged and indeed whether the contact officer would be in a position to handle enquiries on account of language barriers and legal constraints. It was noted that, in practice, creditors would engage lawyers in the State of judicial sale for further information and advice.

76. It was also noted that it was important for the notice to retain information regarding the time and place of sale and conferral of clean title, even if those particulars were not known at the time the notice was issued. It was proposed that the notice could contain information on the "scheduled" or "anticipated" time and place of sale and on circumstances in which clean title would not be conferred. It was added that creditors had an interest in that information, not only because the conferral of clean title would extinguish their rights against the ship, but also because they might be interested in bidding for the ship. It was also said that the model should encourage the notice to contain as much relevant information as available at the time of issuance. It was cautioned that the model form should allow for information on the time of sale to be given in such a way as to accommodate the possible postponement of the sale, the use of online platforms for sale by public auction which were open for remote bidding over a period of time, and the peculiarities of private treaty sales whose timing could only be approximated at the time of issuance.

77. It was proposed to insert information about challenging a judicial sale. In response, it was said that it was not appropriate to do so in respect of a judicial sale that had not yet been conducted.

78. It was proposed to insert information about how creditors could participate in subsequent proceedings for the distribution of proceeds, while acknowledging that only limited information could be provided. It was highlighted that such information was important to allow creditors to exercise their rights, and a failure to include such information could raise constitutional issues in some jurisdictions.

79. It was emphasized that article 4(2) did not require the use of the model form but rather that the notice should contain the information mentioned therein. It was added that the elaboration of a model form was better suited to a guide to enactment than a convention that would be difficult to amend. As such, it was suggested that the information in Appendix I should be presented in the tabulated format used for the model certificate contained in Appendix II. It was also emphasized that nothing in the convention prevented the notice from containing other information required by the law of the State of judicial sale nor prevented the use of an existing form for notice.

80. The Working Group agreed that Appendix I should be presented in a tabulated format and mention the following information: (a) an indication that the notice is given for the purposes of the convention (accepting that it might not be known at the time of issuance that the procedure would result in a convention sale); (b) the name of the State and court of judicial sale; (c) particulars of the ship and owner as contained in Appendix II; (d) the court reference for the judicial sale procedure; (e) information regarding the anticipated timing and place of sale; (f) a statement about the conferral of clean title, including the circumstances under which clean title would not be conferred; and (g) other information required by the law of the State of judicial sale. It was proposed that that information would be submitted to the repository and subject to the language requirements.

81. A concern was raised that the current guidance in the model form on transmitting the notice might not be sufficient to trigger the "give way" clause in article 25 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) ("Service Convention"). It was recalled that recourse to the channels of transmission provided under the Service Convention could lead to notification times that were not suited to the time frames that the judicial sale procedure required (A/CN.9/1047/Rev.1, para. 60). The Working Group agreed to insert a provision in the body of the convention to the effect that, as between the parties to the Service Convention, the latter should not apply to the notice of judicial sale.

7. Publication of notice

82. There was broad agreement that the words in square brackets in article 4(3)(a) were redundant in view of article 4(2) and should be deleted. The Working Group agreed to amend the provision accordingly.

83. It was proposed to insert a requirement for the notice to contain information on how a holder of a maritime lien could notify the court of its claim. The proposal was not taken up by the Working Group. A proposal to delete article 4(3)(a) altogether in deference to the law of the State of judicial sale was also not taken up.

84. The Working Group heard a proposal to specify that the press announcement would be published "in a newspaper or electronic medium in circulation or available" in the State of judicial sale. It was observed that there were two elements to the proposal: first, that the requirement to publish the notice should be medium neutral; second, that a local publication should be available outside the State of judicial sale and that a foreign publication available inside the State of judicial sale could be used. Broad support was expressed for promoting the use of electronic communications to publish the notice, which addressed concerns raised at the thirty-seventh session about reliance on local press and the need for the convention to be futureproof (A/CN.9/1047/Rev.1, para. 63). While considerable support was expressed for the proposal, it was queried whether it was necessary or desirable to specify the medium for publication. It was observed that electronic publication was already covered by the existing wording of article 4(3)(a), and that providing expressly for electronic publication in article 4(3)(a) might imply that electronic notification was not possible under article 4(1). The Working Group asked the secretariat to examine whether article 4(3)(a) could be drafted in more medium neutral terms. It also agreed that any doubt as to whether the provision included the use of electronic communications could be addressed in an eventual explanatory note, which could also examine the second element of the proposal concerning the availability of publications.

8. Repository

85. Recalling the discussions at its thirty-seventh session (A/CN.9/1047/Rev.1, paras. 76-81), the Working Group heard a presentation by IMO on the cost, language and functionality of hosting the centralized online repository as an additional module of the Global Integrated Shipping Information System (GISIS). The Working Group was informed that the decision taken by the IMO Legal Committee at its 107th session to invite the IMO secretariat to make the necessary arrangements to host the possible repository as an additional GISIS module had since been noted by the IMO Council at its 125th session. It was also added that it would take between six months and one year to develop the module and that, as the convention came closer to entering into force, a business case would be prepared, and the necessary work undertaken. That work primarily involved staff time and would be covered by the regular budget of IMO.

86. With regards to functionality, it was explained that, if the repository were established as a public module, information hosted therein could be viewed by members of the public via a public GISIS account, while information could only be submitted via authorized user accounts, which were created and maintained by the web account administrator designated by each IMO member State.

87. It was observed that article 4(3)(b) did not identify who was responsible for transmitting the notice to the repository, and thus accommodated different practices among States as regards the giving of notice in judicial proceedings (see also para. 62 above). It was queried whether existing arrangements could accommodate access not only by courts but by private parties, including their lawyers. In response, it was indicated that it was a matter for each State to decide how to manage access through its web account administrator and that, while technically possible, further study of the issue was required.

88. It was explained that the notice would be "transmitted" to the repository by the relevant notice giver submitting information online via an authorized user account. It was conceivable that information could be submitted by entering particulars using a web form or by uploading an electronic file. It was added that information would be published and viewable in real time. It was noted that, while GISIS modules did not currently support a web feed that could provide users with alerts regarding published information, it was not technically impossible to integrate such a feature.

89. With regards to language, it was explained that, while the GISIS interface was primarily in English, it would be possible to display a multilingual web form in all official languages of the United Nations and IMO. It was noted that some existing GISIS modules had user guides. It was suggested that options could be explored for creating drop-down lists, checkboxes and other tools to minimize information that users would need to enter using free-text fields. The Working Group was also informed that GISIS supported files in multiple languages. At the same time, it was explained that IMO did not provide translation services for information submitted. Moreover, while GISIS had been carefully designed, the IMO secretariat assumed no responsibility for checking submitted information. Reference was made to the disclaimer on the GISIS website, and the notice therein that reports of incorrect information would be communicated to the information provider.

90. It was noted that article 5(7) contemplated that the repository would also publish particulars of any judgment avoiding a judicial sale. It was explained that GISIS would be able to support such information.

91. The Working Group renewed its thanks to the IMO secretariat for its cooperation and for the explanations given. It expressed its enthusiasm for continuing to explore the repository mechanism further with IMO, and noted the potential benefits that the module could bring to the global maritime community. It reaffirmed the view that the role of the repository would be limited to publishing information that it received, it being understood that the convention imposed no duty on the repository to ensure the accuracy or completeness of published information that was capable of giving rise to liability on its part for failure to do so. The Working Group also agreed to retain article 4(3)(b) without amendment.

E. Article 5. Certificate of judicial sale

1. Conditions for issuance

92. The Working Group recalled its earlier tentative agreement to match the conditions for issuing the certificate to the matters being certified (A/CN.9/1047/Rev.1, para. 69). While the need to do so was queried on the assumption that the issuing authority would only certify matters for which it had made the necessary legal and factual findings, the prevailing view was that the convention should clearly prescribe the conditions necessary for issuing the certificate. At the same time, it was acknowledged that subsequent progress on the draft made it unnecessary for the conditions to match exactly the matters being certified.

93. There was broad support not to include physical presence of the ship as a condition for issuance on the basis that article 3(1)(a) already excluded from the scope of the convention any sale of ships outside the territory of the State of judicial sale at the time of the sale.

94. It was observed that, if the matters listed in article 5(1)(a) were to be retained as conditions for issuance, the convention should require compliance with the "requirements" of the law of the State of judicial sale for consistency. It was added that the draft should also require compliance with the requirements "of this Convention" and not just the notice requirements.

95. In response, it was observed that the conditions for issuance should specify the requirements of the convention to be met. It was also observed that compliance with the law of the State of judicial sale might already have been determined by the court

of judicial sale. A concern was raised that, by prescribing compliance with that law as a condition for issuance, the convention was requiring the issuing authority to review those earlier determinations. By doing so, it was added, the convention would open up a new avenue to challenge the judicial sale, which the issuing authority might not otherwise be competent to hear. Moreover, a trivial failure to comply with the requirements of the law of the State of judicial sale, which would not ordinarily invalidate the sale under that law, would be elevated to a condition for issuance that could invalidate the certificate. The Working Group was urged to ensure that the conditions struck the right balance.

96. While some sympathy was expressed for that concern, the prevailing view was that the convention did not mandate that every failure to satisfy the conditions for issuance should result in the non-issuance or invalidity of the certificate. Rather, the remedy was a matter for the law of the State of judicial sale, consistent with views previously expressed within the Working Group with respect to the grounds for invoking jurisdiction under article 9(1). The view was also expressed that the requirement for the certificate only to be issued "upon completion of the judicial sale" assumed that the sale was no longer subject to challenge, which countered any suggestion of a new avenue to challenge. The Working Group agreed not to reopen discussions on the meaning of the "completion" of sale.

97. There was broad support within the Working Group to provide as conditions for issuance the following requirements: (a) the completion of the judicial sale; (b) that the sale conferred clean title; (c) that the sale was conducted in accordance with the requirements of the law of the State of judicial sale; (d) that the sale was conducted in accordance with the requirements of the convention.

2. Identity of issuing authority

98. A query was raised about the word "designated". It was also observed that article 5(1) referred to a "public authority" while the definition of "judicial sale" referred to "court or other public authority". In response, it was reiterated that the authority issuing the certificate might not have conducted the judicial sale. It was also recalled that a suggestion had been made for States joining the convention to notify the depositary of the authorities competent to issue certificates (A/CN.9/973, para. 84), and that article 5(1) reflected that suggestion. The point was made that more than one authority could be competent in a State to issue a certificate. The importance for third parties to know the identity of issuing authorities was also emphasized.

99. The Working Group agreed to refer to issuance by a "competent" authority, and that referring to that authority in the singular did not prevent multiple competent authorities. The Working Group also asked the secretariat to review references throughout the draft to different "authorities" to ensure consistency.

3. Issuance in accordance with "regulations and procedures"

100. The Working Group recalled that broad support had been expressed at the thirty-eighth session for the certificate to be issued automatically and not "at the request of the purchaser" (A/CN.9/1053, para. 24). Some doubts were raised as to the practicality of that approach, particularly if issuance in accordance with the "regulations and procedures" of the issuing authority was understood to capture the payment of fees. It was observed that the regulations and procedures of the types of authorities that would be competent to issue certificates might not permit the authority to act on its own motion but rather on application. Broad support was expressed for accommodating both approaches and for the view that the current wording of article 5(1) already had that effect. The Working Group agreed that no amendment was necessary and noted that an eventual explanatory note could clarify that the "regulations and procedures" also captured whether the issuing authority would act on its own motion or on application.

4. Matters being certified and contents of the certificate

101. There was broad agreement to retain the matters listed in article 5(1) both as conditions for issuing the certificate and statements to be contained in the certificate. However, it was acknowledged that revising article 5(1) to prescribe all conditions for issuance posed some drafting challenges. One possible alternative was to deal in article 5(1) only with the issuance of the certificate and conditions therefor, namely those stated in subparagraphs (a) and (c), while article 5(2) should deal with the contents of the certificate. Another alternative, which received strong support, was to incorporate the conditions for issuing the certificate in the chapeau of 5(1) and list thereafter the content of the certificate, possibly combining both paragraphs 1 and 2. The Working Group agreed to request the secretariat to explore both alternatives in a future revision of the draft convention.

102. It was observed that article 5(2) only required the certificate to be in the "form" of the model contained in Appendix II and, unlike article 4(2), did not require the certificate to contain the information mentioned in the model but rather to contain the "particulars" listed in article 5(2). A concern was raised that, while the model contained a statement certifying that the purchaser had acquired clean title in the ship, that statement was not among the "particulars" listed in article 5(2). While article 5(1) did require the certificate to "record" the acquisition of clean title, it was proposed that the statement be included in the list for added certainty. The Working Group agreed that if the two paragraphs were to be presented separately in a future revision of the draft convention article 5(2) should be amended accordingly.

103. It was observed that article 5(2)(c) referred to the date of completion while item 3.2 of the model referred to "date of sale (e.g., date of order confirming the sale)". The Working Group heard that the different references could be confusing and agreed to refer only to "date of sale" in both instances.

104. It was proposed that item 4.4 of the model should refer to "any" other identifying information to align with article 5(2)(e), which only required such other information if the IMO number was not available. The Working Group asked the secretariat to ensure that the items in the form aligned with the particulars listed in article 5(2)(e). The Working Group also clarified that the list of other identifying information in article 5(2)(e) was illustrative only. In response to a query as to whether the law of the State of judicial sale determined what was sufficient to identify the ship, it was observed that the State of registration would have its own requirements in that regard.

105. It was observed that article 5(2)(i) required either the signature, stamp or "other confirmation of authenticity of the certificate" while the model provided only for the "signature and/or stamp" of the issuing authority. A concern was raised that the reference to confirmation of authenticity could be interpreted as requiring additional formalities to authenticate the certificate. One alternative interpretation put forward was that the additional reference accommodated certificates issued in electronic form. However, that interpretation was questioned in view of article 5bis and a technology neutral reading of the words "signature" and "stamp", which should be understood to cover electronic equivalents as well.

5. Transmission of certificate to repository

106. It was observed that one language version of article 5(3) implied a requirement for the certificate to be transmitted immediately to the repository, which would be problematic in practice. Broad support was expressed to retain a requirement for the certificate to be transmitted promptly, and the Working Group asked the secretariat to ensure that the requirement was accurately reflected in all language versions.

107. It was observed that article 5(3) required the certificate to be transmitted by "the authority". It was proposed that article 5(3) should clarify that it was for the "authority issuing the certificate" to transmit the certificate to the repository. In response, it was observed that, in some States, the certificate might be transmitted by a different authority, such as a government ministry, and therefore it was proposed to refer to

transmission by a “competent” authority. An alternative proposal was put forward to reformulate article 5(3) along the lines of article 4(3)(b) and therefore to state that the certificate “shall promptly be transmitted to the repository”. A query was raised as to whether, in view of the access arrangements for GISIS, it would be more appropriate to limit the transmission of certificates to government agencies. In response, it was recalled that it was a matter for each State to decide how to manage access to GISIS through its web account administrator, and that reformulating article 5(3) as proposed would not prevent a State from controlling access under its own law. The Working Group agreed to reformulate article 5(3) as proposed.

6. No legalization of certificate

108. The view was reiterated that the convention should respect domestic legal requirements for foreign public documents to be legalized. It was added that it would not be realistic to expect registry officials in some States to accept a foreign certificate without any assurance as to its authenticity. The Working Group was asked to consider the proposal, made at the thirty-eighth session, to give States the option to declare, when joining the convention, that they would not apply article 5(4) (see A/CN.9/1053, para. 34). While there was some support for the proposal, there was broad support for imposing the requirement in article 5(4) on all States parties, and it was reiterated that legalization was not suited to the expediency required in the context of the judicial sale of ships. The Working Group decided not to take up the proposal.

7. Evidentiary value of the certificate

109. The Working Group engaged in a detailed discussion on article 5(5) which centred around the meaning of “conclusive evidence” and the relationship between article 5(5) and articles 9 and 10.

110. On one view, the term “conclusive evidence” was interpreted to mean that the certificate was irrefutable evidence of the matters being certified, in the sense that an authority receiving the certificate could not consider other evidence as to those matters. On that view, article 5(5) could not prevent a court exercising jurisdiction under article 9 or hearing an application invoking the public policy ground as contemplated in article 10 from receiving other evidence. Otherwise, it was said, article 5(5) would raise fundamental issues relating to the judicial function. Nor, it was added, would it prevent a court from considering evidence that the certificate was fake, and therefore not a certificate for the purposes of the convention. Accordingly, it was proposed that article 5(5) should be amended so as to apply “unless proceedings according to articles 9 or 10 have been instituted” or “without prejudice to the procedures referred to in articles 9 and 10”, with a preference expressed for the second formulation. At the same time, it was queried whether article 9 was engaged by article 5(5) on the assumption that a certificate could only be issued if the sale was no longer subject to challenge. It was also queried whether it was appropriate to give conclusive effect to the particulars mentioned in the certificate, given that mistakes could be made when completing those particulars.

111. On another view, the term “conclusive evidence” was interpreted to mean that the certificate was sufficient evidence of the matters being certified, in the sense that the party producing the certificate was not required to present additional evidence, but that the authority could consider other evidence refuting those matters. It was added that, on that view, it would not be necessary to resolve the relationship with articles 9 and 10.

112. Some support was expressed for applying the first interpretation. It was added that, to address the relationship with articles 9 and 10, article 5(5) could be moved to article 7, although it was noted that the provision also had value for proceedings contemplated in article 8. Some support was expressed for deleting article 5(5) altogether, on the basis that its effect was already provided for by the obligation in articles 7 and 8 to act on production of the certificate. The prevailing view within the Working Group, however, was to retain article 5(5) and to apply the second

interpretation. Accordingly, the Working Group agreed to replace "conclusive evidence" with "sufficient evidence". It also agreed that article 5(5) should be expressed as being "without prejudice" to articles 9 and 10.

8. International effect of certificate if judicial sale avoided

113. The Working Group agreed to delete articles 5(6) and 5(7).