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Report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session (New York, 7–11 February 2022)

Contents

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I. Introduction

1. At its fortieth session, the Working Group continued its work preparing a convention 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 sixth 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.93, paragraphs 5–9.

II. Organization of the session

2. The fortieth session of the Working Group was held from 7 to 11 February 2022. 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 at the United Nations Headquarters in New York and remotely.

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

4. The session was attended by observers from the following States: Azerbaijan, Bulgaria, Cambodia, Denmark, El Salvador, Greece, Guyana, Kuwait, Madagascar, Maldives, Malta, Morocco, Myanmar, Nepal, Oman, Panama, Paraguay, 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), Association of the Bar of the City of New York, 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 Law Institute (ILI), International Union of Judicial Officers (UIHJ), International Union of Marine Insurance (IUMI), Law Association for Asia and the Pacific (LAWASIA) and UNCITRAL National Coordination Committee Australia (UNCCA).

[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 above), 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.93);

(b) An annotated fifth revision of the Beijing Draft [3] prepared by the secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-ninth session (A/CN.9/WG.VI/WP.94) ("fifth revision").

9. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Adoption of the agenda.
3. Draft convention 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. The Working Group requested the secretariat to revise the draft convention to reflect those deliberations and decisions and to transmit the revised draft to the Commission for consideration and possible approval at its fifty-fifth session. The Working Group also requested the secretariat to circulate the revised draft to all Governments and relevant international organizations for comment, and to compile the comments received for the consideration of the Commission. Finally, the Working Group requested the secretariat to prepare an explanatory note on the draft convention, and to transmit it to the Commission with the revised draft convention.

IV. Future convention on the judicial sale of ships

11. The Working Group noted that, at its thirty-ninth session, it had considered articles 1 to 5 of the fourth revision of the Beijing Draft, as contained in document A/CN.9/WG.VI/WP.92 (see A/CN.9/1089, paras. 11–113), and proceeded with its consideration of the fifth revision of the Beijing Draft, as contained in document A/CN.9/WG.VI/WP.94, from article 5 bis onwards. It also considered the preamble and final clauses of the draft convention, as well as the revisions made to articles 1 to 5 following its thirty-ninth session.

A. Article 5 bis. Electronic form of the certificate of judicial sale

12. The Working Group agreed to merge article 5 bis into article 5.

13. The Working Group agreed to insert the word "reliable" before the word "method" in paragraphs 1(b) and 1(c) so as to ensure consistency with other UNCITRAL instruments in the area of electronic commerce that referred to a standard of reliability for the legal recognition of electronic records, in particular article 10 of the 2017 UNCITRAL Model Law on Electronic Transferable Records.

14. There was some support for a proposal to insert, in paragraph 2, words such as "provided that it complies with paragraph 1" in order to clarify that an authority is not

[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.

obliged by the convention to act upon an electronic certificate if it determines that that certificate does not satisfy the requirements set out in paragraphs 1(a), (b) and (c). In response it was noted that paragraphs 1 and 2 deal with different situations and should not be linked by cross reference. Paragraph 1 established the parameters for establishing functional equivalence between a paper-based certificate and one in electronic form, namely retrievability and readability as an ordinary "writing" (para. 1(a)), authentication by and identification of the issuing authority (para. 1(b)), and assurance of integrity as an "original" record (para. 1(c)). Conversely, paragraph 2 reflected the general non-discrimination principle contained in all UNCITRAL instruments on electronic commerce since it was first expressed in article 5 of the UNCITRAL Model Law on Electronic Commerce, that the electronic form of information in and of itself should not suffice as a sole basis for refusing to give legal effect to that information. The Working Group agreed to retain paragraph 2 as presently drafted.

B. Article 6. International effects of a judicial sale

15. There having been no comments on draft article 6, the Working Group approved the text, subject to any adjustments that may be needed to reflect its deliberations on other provisions.

C. Article 7. Action by registrar

16. Reference was made to the issues identified in paragraph 26 of the cover note to the fifth revision (A/CN.9/WG.VI/WP.94).

1. Taking action on own motion or on application

17. A proposal was made to delete the requirement for the registrar to take action on application (i.e. "at the request" of someone). It was explained that, in some jurisdictions, the registrar is required to act regardless of whether an application is made, and the convention should allow for the registrar to take action on its own motion (i.e. ex officio). In response, it was noted that the purpose of the convention was to provide certainty to the purchaser, and therefore that it was appropriate to state clearly that the registrar had an obligation to act upon a request by the purchaser. It was added that nothing in the convention prevented the registrar from taking action on its own motion. It was also observed that the law of a State Party might provide for the registrar to take action pursuant to an order of a competent court, although a query was raised as to whether a convention dealing with the international effects of judicial sales should be concerned with action by the registrar in the State of judicial sale. After discussion, the Working Group agreed to retain a requirement for the registrar to take action on application. A proposal to include a new paragraph at the end of article 7 acknowledging that the registrar could take action on its own motion was not taken up by the Working Group.

2. Taking action on application by the subsequent purchaser

18. The Working Group recalled the discussions at its thirty-ninth session and the concerns raised about extending the protection of the convention down an unlimited chain of subsequent purchasers (A/CN.9/1089, paras. 34–38).

19. It was proposed that all references to "subsequent purchaser" should be deleted, such that the registrar would only be required to take action on application by the purchaser named in the certificate of judicial sale. It was observed that the certificate of sale produced to the registrar would make no mention of the subsequent purchaser. The point was also made that the convention did not prevent a registrar from taking further action at the request of a subsequent purchaser under domestic law.

20. In response, it was stressed that the convention should recognize the practice by which ships are transferred after judicial sale, but before action on the register, to

satisfy nationality requirements (e.g. to a legal entity that a foreign purchaser establishes in the State of registration). Several compromise proposals were put forward. One proposal was to delete all reference to "subsequent purchaser" but to include a reference in paragraph 1(c) to the registrar registering the ship in the name of the purchaser "or nominee". Another proposal was to retain reference to "subsequent purchaser" but to add a requirement for applications by a subsequent purchaser to be accompanied by evidence regarding the subsequent purchase, although it was conceded that that requirement might already be covered by the reference in the chapeau of article 7(1) to the registrar taking action "in accordance with the law of the [State of registration]". In response to a query as to why the provision should not require action to be taken on application of the "holder" of the certificate, it was noted that the requirement to produce the certification already assumed that the applicant was in possession of the certificate, but that the certificate was not the equivalent of a document of title.

21. Yet a further proposal was to amend the definition of "subsequent purchaser" in article 2(j) by inserting, at the end of the definition, the words "and who is the first to request the deletion or re-registration of the vessel following the judicial sale". In response, it was pointed out that, while a registrar might be able to ascertain that a request for deletion under paragraph 1(b) of article 7 was the first such request for a ship following its judicial sale, a registrar might not be able to do so with respect to a request for new registration under paragraph 1(c). It was therefore proposed that the definition should instead be limited to the person who purchased the ship from the purchaser named in the certificate of judicial sale. After discussion, the Working Group agreed to retain reference to "subsequent purchaser" in article 7 and to amend the definition in article 2(j) to refer to the person who purchased the ship from the purchaser named in the certificate of judicial sale. The explanatory note could state that the provision does not prevent the registrar from acting for a subsequent purchaser down the chain.

3. Identity of the authority taking action

22. Widespread support was expressed for the view that the convention did not need to refer to the "competent" registrar. The Working Group agreed to amend article 7 to refer simply to the registrar. While it was observed that it might also not be necessary to refer to other "competent" authorities, and that the reference might suggest that the convention established a mechanism for designating competent authorities (cf. para. 63 below), it was noted that it was not uncommon for similar conventions to recognize the role of a "competent" authority without establishing such a mechanism, and that the reference could be useful in some jurisdictions. The Working Group agreed to retain the reference.

4. Taking action "in accordance with the law of [the State of registration]"

23. The Working Group was reminded that the words "in accordance with the law of [the State of registration]" originated in a proposal at the thirty-sixth session to ensure that the convention did not supersede domestic law and procedure relating to the registration of ships (A/CN.9/1007, para. 97), and that an earlier version of the draft that allowed the registrar to act "in accordance with its regulations and procedures" had been amended to the present wording following the thirty-seventh session to ensure that it covered not only legal requirements for the payment of fees, but also legal requirements relating to eligibility to be registered as owner (A/CN.9/1047/Rev.1, paras. 91–93). The Working Group was further reminded that the words in square brackets ("without prejudice to article 6") were also inserted following the thirty-seventh session, in response to a concern that a general reference to domestic law might create a loophole allowing action by the registrar to be preconditioned on requirements that undermined the convention regime, particularly the recognition of clean title under article 6.

24. It was observed that, while article 7(1) imposed an obligation on the registrar, the action that the registrar was obliged to take under paragraphs 1(a) and 1(b) was

different to the action that it was obliged to take under paragraph 1(c), and that that difference justified different treatment as regards the application of domestic law. Accordingly, domestic law could not justify a refusal to delete existing mortgages, hypothèques and registered charges or a previous owner under paragraphs 1(a) and 1(b), respectively, but could justify a refusal to register a ship under paragraph 1(c). It was therefore proposed to move the words from the chapeau of article 7(1) to paragraph 1(c).

25. In response, it was noted that domestic law was still relevant to action under paragraphs 1(a) and 1(b). However, it was conceded that, if paragraph 1(c) were to be amended to preserve domestic legal requirements relating to eligibility to be registered as owner, the requirements that would need to be preserved for paragraphs 1(a) and 1(b) would be procedural requirements relating to how the registrar acts. Accordingly, it was proposed that the Working Group could revert to the previous wording, and therefore that the chapeau of article 7(1) could be amended to refer to the registrar taking action "in accordance with its regulations and procedures". At the same time, caution was expressed about implying that only substantive law was relevant to paragraph 1(c) and that only procedural law was relevant to paragraphs 1(a) and (b). The view was also expressed that it was sufficient to retain a general reference to the law of the State of registration in the chapeau and leave it to the explanatory note to indicate the kind of laws that might be relevant to each paragraph. After discussion, the Working Group agreed to amend the chapeau to revert to the previous wording and to amend paragraph 1(c) to the effect that action to register the ship would be subject to a proviso that the ship and the person in whose name the ship was to be registered met the requirements of the law of the State of registration.

26. Different views were expressed on the need to retain the words in square brackets (see para. 23 above). On one view, the words were superfluous and should be deleted. On another view, they were only relevant to action under paragraphs 1(a) and 1(b), and might not be necessary if the chapeau were amended to refer to regulations and procedures. On yet another view, the words were important and should be retained in the chapeau so as to apply not only to laws relevant to paragraphs 1(a) and 1(b), but also to laws relevant to paragraph 1(c). It was proposed that, for added clarity, the words could be replaced with "subject to article 6", although it was noted that the formulation "without prejudice" might be more appropriate and more readily understood in all official languages. It was added that, in any case, the draft should make it clear that the words qualified the reference to the law of the State of registration and not the entirety of article 7(1). After discussion, the Working Group agreed to retain the words in square brackets. It was noted that, by including the comma, the words did not qualify the reference to the law of the State of registration (or rather the regulations and procedures of the registrar) but rather the entire paragraph 1.

5. Taking all actions in all cases

27. A proposal was made to amend the chapeau of article 7(1) to clarify that the registrar would not be required to take all of the actions listed, but rather only those actions "where applicable". It was observed that action to delete a ship under paragraph 1(b) was an alternative to action to reregister under paragraph 1(c) in the State of registration, and that the request of the purchaser or subsequent purchaser would determine which action to take. A view was expressed that no clarification was necessary, as the purchaser would request the appropriate action for the registrar to take. It was added that providing for action to be taken "where applicable" risked diluting the obligation on the registrar.

28. It was also observed that the corresponding provision in the International Convention on Maritime Liens and Mortgages (1993) ("MLMC 1993") presented actions corresponding to paragraphs 1(b) and 1(c) as alternatives to be taken "as the case may be", and it was proposed that article 7 should use similar words. It was also proposed that the draft convention could clarify that the list of actions to be taken was

non-cumulative by replacing the word “and” at the end of paragraph 1(c) with the word “or”. It was noted that that amendment might alone be sufficient without the need to amend the chapeau.

29. After discussion, the Working Group agreed to amend the chapeau of article 7(1) to insert the words “as the case may be” after “shall” and to replace the word “and” at the end of paragraph 1(c) with the word “or”.

6. Time limit for taking action

30. Some support was expressed for specifying that the action listed in paragraph 1(a) of article 7 should only be taken with respect to mortgages, hypothèques and registered charges registered before the judicial sale. However, caution was expressed at any suggestion to specify a particular period of time for taking any of the actions listed in paragraph 1. After discussion, the Working Group agreed to insert the following at the end of paragraph 1(a): “that had been registered before completion of the judicial sale”.

7. Taking action to delete any mortgage or hypothèque and any registered charge (article 7(1)(a))

31. The Working Group heard that, in some jurisdictions, the ship could be subject to charges registered not only in the ship register or register of security interests, but also in a company register. It was explained that a ship might fall within a class of assets of a company to which a registered floating charge might attach. The Working Group agreed that paragraph 1(a) could require action by multiple registrars in the same jurisdiction. At the same time, it was pointed out that action taken under paragraph 1(a) did not eliminate any personal claim that might be secured by the charge. It was added that action under paragraph 1(a) would effectively remove the ship from the class of assets to which the floating charge was attached and not affect the registration of the floating charge with respect to the remaining assets in that class.

8. Taking action to delete the ship (article 7(1)(b))

32. The Working Group heard a proposal to clarify that action under paragraph 1(b) was for the purpose of new registration “in another State”. It was observed that some States maintained multiple ship registers, and that paragraph 1(b) could be applied in cases in which the purchaser wished to transfer the ship from one of those registers to another. It was therefore not concerned solely with the scenario in which the purchaser wished to reflag the ship. The Working Group agreed that, for those reasons, paragraph 1(b) should not be amended to refer to registration “in another State”.

9. Taking action to reregister the ship (article 7(1)(c))

33. A view was expressed that it was unclear whether the existing actions listed in article 7(1) covered the scenario in which the register was simply updated to substitute the purchaser as owner of the ship. It was added that, if the scenario was to be covered by action under paragraph 1(d), wording to preserve domestic legal requirements relating to eligibility to be registered as owner, similar to that inserted for paragraph 1(c) (see para. 25 above), should be inserted in paragraph 1(d). Alternatively, it was proposed to insert a new subparagraph requiring action to “delete the registered owner of the ship from the register and register the purchaser as the new owner of the ship”.

34. In response, it was stated that paragraph 1(c) already covered the scenario. It was added that the paragraph was drafted in broad terms that accommodated a variety of actions and registration practices, and that the convention should avoid being overly prescriptive. It was suggested that the explanatory note could elaborate some of the different actions that could be taken under paragraph 1(c). After discussion, the Working Group agreed with the view that paragraph 1(c) covered action to substitute the purchaser as owner of the ship, and that no further amendment was necessary.

10. Taking action to update the register (article 7(1)(d))

35. It was noted that paragraph 1(d) reflected an earlier agreement of the Working Group (A/CN.9/1047/Rev.1, para. 96). It was emphasized that paragraph 1(d) was not concerned with new registration of a ship or registration of a new owner, but merely with other "particulars" in the certificate. The Working Group considered that the provision served a useful purpose and agreed to retain it without amendment.

11. Certification of copies and translations (articles 7(3) and 7(4))

36. The Working Group agreed to retain the requirement for translations and copies to be certified. It was observed a certified copy served the important purpose of authenticating the contents of the copy. It was added that article 7(4) was not concerned with authenticating the identity of the issuing authority and was therefore not concerned with legalization of the certificate. It was highlighted that article 7(4) applied where the (original) certificate had already been produced to the registrar.

12. Public policy (article 7(5))

37. The Working Group considered whether to retain the word "manifestly" in article 7(5). It recalled its earlier deliberations on the issue, and heard similar arguments for and against retaining the word (see A/CN.9/1047/Rev.1, para. 86). It was noted that the "manifestly contrary" threshold did not afford sufficient latitude to the court hearing an application invoking the public policy ground under article 10. As a compromise, it was suggested that the Working Group could consider deleting the word "manifestly" and referring instead to "international public policy", which was a concept already recognized by the law in several jurisdictions. After discussion, the Working Group agreed to retain the word "manifestly". It was suggested that the explanatory note could include a description of the "manifestly contrary" threshold consistent with the explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

38. The Working Group agree to amend article 7(5) to clarify that it applied to a determination by a court in the State of the registrar.

39. The Working Group was reminded that, at its thirty-seventh session, a question had been raised as to whether article 7(5) would apply if the court in the State of the registrar ordered protective measures pending final determination, and that it had agreed to defer further consideration of the issue (A/CN.9/1047/Rev.1, para. 100). The Working Group was invited to form a view on whether action by the registrar under article 7 should be subject to such protective measures and, if not, how that position could be reflected in the draft. It was proposed that one way would be to insert the word "only" after "apply", although it was noted that paragraphs 1 and 2 might also not apply if the judicial sale were avoided by a court exercising jurisdiction under article 9.

40. It was conceded that subjecting action taken by the registrar under article 7 to interim protective measures might provide a loophole for a bad faith creditor to frustrate the international effects of a judicial sale by abusing article 10 proceedings. However, it was acknowledged that the convention should not put the registrar in the position of having to choose between compliance with article 7 and compliance with a court order. In any case, it was observed that the issue was more a matter of controlling the jurisdiction of the court in proceedings under article 10 than of the scope of article 7, and the Working Group agreed to revisit the issue in its consideration of article 10.

41. The revised text of draft article 7, as approved by the Working Group was as follows:

Article 7. Action by registrar

1. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registrar or other competent

authority of a State Party shall, as the case may be and in accordance with its regulations and procedures, but without prejudice to article 6:

(a) Delete any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale;

(b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration;

(c) Register the ship in the name of the purchaser or subsequent purchaser provided further that the ship and the person in whose name the ship is to be registered meet the requirements of the law of the State of registration; or

(d) Update the register with any other relevant particulars in the certificate of judicial sale.

2. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registrar or other competent authority of a State Party in which the ship was granted bareboat charter registration shall delete the ship from the bareboat charter register and issue a certificate of deletion.

3. If the certificate of judicial sale is not issued in an official language of the registrar or other competent authority, the registrar or other competent authority may request the purchaser or subsequent purchaser to produce a certified translation into such an official language.

4. The registrar or other competent authority may also request the purchaser or subsequent purchaser to produce a certified copy of the certificate of judicial sale for its records.

5. Paragraphs 1 and 2 do not apply if a court in the State of the registrar or other competent authority determines under article 10 that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.

D. Article 8. No arrest of the ship

42. The Working Group accepted a proposal to extend the application of article 8 to any other judicial authority so as to maintain consistency with the International Convention Relating to the Arrest of Seagoing Ships (1952) and the International Convention on Arrest of Ships (1999). The Working Group agreed to retain the requirement for translations of the certificate of judicial sale to be certified. Recalling its earlier deliberations on article 7(5) (see para. 37 above), it also agreed to retain the word “manifestly”. Apart from those amendments, the Working Group approved the draft article. Questions were raised as to how the public policy determination referred to in article 8(4) might be different to the determination referred to in article 10, how action by a court under articles 8(1) and 8(2) might contravene public policy, and what a determination referred to in article 10 would mean for the application of articles 8(1) and 8(2). It was suggested that those matters could be clarified in the explanatory note.

E. Article 9. Jurisdiction to avoid and suspend judicial sale

1. Scope of jurisdiction

43. A concern was raised that, by conferring jurisdiction to “hear any claim or application to avoid a judicial sale”, article 9(1) could be interpreted to apply not only to proceedings to challenge a judicial sale, but also to proceedings leading to the judicial sale. Thus, those words should be replaced with “deal with any complaint against a decision ordering a judicial sale”. In response, it was emphasized that article 9(1) was concerned with jurisdiction to avoid a judicial sale and not with jurisdiction to take other enforcement measures or to hear claims that might give rise to a judicial sale.

44. Recalling earlier discussions regarding interim measures, it was suggested that article 9(1) could specify that the jurisdiction extended to any interim measures associated with the application to avoid the judicial sale. In response, it was argued that article 9 should not be used to oust the jurisdiction of a court seized under article 10 to order interim measures, or to prescribe the jurisdiction of the court in the State of judicial sale to order such measures. The proposal was not taken up by the Working Group.

45. Attention was drawn to deliberations at the thirty-ninth session regarding the application of article 9 to judicial sales that did not confer clean title (A/CN.9/1089, para. 45). Some support was expressed for the view that article 9 should apply to all judicial sales, noting that, in some jurisdictions, it might not be known at the time when the application to avoid was brought whether the sale would confer clean title. It was added that, as article 9 reflected a general principle, it did not matter whether it applied to non-clean title sales. The prevailing view, however, was that article 9 should be limited to clean title sales. For some, article 1 already produced that effect, and therefore no further amendment was needed. For others, article 1 did not define the substantive scope of the convention, and therefore an express limitation was necessary. To that end, the preference of the Working Group was to refer to a judicial sale "conferring clean title" rather than one "for which a certificate of judicial sale has been issued", and it agreed to amend article 9 accordingly.

2. Availability of avoidance as a remedy; grounds for avoidance

46. The Working Group heard a proposal to insert the following sentence at the beginning of article 9(1): "The State of judicial sale shall provide for adequate remedies to avoid a judicial sale of a ship conducted in that State or to suspend its effects." It was observed that the safeguards under the convention were operationalized as conditions for the issuance of the certificate of judicial sale in the State of judicial sale, and that requiring that State to provide an effective remedy to aggrieved creditors struck a fair balance. In response, the view was reiterated that the convention should avoid as much as possible intruding into procedural matters in the State of judicial sale and therefore should not deal with the availability of remedies. It was recalled that avoidance was an exceptional remedy that would be relevant only to very few parties with an interest in the sale itself, that article 9 did not affect jurisdiction with respect to other remedies, and that the main recourse for creditors was participating in the distribution of the proceeds of sale which the convention did not govern.

47. The Working Group heard another proposal (cf. A/CN.9/1053, para. 29) to specify that the judicial sale could be avoided on the grounds that it was manifestly contrary to the public policy of the State of judicial sale, which might arise in cases of fraud or price fixing. In response, the view was reiterated that the convention should not prescribe the grounds for avoidance.

48. After discussion, the Working Group did not take up either proposal and agreed to articles 9(1) or 9(2) without further amendment.

3. Transmission of decision avoiding the judicial sale

49. It was observed that there was merit in including a provision requiring any decision avoiding a judicial sale to be published in the repository, which would provide added assurance for parties seeking to rely on the certificate of judicial sale. Accordingly, it was proposed to insert a new paragraph in article 9 requiring the court of the State of judicial sale to promptly transmit the decision.

50. There was some resistance to the proposal. On the one hand, it was cautioned that simply publishing the decision in the repository with nothing more could cause confusion and misunderstanding about the impact of the decision on the effects produced outside the State of judicial sale by the certificate of judicial sale. On the other hand, it was not appropriate for the convention to require a court to take action with respect to the transmission. It was added that, if there was a real need for

publishing the decision, the parties concerned would find a way to make the decision known without the need for a treaty obligation.

51. It was suggested that those concerns might be alleviated by reformulating the provision along the lines of article 5(2), which did not identify who was responsible for transmission. Alternatively, it was proposed that the State of judicial sale should require the decision to be transmitted to the repository. After discussion, the Working Group agreed to insert a new paragraph in article 9 along the following lines:

> "If, after a certificate of judicial sale has been transmitted to the repository pursuant to article 5(2), the court of the State of judicial sale avoids the judicial sale or suspends its effects pursuant to article 9(1), the State of judicial sale shall require that the decision of the court be transmitted to the repository referred to in article 11."

4. International effect of avoidance

52. The Working Group agreed to delete article 9(3) and (4).

53. It was noted that the term "applicable law" in article 9(5) was not clear, and differing views were expressed as to which law should apply. On one view, the law of the State of judicial sale should apply, and it was proposed to amend the provision to make that clear. Another view stressed that the effect of avoidance might be at issue in another State in which the judicial sale was sought to be given effect. Therefore, it was not appropriate to mandate the application of the law of the State of judicial sale in all cases. It was added that the present wording reflected that approach.

54. Broad support was expressed for leaving it to the law applicable in whichever State the issue was raised, if such a provision was felt necessary. In any event the provision did not belong in article 9, which otherwise dealt with jurisdiction. Accordingly, it was proposed that article 9(5) be deleted and recast as a new paragraph in article 14, which would be reformulated as a rule to the effect that the convention did not govern the effects of avoidance. The Working Group agreed to that proposal, and to include a reference to the effects of suspension so as to align the new paragraph with article 9(1) and (2).

F. Article 10. Circumstances in which judicial sale has no international effect

55. The Working Group recalled its deliberations on article 7(5) (para. 37 above) and agreed to retain the word "manifestly" in article 10. Apart from that amendment, the Working Group approved the draft article.

G. Article 11. Repository

56. Recalling its deliberations on article 9 (paras. 49–51 above), the Working Group agreed to amend article 11 to include a reference to the decision avoiding the judicial sale or suspending its effects.

57. Reference was made to paragraph 29 of the cover note to the fifth revision (A/CN.9/WG.VI/WP.94), which invited the Working Group to consider whether, in view of its deliberations regarding the limited role of the repository, it would be more appropriate for article 11(2) to require the repository to publish instruments "in a timely manner, in the form and in the language in which it receives them". While several delegations supported retaining the present formulation of article 11(2), which required the repository to publish instruments "promptly", the Working Group agreed to amend article 11(1) accordingly. It was noted that, while article 5(2) required "prompt" transmission on the part of the State of judicial sale, it was not appropriate to impose such a stringent requirement on the repository.

58. The Working Group was reminded of the presentation at its thirty-ninth session of the functionality of the repository as a module of the Global Integrated Shipping Information System (GISIS) (see A/CN.9/1089, paras. 86–88). A question was raised as to whether article 11(2) would need to be amended to better reflect that functioning. In response, it was suggested that the convention should avoid being too prescriptive so as to accommodate future changes in how GISIS was delivered.

59. It was observed that, while the Secretary-General of IMO was designated as the repository, IMO itself would not be party to the convention and would not be bound by its terms. A question was therefore raised about how the repository mechanism would be operationalized and whether the convention would need to address IMO's immunity from legal process with respect to the discharge of the repository function.

60. It was explained that the secretariat was continuing to work through arrangements with the IMO secretariat and that ultimately it was a matter for IMO to determine the legal process required to implement the repository function, including resolutions of IMO organs and administrative issuances of the IMO secretariat. It was envisaged that technical requirements for the repository mechanism would be the subject of a working-level understanding between the two secretariats.

61. It was reiterated that, unlike the International Registry for Aircraft Objects established pursuant to article 17(2) of the Convention on International Interests in Mobile Equipment (2001) and the Protocol thereto on Matters Specific to Aircraft Equipment, the repository under the present convention would perform purely an informative function, and therefore that the publication of instruments by IMO would have no particular legal effect. It was added that this would reduce the risk of exposure to legal process and the need to invoke immunity. As IMO would be discharging the repository function in the exercise of its own functions, it would enjoy existing immunities derived from the Convention on the International Maritime Organization (1948) and the Convention on the Privileges and Immunities of the Specialized Agencies (1947).

62. The Working Group agreed that no further amendment was required to article 11 to operationalize the repository mechanism or to accommodate the repository as a GISIS module. However, as a means to futureproof the convention, it agreed that article 11(1) should be amended to designate, as an alternative, an institution named by the Commission.

H. Article 12. Communication between authorities

63. Reference was made to paragraph 34 of the cover note to the fifth revision (A/CN.9/WG.VI/WP.94), which recalled previous deliberations of the Working Group regarding a mechanism for designating authorities. No support was expressed for establishing such a mechanism. In connection with the notion of "authority", it was suggested that the explanatory note should clarify, at the appropriate place, whether a sale conducted by a competent authority on the basis of an arbitral award or a decision of another public authority (e.g. a competition tribunal) can be considered as a "judicial sale" under the convention.

64. Reference was made to paragraph 37 of the cover note, which invited the Working Group to consider broadening the scope of article 12(1) beyond communication for the purposes of articles 7 and 8. While some resistance was expressed to authorizing communication between all authorities under the convention lest it interfere with existing mechanisms for judicial and administrative cooperation, the Working Group agreed that article 12(1) should apply "for the purposes of this Convention". The Working Group also agreed to retain article 12(2). It was clarified that article 12(2) was concerned with judicial assistance in the form of communication and not in the form of giving international effect to judicial sales, which was preserved in article 13(1). It was also clarified that article 12(1) did not require authorities to correspond.

65. The Working Group agreed to amend the heading of article 12 to read "communication between authorities of States Parties" and otherwise approved the draft article without further amendment.

I. Article 13. Relationship with other international conventions

66. It was emphasized that the draft convention dealt with giving international effect to judicial sales and not with the recognition of judgments. It was added that, although a judicial sale might be ordered or confirmed by a decision of a court, it was the clean title conferred by the judicial sale that was to be given effect. It was suggested that, in order to make that clear, article 13 should refer not to "recognizing" but rather to "giving effect" to a judicial sale.

67. It was noted that article 13(1) and 13(3) were both concerned with preserving other bases for giving effect to a judicial sale. It was proposed that both provisions should be formulated in similar terms and could be combined into a single paragraph, and that it was more appropriate to state that nothing in the convention "precluded" those other bases.

68. Different views were expressed on the relationship between the convention and domestic law regimes for giving effect to foreign judicial sales. On one view, the convention should preserve domestic regimes with respect to a judicial sale "for which no certificate of judicial sale is issued", and it was proposed that article 13(3) should be amended to insert those words. It was observed that, because the convention did not deal with the effects of such sales, the revised provision was better suited to article 14.

69. Another view recalled that judicial sales that would benefit from the convention regime were already given international effect under domestic law, including on the basis of comity, and that the convention should not oust the ability for parties to continue to rely on those domestic regimes, regardless of whether a certificate had been issued. It was nevertheless cautioned that domestic regimes could admit grounds for denying effect that were inconsistent with the convention, and that the convention should at least oust those grounds. Article 13(3) should therefore only preserve domestic regimes that provided a more favourable basis for giving effect to foreign judicial sales. Admittedly, article 13(3) could be interpreted as having that operation, but it was suggested that that operation could be clarified by revising article 13(3) to refer to "bases" under domestic law for giving effect to a judicial sale. The Working Group agreed to redraft article 13(3) along those lines.

70. The Working Group further agreed to combine articles 13(1) and 13(3) into a single paragraph that would be contained in a new standalone article dealing with other bases for giving effect to a judicial sale, and that the article would use the term "preclude" or a similar term.

71. The Working Group agreed to retain articles 13(2) and (4) without amendment, noting that they would now comprise the sole paragraphs of article 13.

J. Article 14. Matters not governed by the convention

72. While some support was expressed for incorporating article 14 into article 3, the prevailing view was that article 14 should remain in its present position. It was noted that the provisions of article 14 did not control the scope of the convention, but rather confirmed, for the avoidance of doubt, matters that were outside scope. Understood as such, it was suggested article 14 could be deleted altogether, although it was added that it was useful for the convention itself to signpost matters related to the judicial sale of a ship that it did not govern.

73. A concern was expressed that the word "owned" in article 14(b) might be interpreted to mean the "owner" of the ship as defined in article 2(h). There was broad support for the view that the meaning of the word "owner" should not be confined by

the definition of "owner". It was proposed that the issue could be addressed by referring to the person "who owned or had proprietary rights in the ship". The Working Group agreed to amend article 14(b) accordingly.

74. The Working Group recalled its agreement to recast article 9(5) as a new paragraph of article 14 (see para. 54 above), and agreed to formulate that paragraph along the following lines:

> "Moreover, this Convention shall not govern the effects, under the applicable law, of the suspension or avoidance of judicial sales by a court exercising jurisdiction under article 9."

75. A proposal to amend the chapeau of article 14 to clarify that it did not list exhaustively the matters not governed by the convention was not taken up by the Working Group.

K. Final clauses

1. Terminology

76. The Working Group agreed to revise the text through to refer to "State Party". It also heard a proposal to replace "signatories" with "signatory States" in article 16, and to measure time in days rather than months for added certainty. The Working Group asked the secretariat to consider those proposals.

2. Signing ceremony

77. The delegation of China expressed an interest in hosting a ceremony for the signing of the convention, once adopted, and proposed to refer to the convention as the "Beijing Convention". The Working Group expressed its gratitude for the generous offer and agreed to relay it to the Commission with a request to consider it favourably, also in the light of the measures imposed to combat the COVID-19 pandemic that may be in force at the time.

3. REIO clause

78. The Working Group agreed to replace the final sentence of article 17(1) with the following, to clarify its application:

> "For the purposes of articles 19 and 20, an instrument deposited by a regional economic integration organization shall not be counted."

4. Non-unified legal systems

79. The Working Group agreed to adapt the interpretation rules in article 18(3) to the convention. Accordingly, it agreed to:

(a) Refer to "law, regulations or procedures" in subparagraph (a);

(b) Delete subparagraph (b); and

(c) Amend subparagraph (c) to refer to "authority".

80. The Working Group considered a proposal to amend the chapeau of article 18(3) so that the interpretation rules applied only if the State concerned had extended the convention to some of its territorial units. A view was expressed that the rules should apply to every State with two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in the convention, regardless of whether a declaration has been made, and it was therefore proposed to retain the chapeau in its present form. The Working Group agreed to retain the chapeau without amendment. The Working Group also heard a proposal to insert a provision stating that article 18 did not apply to regional economic integration organizations, and asked the secretariat to consider the issue further.

5. Transitional application

81. The Working Group was invited to consider the application of the convention to judicial sales conducted around the time of entry into force of the convention for the State of judicial sale. In the discussion that ensued, three options were identified: (a) applying the convention only to sales "conducted" after entry into force; (b) applying the convention to sales not entirely conducted but "completed" after entry into force, and (c) applying the convention to sales completed before entry into force, but for which a certificate was issued afterwards.

82. It was widely recognized that option (c) provided the highest degree of certainty and predictability, since the date of issuance of the certificate was documented and easily ascertainable, whereas the time of "completion" or "conduct" of a judicial sale varied among legal systems. Nevertheless, there were strong reservations to that option. First, it was observed that the regime under the convention applied to judicial sales for which a certificate of judicial sale had been issued and that, pursuant to article 5(1) a certificate could only be issued if the sale was conducted "in accordance with … the requirements of [the] [c]onvention", which included the notice requirements in article 4. The view was expressed that the notice requirements could not be complied with unless the convention was in force at the time when the notice requirements were to apply, which would ordinarily coincide with the commencement of the judicial sale procedure. It was also pointed out that one of the notice requirements was the transmission of the notice of judicial sale to the repository, and it was queried whether the repository would accept a notice for a judicial sale that was, at the time, conducted in a non-State party. It was therefore stated that, in legal and practical terms, the convention could not apply to a judicial sale commenced prior to entry into force of the convention for the State of judicial sale.

83. Option (b), too, was felt to be hardly compatible with the logic of the convention, which applied only to judicial sales that were "conducted in a State Party". It was recalled that only a State for which the convention had entered in force could be a "State Party", and that the term "conducted" implied a period of time prior to the completion of the judicial sale. Thus, it was not sufficient merely for the judicial sale to be completed prior to entry into force, let alone for the certificate of judicial sale to be issued prior to entry into force.

84. A preference emerged within the Working Group towards the prudent approach of limiting the application of the convention only to those sales entirely "conducted" after entry into force. It was noted, however, that a judicial sale was a process that in some legal systems might entail several steps and that in some systems the notice contemplated in article 4 was a preparatory step but not part of the judicial sale as such. For those systems, the requirement for the sale to be "conducted" after entry into force could be unnecessarily rigid. One possible solution could be to encourage early implementation of the notice requirements set forth in the convention by allowing the repository to receive and publish notices of judicial sale emanating from States that have deposited their instrument of ratification or accession but for which the convention had not yet entered into force. In response, it was noted that the solution raised questions regarding the provisional application of treaties, and would need to be discussed with IMO if it was not expressly spelled out in the convention. It was also noted that it might pose difficulties for States in which the operation of the convention required implementing legislation whose own entry into force depended on the entry into force of the convention for the State concerned.

85. After discussion, the Working Group agreed to amend article 19 to provide that the convention applied to judicial sales conducted after the entry into force of the convention for the State of judicial sale. The Working Group further agreed to insert a provision in article 11 allowing for notices emanating from States which have ratified, accepted, approved or acceded to the convention to be transmitted to the repository for publication.

6. Amendment

86. Consistent with the new final sentence of article 17(1) (see para. 78 above), the Working Group agreed to insert the following sentence at the end of article 20(2):

> "For the purposes of this paragraph, the vote of a regional economic integration organization shall not be counted."

87. It was noted that applying amendments to territorial units to which the convention had been extended by declaration was already covered by article 18.

88. A proposal was made to invite members of the Commission to participate as observers in proceedings of the conference of States Parties. It was reasoned that, as the convention had been prepared by the Commission, members of the Commission should be able to participate in preparing amendments. In response, it was observed that article 20 represented a standard clause in United Nations conventions that was based on the principle that treaty amendments were a prerogative of the parties, and that the Commission was not a treaty body under the convention. The implications of involving the Commission in the amendment process would need to be considered, noting in particular that its membership changed over time. If anything, all States Members of the United Nations should be invited. While some support was expressed for the proposal, after discussion, the Working Group approved article 20 without any further amendment.

7. Denunciation

89. Recalling its deliberations regarding the transitional application of the convention (paras. 81–85 above), the Working Group agreed to retain the final sentence of article 21(2) but to replace "conducted" with "for which a certificate of judicial sale is issued".

8. No legalization of certificate

90. The Working Group recalled its agreement to article 5(3) of the fifth revision and its rejection of a proposal to allow States Parties to require the legalization of a certificate of judicial sale (see A/CN.9/1089, para. 108).

91. It was noted that concerns remained about the willingness of registry officials in some States to take action on a foreign certificate of judicial sale without assurance as to its authenticity, and that a failure to address those concerns might limit the appeal of the convention to those States. As a compromise, it was proposed to insert a provision among the final clauses allowing a State which was party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) ("Apostille Convention") to make a declaration when joining the convention that a certificate produced to the registrar under article 7 was required to be accompanied by an Apostille if issued in another party to the Apostille Convention. It was added that, while over 120 States were party to the Apostille Convention, the provision, which the secretariat was requested to draft, would need to ensure that certificates issued in States that were not party thereto were not affected.

L. Preamble

92. It was recalled that the fifth revision reproduced the preamble contained in the original Beijing Draft. The Working Group agreed that the preamble should be revised to reflect the language and content of the convention and to focus on less technical matters. In that regard, it was added that the preamble should recognize the importance of seagoing and inland shipping to international trade, and the needs of the shipping and finance industry for legal certainty regarding the effects of judicial sales abroad.

M. Title

93. The Working Group heard a proposal to rename the draft the “Convention on the International Effects of Judicial Sales of Ships”.

N. Articles 1 and 3

94. The Working Group was reminded of deliberations at its thirty-ninth session regarding the allocation of the various elements in articles 1 and 3 (see A/CN.9/1089, paras. 40, 42 and 47). It was proposed that article 3 could be merged with article 1. The Working Group agreed to retain articles 1 and 3 as separate articles.

O. Article 4

1. Drafting

95. The Working Group agreed to a proposal to replace references to “registrar” with “registry” in articles 4(3)(a), 4(3)(b) and 4(3)(e)(ii) to ensure alignment with article 7.

2. Reliance on register information

96. It was observed that information set forth in registers might be out of date, and that article 4(7) could be interpreted to preclude reference to other sources of information, which could jeopardize the proper notification of creditors. It was therefore proposed to delete the words “exclusively” in the chapeau of article 4(7).

97. In response, it was noted that article 4(7) was designed to provide certainty for the notice giver while also protecting the purchaser from bad faith claims that the notice was sent to the wrong address. It was added that the person entitled to notice should bear the risk of inaccurate information in the register and not the purchaser. In any case, it was reiterated that the notice of judicial sale was not a substitute for the notice to participate in the distribution of proceeds.

98. It was further explained that article 4(7) did not preclude the notice giver from referring to other sources of information, including to comply with domestic law requirements, but rather that the notice giver need not do so to comply with the notice requirements under the convention. Broad support was expressed for retaining the word “exclusively”. To avoid doubt, the Working Group agreed to replace the words “reliance may be placed exclusively on” in the chapeau with the words “reliance may exclusively be placed on” and for the operation of article 4(7) to be clarified in the explanatory note.

3. Function of the notice requirements

99. It was recalled that non-observance of the notice requirements in article 4 would not in itself constitute a breach of a treaty obligation by the State of judicial sale, but rather lead to the non-issuance of the certificate (A/CN.9/1089, para. 52). To avoid doubt, the Working Group agreed to replace article 4(2) with the following:

> “Notwithstanding paragraph 1, a certificate under article 5 may only be issued if notice of a judicial sale is given prior to the judicial sale of a ship in accordance with the requirements of paragraphs 3 to 7.”

4. Language requirements

100. There was broad support for retaining a language requirement based on article 4(6) of the fifth revision. It was acknowledged that the provision also applied when the notice was transmitted to the repository and only to the information mentioned in Appendix I. To clarify its application, the Working Group agreed to amend article 4(6) by placing the words “of the information mentioned in

Appendix I" immediately after the word "translation" and to refer to "any" such working language of the repository.

101. It was proposed that the translation should be certified. It was noted that the law in some jurisdictions might require notified documents to be accompanied by a certified translation if not in the official language of the State of judicial sale, although it was queried why such a requirement would apply to certain items of information transmitted to the repository by the State of judicial sale. It was added that, in some States, the notice giver was a court, which might not be authorized to certify the translation. Moreover, it was noted that a certification requirement might unduly burden the process and not be compatible with the passive function of the repository and the use of drop-down lists as contemplated for the GISIS interface. However, it was noted that items 7 and 8 of Appendix I called for free-text input, and that a certification requirement would be useful for that information. After discussion, the Working Group agreed not to include a certification requirement.

5. Appendix I

102. It was recalled that Appendix I listed minimum information to be contained in the notice rather than a model notice form to be completed. To better reflect its function, the Working Group agreed to delete the blanks indicated in Appendix I.

103. It was explained that item 3.1 called for the name of the court or other public authority and not its contact details, which responded to concerns about whether a court would be in a position to handle enquiries (see A/CN.9/1089, para. 75). It was observed that the reference to the court or other public authority "conducting" the judicial sale was potentially confusing as it could refer to the authority that was ordering, approving or confirming the sale or to the authority that was carrying it out. It was explained that the name of the authority ordering, approving or confirming the sale was more relevant, and the Working Group agreed to amend the item accordingly.

104. It was explained that item 4.2 was concerned with the register of ships in which the ship was registered, although it was admitted that it might avoid confusion if the term "registry" was used. A suggestion was made to revert to "port of registry", as that reflected how the register was maintained in some jurisdictions. In response, it was emphasized that the registry was the institution maintaining the register, and therefore that the term "registry" accommodated references to local registry offices maintaining the register for a particular port. The Working Group agreed to use the term "registry".

105. The Working Group agreed to delete item 5.3. It was observed that the contact details of the owner were not necessary in the notice, and that the publication of those details in the repository could raise personal data protection issues.

106. The Working Group agreed to split item 6 into two sub-items. The first would state "in the case of a judicial sale by public auction: anticipated date, time and place of public auction", while the second would state "in the case of a judicial sale by private treaty, any relevant details ordered by the court of judicial sale".

P. Article 5

1. Drafting

107. The Working Group agreed to split article 5(1) into two paragraphs along the lines indicated in paragraph 22 of the cover note to the fifth revision. It also agreed to mention the court of judicial sale as an issuing authority in the chapeau of article 5(1) on account of the likelihood in many jurisdictions that the court would also issue the certificate of judicial sale.

108. The Working Group agreed to amend article 5(2) to apply the formulation used in the new paragraph on transmitting avoidance decisions to the repository (see para. 51 above). While a question was raised about the meaning of "promptly", and a

suggestion was made to replace it with “in a timely manner”, the Working Group agreed to retain the requirement for the certificate to be transmitted promptly.

2. Appendix II

109. The Working Group agreed to amend items 3.1 and 4.2 and to delete items 5.3 and 6.3 to align with the amendments to Appendix I. It also agreed to revise item 4.4 to match item 4.4 of Appendix I and to make further amendments to the subparagraphs of article 5(1) to match the amendments to Appendix II. The Working Group heard a proposal to insert an item containing details of the bareboat charterer, noting that article 7(2) contemplated the use of the certificate for deletion of bareboat charter registration. While some support was expressed for the proposal, the Working Group did not agree to insert the item.