



**United Nations Commission on
International Trade Law
Working Group VI (Judicial Sale of Ships)
Thirty-seventh session
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**Synthesis of comments submitted on the second revision of
the Beijing Draft**

Note by the Secretariat

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I. Introduction

1. To facilitate the progress of work of Working Group VI during the COVID-19 pandemic, the Secretariat invited States, intergovernmental organizations and invited international non-governmental organizations to submit comments on the second revision of the Beijing Draft (A/CN.9/WG.VI/WP.87) as well as on the overarching issues identified in the accompanying note (A/CN.9/WG.VI/WP.87/Add.1).

2. This note synthesizes the comments submitted by the following States and international organizations:

(a) *States*: Canada, China, El Salvador, European Union and its member States (referred to collectively as the EU),¹ Lebanon, Mexico, and United States of America (US);

(b) *International organizations*: Comité Maritime International (CMI), International Association of Judges (IAJ) jointly with the Law Association for Asia and the Pacific (LAWASIA), and International Chamber of Shipping (ICS) in coordination with the Baltic and International Maritime Council (BIMCO).

II. Synthesis of comments on overarching issues identified in the accompanying note

A. Form of the instrument²

3. The accompanying note invites the Working Group to take a final decision on the form of the instrument at the thirty-seventh session. All submissions commenting on this issue support the instrument taking the form of a treaty.³

B. Geographic scope⁴

4. The accompanying note invites the Working Group to express its agreement to apply the recognition regime only to judicial sales conducted in a State that is party to the treaty (if the instrument takes the form of a treaty). Most submissions express a preference for a “closed” regime, in the sense that the instrument only applies to judicial sales conducted in a State party.⁵ One of these submissions notes that a closed regime will encourage wider acceptance of the instrument.⁶

5. One submission expresses a preference for an “open” regime, in the sense that the instrument applies to judicial sales conducted in any State irrespective of whether it is a party or not, with the option for States to apply the instrument only to judicial sales conducted in a State party.⁷ It notes that an open regime will promote the objective of legal certainty, and that applying the instrument to judicial sales in a non-State party may still affect the interests of stakeholders (e.g., shipowners, financiers and maritime lienholders) which are nationals of a State party.

C. Types of ships covered⁸

6. The accompanying note analyses the relationship between a future instrument and Protocol No. 2 to the Convention on the Registration of Inland Navigation Vessels

¹ Two EU member States – Germany and Malta – also submitted separate comments.

² See paragraph 2 of the accompanying note.

³ Canada, China, EU, Malta, CMI, IAJ/LAWASIA, ICS/BIMCO.

⁴ See paragraph 3 of the accompanying note and articles 1 and 6(1) of the second revision.

⁵ Canada, EU, Malta, CMI, IAJ/LAWASIA, ICS.

⁶ Malta.

⁷ China.

⁸ See paragraphs 4–9 of the accompanying note and article 2(i) of the second revision.

(1965) (“Geneva Convention”). It finds that, if inland navigation vessels are included within the scope of the draft instrument, there would be some overlap between the draft instrument and Protocol No. 2. It invites the Working Group to consider preserving the application of Protocol No. 2. The second revision makes provision to that effect in article 14(2).

7. Most submissions commenting on this issue support retaining article 14(2).⁹ Several submissions express a preference for including inland navigation vessels within the scope of the instrument.¹⁰ One submission notes that whether the judicial sale of an inland navigation vessel is within scope should ultimately be a matter for the law of the State of judicial sale.¹¹ This follows from the definition of “ship” in article 2(i) of the second revision, which extends to a vessel “that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale”. One submission recommends further analysis as to whether the instrument should apply only to seagoing vessels.¹²

D. Centralized online repository¹³

8. The accompanying note presents a preliminary report of work carried out by the Secretariat in looking into options for possible hosts for a centralized online repository of notices and certificates of judicial sale. It notes that the Secretariat is in discussions with the International Maritime Organization (IMO) secretariat to explore options for the IMO to host the repository as an additional module within the Global Integrated Shipping Information System (GISIS).

9. All submissions commenting on this issue support establishing a centralized online repository and hosting it within GISIS under arrangement with the IMO.¹⁴ One submission observes that the repository may obviate the need to provide for the presentation of certified copies of the certificate of judicial sale.¹⁵ Another submission queries the legal value of certificates published in the repository.¹⁶ The Secretariat notes that a certificate published in the repository may satisfy the requirements of an electronic certificate in article 11(2) of the second revision, in which case that certificate could be treated as *the* certificate.

E. Certified copies and translations of the certificate¹⁷

10. The accompanying note invites the Working Group to consider whether it is necessary to retain certification requirements for copies and translations of the certificate of judicial sale. Two submissions support retaining the certification requirement for translations produced pursuant to articles 7(3) and 8(3) of the second revision.¹⁸ One submission supports retaining the certification requirement for copies produced at the request of the registrar pursuant to article 7(4),¹⁹ while another submission observes that this requirement may be obviated by the establishment of

⁹ China, EU, Malta, CMI, IAJ/LAWASIA, ICS/BIMCO.

¹⁰ China, Malta, ICS/BIMCO.

¹¹ CMI. One submission adds that inland navigation vessels are expressly excluded from the legislative regime for the arrest and judicial sale of ships in Australia: IAJ/LAWASIA.

¹² Germany.

¹³ See paragraphs 10–16 of the accompanying note and articles 4(3)(b), 5(3) and 12 of the second revision.

¹⁴ China, Malta, ICS/BIMCO.

¹⁵ China.

¹⁶ ICS/BIMCO.

¹⁷ See paragraphs 17–18 of the accompanying note and articles 7(3), 7(4) and 8(3) of the second revision.

¹⁸ China, ICS/BIMCO.

¹⁹ ICS/BIMCO.

the centralized online repository (see para. 9 above).²⁰ Two submissions suggest that a certified copy of the certificate could be presented in lieu of the certificate itself.²¹

F. Conditions for giving international effect²²

11. The accompanying note summarizes the three conditions in article 6 of the second revision for giving international effect to the judicial sale, namely (a) that the ship was physically within the jurisdiction of the State of judicial sale at the time of the sale (“condition 1”), (b) that the judicial sale was conducted in accordance with the law of the State of judicial sale (“condition 2”), and (c) that the judicial sale was conducted in accordance with the notice requirements contained in the draft instrument (“condition 3”). The note invites the Working Group to consider whether it is more effective for these conditions to be scrutinized by the authorities in the State of judicial sale and thus omitted from article 6.

12. All submissions commenting on this issue support omitting the three conditions from article 6.²³ However, one submission points out that a State other than the State of judicial sale still has a role in scrutinizing condition 1, which serves as a ground for refusal (article 10(1)(a)) and defines the scope of application of the instrument (article 3(1)(a)).²⁴ The submission expresses the view that condition 1 should continue to serve these functions (see synthesis of comments on the operation of the grounds for refusal and on article 3 in paras. 15 and 32, respectively).

G. Function of the notice requirements²⁵

13. The accompanying note invites the Working Group to consider what function the notice requirements in article 4 of the second revision should serve. In particular, it invites the Working Group to consider whether the notice requirements should serve as a condition for issuing the judicial sale, as currently provided in article 5(1) of the second revision, or as a stand-alone provision. All submissions commenting on the issue support the notice requirements serving as a condition for issuing the certificate of judicial sale.²⁶

H. Operation of the grounds for refusal²⁷

14. The accompanying note invites the Working Group to pay particular attention to the interaction between articles 7(5), 8(4) and 10 in its consideration of the second revision. It recalls the proposal made at the thirty-sixth session to “link and adapt” the grounds for refusal in article 10 to the obligations imposed on States other than the State of judicial sale, namely the obligation to register/deregister (article 7) and the obligation not to arrest (article 8). Broad support has been given in the Working Group to exploring this proposal further,²⁸ which is implemented in articles 7(5) and 8(4) of the second revision. One submission suggests that articles 7(5) and 8(4) should be referred to in the body of the instrument.²⁹

²⁰ China.

²¹ Malta, US.

²² See paragraphs 19–22 of the accompanying note and article 6 of the second revision.

²³ China, Malta, US.

²⁴ China.

²⁵ See paragraphs 23–24 of the accompanying note and articles 4, 5(1) and 6(1)(b) of the second revision.

²⁶ China, ICS/BIMCO.

²⁷ See paragraph 25 of the accompanying note and articles 7(5), 8(4) and 10 of the second revision.

²⁸ A/CN.9/1007, para. 89.

²⁹ Lebanon.

1. Accepted grounds for refusal

15. The grounds for refusal in article 10 of the second revision are (a) that the ship was not physically within the jurisdiction of the State of judicial sale at the time of the sale (“ground 1”),³⁰ (b) that the sale was procured by fraud committed by the purchaser (“ground 2”), and (c) that the judicial sale having effect in the State addressed would be manifestly contrary to the public policy of that State (“ground 3”). Footnotes 46 and 47 of the second revision invite the Working Group to consider whether it is desirable to retain grounds 1 and 2. One submission supports retaining all of the grounds,³¹ while three submissions support omitting grounds 1 and 2,³² and one suggests omitting only ground 1.³³ With respect to ground 1, two submissions observe that it is redundant as it already serves to define the scope of application of the instrument (article 3(1)(a)).³⁴ With respect to ground 2, one submission suggests that it should be amended so as to apply to fraud committed by the purchaser in procuring the certificate of judicial sale rather than in procuring the sale itself. It adds that such a fraud might be committed if the purchaser requested a certificate knowing that the matters being certified (as listed in article 5(1)) were not present.³⁵ Another submission observes that ground 2 is redundant as it restates the general principle that “fraud vitiates everything”.³⁶ The Secretariat notes that applying this ground for refusal in the State addressed would not vitiate the judicial sale in the State of judicial sale.³⁷

2. Interaction between articles 7(5), 8(4) and 10

16. Three submissions address this issue. One submission suggests that both articles 7(5) and 8(4) should provide for the same grounds for refusal to apply.³⁸ With respect to the obligation to register/deregister, a second submission suggests that article 7(5) should be reformulated to cross-refer to article 10, such that the obligation would not apply if the judicial sale is determined to have no effect in the State pursuant to article 10.³⁹ The full “suite” of grounds – whatever they may be – would still apply. A third submission makes a similar suggestion with respect to the obligation not to arrest, adding that article 8(4) could expressly acknowledge that either the court addressed or another court of the State could have jurisdiction to determine whether a ground for refusal exists.⁴⁰ The submission expresses the view that the full “suite” of grounds – not just the ground 3 (the public policy ground) – should apply to the obligation not to arrest.

17. Returning to the obligation to register/deregister, the third submission also suggests that article 7(5) should be reformulated to provide that the registrar may refuse to take action if (a) the certificate of judicial sale is avoided or cancelled, or (b) the certificate of judicial sale is declared to be of no effect by a court with jurisdiction over the registrar. On (a), the second revision does not provide for the avoidance or cancellation of the certificate of judicial sale per se, but does provide for the certificate to cease to have effect – and thus cease to trigger the obligation to register/deregister – if the sale is avoided under article 9 (article 5(6)).⁴¹ On (b), the second revision does not provide for a court in a State other than the State of judicial

³⁰ As noted above (para. 12), in the second revision, this ground for refusal also serves to define the scope of application of the instrument (article 3(1)(a)) while also serving as a condition for giving international effect to the judicial sale (article 6(1)(a)).

³¹ China.

³² Lebanon, CMI, ICS/BIMCO.

³³ US.

³⁴ Lebanon, US.

³⁵ US.

³⁶ Lebanon.

³⁷ A/CN.9/1007, para. 79.

³⁸ Germany.

³⁹ US.

⁴⁰ China.

⁴¹ See footnote 27 of the second revision.

sale to scrutinize the certificate of judicial sale, which is a matter within the exclusive jurisdiction of the courts of the State of judicial sale (article 9(1)).

I. Other issues

18. A number of submissions lend their support for the overall structure of the recognition regime under the draft instrument.⁴² Two submissions re-emphasize the need for the instrument to strike a fair balance between the rights of existing creditors and the rights of the purchaser in a judicial sale.⁴³ These two submissions also re-emphasize the importance of the notice requirements in safeguarding due process with respect to the judicial sale and in ensuring that affected parties have the opportunity to assert their rights.⁴⁴ Another submission highlights the need to protect maritime lienholders.⁴⁵ The Secretariat notes that the Working Group has decided that, besides establishing minimum standards for notification, the instrument should not regulate the conduct of the judicial sale in the State of judicial sale or the proceedings leading to the judicial sale.⁴⁶

III. Synthesis of article-by-article comments on the second revision

A. Article 1 – Purpose⁴⁷

19. One submission suggests that article 1 should be deleted, adding that, if anything, a declaration of purpose could be included in the preamble.⁴⁸ It also observes that the purpose of the instrument is not just to set forth the “conditions” under which a judicial sale conducted in one State Party has effects in another State Party.

20. There was general agreement at the thirty-sixth session of the Working Group to insert a provision, at the start of the instrument, which declares – in positive terms – the object and purpose of the instrument. If the Working Group wishes to retain article 1, it may wish to consider replacing “conditions” with “circumstances”.

B. Article 2 – Definitions

1. Definition of “clean title” (article 2(b))⁴⁹

21. The second revision presents two alternative options in square brackets for the definition of “clean title”. Some submissions express a preference for the first option,⁵⁰ while others express a preference for the second option.⁵¹

22. With respect to the first option, one submission suggests that the definition should be amended to specify that the rights and interests are “proprietary” in nature.⁵² It adds that this amendment would mean that *jus in re aliena* (i.e., rights in a thing belonging to another, which would include a maritime lien and other rights within the meaning of “charge” as defined in article 2(a)) is not part of the “rights and interests in the ship” that are extinguished by the acquisition of clean title.

⁴² El Salvador, CMI, IAJ/LAWASIA, ICS/BIMCO.

⁴³ Mexico, ICS/BIMCO. See A/CN.9/973, para. 67, and A/CN.9/1007, paras. 55 and 82.

⁴⁴ See A/CN.9/973, paras. 22 and 67, and A/CN.9/1007, para. 85.

⁴⁵ Germany.

⁴⁶ A/CN.9/1007, paras. 43 and 44.

⁴⁷ See footnote 2 of the second revision.

⁴⁸ China.

⁴⁹ See footnote 4 of the second revision.

⁵⁰ US, IAJ/LAWASIA.

⁵¹ China, Lebanon, Mexico.

⁵² China.

23. With respect to the second option, one submission suggests that the reference to “any mortgage or charge” is too narrow and should be replaced with a reference to “encumbrances”.⁵³

2. Definition of “judicial sale” (article 2(c))⁵⁴

24. A suggestion was made at the thirty-sixth session of the Working Group to revise the definition of “judicial sale” to clarify that a sale by “private treaty” is not a private sale but rather a sale that is carried out under the supervision and with the approval of a court. One submission suggests that this clarification is unnecessary and that the words “carried out under the supervision and with the approval of a court” should be omitted.⁵⁵

25. Another submission suggests that subparagraph (i) of the definition should be amended to refer to judicial sales also being “confirmed” by a court or other public authority.⁵⁶ It also suggests that subparagraph (ii) of the definition should be amended to specify that the creditors to which the proceeds of the sale are made available are those which are “entitled [to the proceeds] under applicable law of the State of judicial sale”.

3. Definition of “maritime lien” (article 2(d))⁵⁷

26. Two submissions support defining the term “maritime lien” by reference to the law applicable in the State of judicial sale.⁵⁸ This effectively reverts to the definition in the original Beijing Draft.⁵⁹ At the thirty-sixth session, it was noted that the term “maritime lien” had a dual use in the instrument (insofar as it (a) prescribes the class of persons to whom the notice of judicial sale is to be given and (b) defines the “clean title” to be recognized in a State other than the State of judicial sale). As such, it was suggested that it was neither necessary nor desirable to limit the definition of maritime lien by reference to the law applicable in the State of judicial sale. The definition in the second revision seeks to address this dual use by defining the term “maritime lien” by reference to the “applicable law” without reference to a particular State. One submission supports this wording.⁶⁰

4. Definition of “mortgage” (article 2(e))⁶¹

27. Like “maritime lien”, the term “mortgage” is used in the second revision to define action in the State of judicial sale (e.g., the class of persons to whom the notice of judicial sale is to be given) and action in a State other than the State of judicial sale (e.g., the “clean title” to be recognized and the action to be taken by the registrar). Footnote 7 of the second revision invites the Working Group to consider whether, for each of these uses, it is appropriate for subparagraph (ii) of the definition to limit a “mortgage” to one that is “recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale”.

28. One submission supports defining the term “mortgage” by reference to the “applicable law” without reference to a particular State, like in the definition of “maritime lien”.⁶² Another submission supports omitting subparagraph (ii) altogether, adding that this is consistent with the approach taken to the recognition of mortgages in the International Convention on Maritime Liens and Mortgages (1993) (MLMC

⁵³ Mexico.

⁵⁴ See footnote 5 of the second revision.

⁵⁵ China.

⁵⁶ US.

⁵⁷ See footnote 6 of the second revision.

⁵⁸ US, IAJ/LAWASIA.

⁵⁹ A/CN.9/WG.VI/WP.82, article 1(i).

⁶⁰ Germany.

⁶¹ See footnote 7 of the second revision.

⁶² Germany.

1993)⁶³ and avoids a potential conflict with subparagraph (i) of the definition.⁶⁴ The submission also supports omitting reference in subparagraph (i) to the mortgage being “recorded” (in addition to being “registered”). At the thirty-sixth session, the Working Group agreed to include a reference to the mortgage being “registered or recorded”. The Secretariat notes that the MLMC 1993 refers to mortgages being “registered” but not recorded, while article 11(2) of the United Nations Convention on Conditions for Registration of Ships (“Ship Registration Convention”)⁶⁵ refers to *particulars* of a mortgage being “recorded”.

5. Definition of “owner” (article 2(f))⁶⁶

29. One submission suggests qualifying that the equivalent registry by reference to which the owner of the ship is determined is a “public” registry.⁶⁷

6. Definition of “purchaser” (article 2(h))⁶⁸

30. The second revision puts the definition of “purchaser” in square brackets to indicate its possible deletion. Two submissions support retaining the definition,⁶⁹ with one adding that the definition should accord with the definition of “clean title”.⁷⁰

7. New definition of “authority”

31. One submission suggests defining the term “authority”.⁷¹ This term is used (a) to circumscribe the bodies conducting a judicial sale for the purposes of the definition of “judicial sale” (i.e., sales ordered, approved or carried out by public authority), (b) to define certain judicial sales excluded from scope (i.e., sales involving “tax, customs or other law enforcement authorities”), (c) to circumscribe the bodies issuing a certificate of judicial sale (i.e., a public authority designated by the State of judicial sale), and (d) to identify the bodies authorized to correspond directly under article 13. The Working Group has previously heard proposals to define the term “authority”.⁷²

C. Article 3 – Scope of application

32. One submission suggests amending article 3(1) to specify that the instrument applies only to judicial sales for which the proceeds are made available to creditors.⁷³ The Working Group has previously considered using the provision on scope of application to do so, with agreement reached at the thirty-sixth session to use the definition of “judicial sale” instead,⁷⁴ as reflected in article 2(c) of the second revision.

33. The second revision puts the exclusion of sales by tax, customs and other law enforcement authorities in article 3(2)(a) in square brackets. Footnote 13 invites the Working Group to consider whether the exclusion is still needed in the light of the amended definition of judicial sale (specifically subparagraph (ii) thereof). One submission expresses the view that the exclusion is not needed.⁷⁵ Another submission expresses the view that the exclusion is needed,⁷⁶ while yet another suggests that the

⁶³ United Nations, *Treaty Series*, vol. 2276, No. 40538.

⁶⁴ China.

⁶⁵ *International Legal Materials*, vol. 26, No. 5 (1987), p. 1229.

⁶⁶ See footnote 8 of the second revision.

⁶⁷ US.

⁶⁸ See footnote 9 of the second revision.

⁶⁹ China, Lebanon.

⁷⁰ Lebanon.

⁷¹ China.

⁷² See A/CN.9/973, para 83.

⁷³ Lebanon.

⁷⁴ See A/CN.9/973, paras 31 and 89, and A/CN.9/1007, para. 37.

⁷⁵ China.

⁷⁶ IAJ/LAWASIA.

exclusion should be applied to sales that are “for purposes other than protection of creditors”.⁷⁷ Neither of these suggestions expresses a view as to whether the exclusion is covered by the definition of judicial sale.

34. One submission expresses the view that the exclusion of State-owned ships in article 3(2)(b) should be incorporated into the definition of ship in article 2(i).⁷⁸

D. Article 4 – Notice of judicial sale⁷⁹

1. Applicability to judicial sales within scope⁸⁰

35. Footnote 16 of the second revision invites the Working Group to confirm whether, at the point when notice is given (i.e., prior to the judicial sale), it will always be known that the judicial sale will result in the conferral of clean title, and therefore that the judicial sale is within the scope of application of the instrument. One submission notes that, under the domestic law of the relevant State, judicial sales always confer clean title on the eventual purchaser.⁸¹

2. Persons to be notified (article 4(1))⁸²

(a) Ship registrars (article 4(1)(a))

36. One submission notes that a ship may be registered in multiple registries in a State (e.g., a federal registry and a state/provincial registry) and suggests that subparagraph (a) should be amended to provide for the notice to be given to the registrar of each of these registries.⁸³

37. Another submission notes the need for the Working Group to consider the scope of notification of the ship registrar and its effects.⁸⁴ In doing so, the Working Group may wish to recall that:

(a) the second revision does not codify the notice requirements for a judicial sale but does establish certain minimum standards for notification, including for the contents of the notice of judicial sale (article 4(2) and Appendix I);

(b) the *function* of the notice requirements is still a matter to be resolved by the Working Group (as discussed in paragraph 13 above);

(c) a distinction has been emphasized on several occasions within the Working Group between proceedings for the judicial sale on the one hand and proceedings for the claim giving rise to the judicial sale and proceedings for the distribution of proceeds on the other hand,⁸⁵ with the point being made that the notice requirements should be adapted to the proceedings for the judicial sale;⁸⁶

(d) the point has also been made on several occasions that the *objective* of the notice requirements is to strike a balance between fairness and efficiency.⁸⁷

⁷⁷ US.

⁷⁸ China.

⁷⁹ See also discussion above under the heading “function of the notice requirements”. No comments were received on the model notice contained in Appendix I of the second revision.

⁸⁰ See footnote 16 of the second revision.

⁸¹ China.

⁸² See footnote 17 of the second revision.

⁸³ IAJ/LAWASIA.

⁸⁴ Mexico. See also synthesis of comments in paragraph 40 below.

⁸⁵ See A/CN.9/973, paras. 21, 24 and 56, and A/CN.9/1007, para. 55.

⁸⁶ See A/CN.9/973, para. 68.

⁸⁷ See A/CN.9/973, para. 67, and A/CN.9/1007, para. 55.

(b) Holders of mortgages and registered charges (article 4(1)(b)) and holders of maritime liens (article 4(1)(c))

38. One submission stresses the importance of ensuring that all creditors have the opportunity to assert their rights in the ship.⁸⁸ Another submission suggests that the draft instrument should provide for the notice of judicial sale to be given to all holders of unregistered charges (not just holders of maritime liens).⁸⁹ Questions have previously been raised within the Working Group as to the feasibility of identifying and reaching all creditors.⁹⁰ At the same time, as noted in footnote 17 of the second revision, the list of persons to be notified of the judicial sale has not been determined by the Working Group.

(c) Bareboat charterers and bareboat charter-in registrars (articles 4(1)(e) and (f))

39. One submission suggests that, if the ship is under bareboat charter, it might be more reliable to give notice to the master of the ship rather than to the bareboat charterer and bareboat charter-in registrar.⁹¹

3. Optional notification of registrars

40. At its thirty-sixth session, the Working Group heard that, in several jurisdictions, the ship registrar is not given notice of the judicial sale.⁹² One submission suggests that giving the notice to ship registrars and bareboat charter-in registrars should be optional, and therefore that article 4(1) should be amended to provide that the notice of judicial sale “may” be given to them.⁹³ The submission notes that ship registrars do not have any property interests in the ship being sold and may not appear in the proceedings. It also notes that those registrars may not have procedures in place to receive and process notices of judicial sale and may not be willing therefore to receive them. The Secretariat notes that a number of proposals have previously been put to – but so far not taken up by – the Working Group for the ship registrar to play a more active role in the notification process.⁹⁴

4. Publication of notice (article 4(3)(a))

41. One submission suggests that the notice of judicial sale should also be published in the State of registration (i.e., the State in whose registry of ships the ship is registered), observing that many encumbrances on the ship are likely to be registered in that jurisdiction.⁹⁵

5. Reliance on registry information (article 4(4))

42. One submission observes that the kinds of information listed in article 4(4) may be subject to personal data protection laws in some States.⁹⁶ The Secretariat notes that this observation may also be relevant to information exchanged under article 13. It also notes that article 4(4) does not require the registrar to disclose or provide access to registry information, which is subject to domestic law and other international law regimes (e.g., article 1(b) of the MLMC 1993 and article 6(3) of the Ship Registration Convention (which is not yet in force)).

⁸⁸ Mexico.

⁸⁹ China.

⁹⁰ See A/CN.9/973, para. 67.

⁹¹ US.

⁹² See A/CN.9/1007, para. 63.

⁹³ China.

⁹⁴ See A/CN.9/973, paras. 73 and 74.

⁹⁵ Mexico.

⁹⁶ Mexico.

E. Article 5 – Certificate of judicial sale

1. Conditions for issuance (article 5(1))

43. In the second revision, the conditions for the issuance of the certificate of judicial sale are (a) that the sale be conducted in accordance with the law of the State of judicial sale, (b) that the sale be conducted in accordance with the notice requirements in article 4, (c) that the certificate be issued at the request of the purchaser, and (d) that the certificate be issued in accordance with the regulations and procedures of the issuing authority. As noted in footnote 20 of the second revision, the Secretariat has included condition (d) for consideration by the Working Group as a means to allow the State of judicial sale to specify the procedures for applying for a certificate.

44. Two submissions support the inclusion of condition (d).⁹⁷ Another submission expresses the view that the certificate of judicial sale should only be issued if the rights of creditors have been respected.⁹⁸ That submission also suggests that condition (c) should be omitted and replaced with a condition that the certificate be issued by the issuing authority of its own motion.

45. Several submissions suggest the inclusion of an additional condition that the certificate only be issued if the judicial sale is no longer subject to challenge.⁹⁹ These submissions observe that the issuance of the certificate triggers a series of serious and irreversible effects, and that the subsequent invalidation of the certificate would lead to complications. This suggestion has implications for article 5(6) and the final clause of article 9(1). It also raises the question as to whether the international effects of a judicial sale pursuant to article 6 should be postponed until after the time period for challenging the judicial sale has lapsed.

2. Contents of the certificate (article 5(2))¹⁰⁰

46. Footnote 22 of the second revision invites the Working Group to consider whether article 5(2)(d) should be amended to replace “port of registry” with “registry of ships or equivalent registry in which the ship is registered”. Four submissions support this amendment.¹⁰¹

47. The specification of the purchase price in article 5(2)(h) of the second revision is in square brackets following the discussion of the Working Group at its thirty-sixth session. Two submissions support retaining this provision.¹⁰² Another submission observes that, while specification of the purchase price may help to identify fraud, it will not always reflect the full consideration provided by the purchaser (which might include the assumption of other costs or liabilities).¹⁰³ The submission suggests that article 5(2)(h) should be amended accordingly. A further submission supports omitting the provision, adding that specifying the purchase price in the certificate of judicial sale might affect the market price for the ship in a subsequent sale.¹⁰⁴

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

48. Article 5(4) of the second revision requires the issuing authority to maintain a record of certificates issued and to verify whether particulars in a produced certificate correspond with particulars included in the record. Footnote 25 notes that, if a

⁹⁷ China, EU.

⁹⁸ Mexico. The Secretariat recalls the decision of the Working Group not to regulate the conduct of the judicial sale in the State of judicial sale or the proceedings leading to the judicial sale (see para. 18 above).

⁹⁹ Germany, CMI, IAJ/LAWASIA, ICS/BIMCO.

¹⁰⁰ No comments were received on the model certificate contained in Appendix I of the second revision.

¹⁰¹ China, EU, Lebanon, IAJ/LAWASIA.

¹⁰² China, IAJ/LAWASIA.

¹⁰³ US.

¹⁰⁴ Lebanon.

centralized online repository is established, article 5(4) can be omitted. One submission notes that, if article 5(4) is retained, the draft instrument will need to make more specific provision regarding the record of certificates.

4. Evidentiary value of certificate (article 5(5))

49. Article 5(5) of the second revision, which gives the certificate of judicial sale conclusive effect, is expressed to be subject to the operation of the grounds for refusal set out in articles 7(5), 8(4) and 10. Footnote 26 invites the Working Group to consider whether the qualification should be deleted. Three submissions support deleting the qualification.¹⁰⁵ One submission supports omitting article 5(5) altogether.¹⁰⁶

5. Issuance of certificate during appeal period (article 5(6))

50. The second revision presents alternative wording in square brackets for article 5(6). Two submissions support the second wording (that the certificate shall “cease to have effect” if the judicial sale is avoided).¹⁰⁷ One of the submissions adds that, as such, any action taken on the certificate would remain legally valid even if the judicial sale were subsequently avoided.¹⁰⁸ The other submission invites the Working Group to consider how to preserve the function of the certificate in evidencing finality without undermining the rights under article 9.¹⁰⁹

F. Article 6 – International effects of a judicial sale

51. Most comments submitted on article 6 relate to the conditions for giving international effect, which are synthesized above (paras. 11–12).

1. Title of article 6 and connection with article 10

52. One submission invites the Working Group to consider amending the title of article 6 to better reflect that its scope is concerned with extending the effects of the judicial sale to States other than the State of judicial sale.¹¹⁰ For similar reasons, the submission also invites the Working Group to consider amending the title of article 10, adding that, as the effect of a decision in one State to apply a ground for refusal would not, by virtue of the instrument, extend to any other State,¹¹¹ it is erroneous to say that such a decision would cause the judicial sale not to have “international effect”. The Working Group may wish to consider “effects of judicial sale in other States parties” as an alternative title for article 6 and “circumstances in which judicial sale has no effect in other States parties” as an alternative title for article 10.

53. Continuing with the connection between articles 6 and 10, the submission picks up the invitation to the Working Group in footnote 28 of the second revision and suggests that article 6(1) should be amended to state that it is “subject to article 10”. Footnote 34 also invites the Working Group to consider whether article 10 should be placed immediately after article 6. One submission suggests that, since articles 6, 9(3), 9(4), and 10 all deal with the international effects of a judicial sale, they should be combined.¹¹²

2. Preservation of *in personam* claims (article 6(2)(b))

54. Footnote 30 of the second revision invites the Working Group to consider a suggestion to move article 6(2)(b) to the provision on scope of application (article 3).

¹⁰⁵ China, Lebanon, IAJ/LAWASIA.

¹⁰⁶ US.

¹⁰⁷ China, US.

¹⁰⁸ China.

¹⁰⁹ US.

¹¹⁰ China.

¹¹¹ A/CN.9/1007, para. 79.

¹¹² Germany.

Two submissions support this suggestion.¹¹³ Another submission does not support it on the basis that article 6(2)(b) concerns the effect of the judicial sale rather than the scope of application of the instrument.¹¹⁴ The submission also suggests that the term “personal claim”, as used in article 6(2)(b), should be replaced in the English version of the second revision with “*in personam* claim” so as to avoid confusion and to facilitate translation.

55. Another submission suggests that article 6(2)(b) should extend to the preservation of *in personam* claims against the bareboat charterer of the ship prior to the judicial sale on the basis that some domestic laws may recognize the bareboat charterer as the owner of the ship.¹¹⁵

G. Article 7 – Action by registrar

56. Most comments submitted on article 7 relate to the production of certified copies and translations of the certificate of judicial sale and the operation of the grounds for refusal, which are synthesized above (paras. 10 and 14–17, respectively).

57. Footnote 32 of the second revision invites the Working Group to consider whether the words “or registrars” in square brackets in the chapeau of article 7(1) should be retained to further clarify that there may be more than one relevant registrar in the State addressed. One submission expresses the view that the existing reference to “competent registrar” is sufficient and that no further clarification is necessary.¹¹⁶ Another submission supports retaining the words.¹¹⁷

58. Two submissions comment on the conditions for the registrar taking action under article 7. One submission suggests that article 7(1) should specify that the registrar take action not only upon production of the certificate of judicial sale but also “on application of the purchaser or subsequent purchaser”.¹¹⁸ This suggestion recalls the position in the original Beijing Draft, which required the certificate of judicial sale to be produced “by a purchaser or subsequent purchaser”.¹¹⁹ The submission also suggests that the actions listed in article 7(1)(b) should be taken “on application” rather than “at the direction” of the purchaser.

59. A second submission expresses the view that action by the registrar should *precede* the judicial sale in order for the judicial sale to confer clean title.¹²⁰ This view may imply a departure from the sequencing envisaged in the Beijing Draft as well as in the MLMC 1993.

H. Article 8 – No arrest of the ship

60. Footnote 37 invites the Working Group to consider whether article 8 would apply to the arrest of a ship as a protective measure pending determination of the existence of a ground for refusal under article 10. One submission¹²¹ expresses the

¹¹³ Germany, IAJ/LAWASIA.

¹¹⁴ China. The Secretariat notes that the Working Group has decided that the instrument should not regulate the effects of the judicial sale in the State of judicial sale: A/CN.9/1007, paras. 43 and 44.

¹¹⁵ IAJ/LAWASIA. The Secretariat understands that there has been some debate in the past in some common law jurisdictions as to whether a bareboat charterer is an “owner” or “beneficial owner” under admiralty legislation, with the prevailing view that it is not: see, e.g., Court of Appeal of Singapore, *The “Permina 3001”*, Judgment, 25 July 1977, *Lloyd’s Law Reports*, vol. 1 (1979), p. 329; High Court of England and Wales, Queen’s Bench Division, *The “Father Thames”*, Judgment, 30 March 1979, *Lloyd’s Law Reports*, vol. 2 (1979), pp. 366–367.

¹¹⁶ China.

¹¹⁷ IAJ/LAWASIA.

¹¹⁸ China.

¹¹⁹ A/CN.9/WG.VI/WP.82, articles 6(1) and 6(2).

¹²⁰ Mexico.

¹²¹ China.

view that such a scenario would not give rise to a right to arrest under either the International Convention Relating to the Arrest of Seagoing Ships (1952)¹²² or the International Convention on Arrest of Ships (1999).¹²³ Another submission suggests that the draft instrument should provide for the ship to be arrested in this scenario.¹²⁴

61. One submission notes that article 8 is inconsistent with the domestic law of the submitting State, which only allows a court to release a ship if the matter is resolved or if security is provided.¹²⁵

62. Other comments submitted on article 7 relate to the production of certified translations of the certificate of judicial sale and the operation of the grounds for refusal, which are synthesized above (paras. 10 and 14–17, respectively).

I. Article 9 – Jurisdiction to avoid and suspend judicial sale

63. One submission expresses the view that further in-depth analysis and discussions should be devoted to article 9 to provide additional clarity as to its scope.¹²⁶

64. One submission suggests that the obligation to decline jurisdiction in article 9(2) should not apply in respect of a claim or application to suspend the effects of a foreign judicial sale.¹²⁷ The Secretariat notes that the original Beijing Draft did not deal with exclusive jurisdiction to suspend and the Working Group has not considered the issue of suspension in detail. If articles 9(1) and 9(2) are concerned with suspending the effects of the judicial sale in the State of judicial sale, it is questionable whether a case would ever arise in which a court in another State would seek to suspend those effects.

65. Footnote 40 of the second revision notes that articles 9(3) and 9(4) have been moved from article 10 and invites the Working Group to consider the appropriateness of the move. Unlike article 9(1) and 9(2), articles 9(3) and 9(4) are not concerned with exclusive jurisdiction and deal with the effects of the judicial sale in a State other than the State of judicial sale. One submission expresses the view that article 9 should be focussed on exclusive jurisdiction.¹²⁸

66. Footnote 41 invites the Working Group to confirm that the grounds for avoidance or suspension are a matter for the law applicable in the State of judicial sale. Two submissions support this position.¹²⁹ Footnote 42 invites the Working Group to consider amending article 9 by replacing the term “courts” with “authorities”. One submission supports this amendment.¹³⁰

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

67. Many comments submitted on article 10 relate to the accepted grounds for refusal and to the interaction with articles 7(5) and 8(4), which are synthesized above (paras. 14–17).

68. One submission suggests that the chapeau of article 10 should be amended to provide that the judicial sale shall “cease to have effect” if a ground for refusal applies.¹³¹ It adds that the amendment would mean that any action taken on the

¹²² United Nations, *Treaty Series*, vol. 439, No. 6330.

¹²³ United Nations, *Treaty Series*, vol. 2797, No. 49196.

¹²⁴ Lebanon.

¹²⁵ Mexico.

¹²⁶ EU.

¹²⁷ US.

¹²⁸ China.

¹²⁹ China, CMI.

¹³⁰ China.

¹³¹ China.

certificate of judicial sale in the State addressed would remain legally valid even if a court in that State subsequently determined that a ground for refusal applied.

69. Footnote 49 of the second revision invites the Working Group to consider whether the instrument should limit standing to apply for a determination that a ground for refusal applies. One submission expresses support for this approach and thus supports retaining article 10(2) and the text in square brackets in article 10(1).¹³²

70. Another submission notes that, before a ground for refusal can be applied, the procedural formalities of the State addressed must be complied with and all persons with a right in the ship must be called before the court of judicial sale.¹³³

K. Article 11 – Additional provisions relating to the certificate of judicial sale

71. One submission expresses support for article 11 in view of the establishment of a centralized online repository under article 12.¹³⁴ Another submission supports the view expressed in footnote 50 that the “no legalization” rule in article 11(1) would not preclude a determination that a document purporting to be a certificate of judicial is not authentic.¹³⁵

L. Article 12 – Repository

72. Comments submitted on the establishment of a centralized online repository are synthesized above (paras. 8–9).

M. Article 13 – Communication between parties

73. One submission expresses the view that the title of article 13 should be amended to replace “Parties” with “authorities”.¹³⁶

N. Article 14 – Relations with other international instruments

74. Footnote 54 of the second revision invites the Working Group to consider amendments designed to simplify and expand article 14(1). Two submissions express support for these amendments.¹³⁷ Comments submitted on article 14(2) are synthesized above (paras. 6–7).

¹³² China.

¹³³ Mexico.

¹³⁴ China.

¹³⁵ IAJ/LAWASIA.

¹³⁶ China.

¹³⁷ China, IAJ/LAWASIA.

