



COMITE MARITIME INTERNATIONAL

Meeting Notes for the 40th Session of UNCITRAL Working Group VI Judicial Sales

New York 7th – 11th February 2022

3rd January 2022

Scope

The CMI IWG on the international effects of judicial sales has considered the Annotated Fifth Revision of the Beijing Draft as circulated by the UNCITRAL Secretariat in the document bearing identification number ***A/CN.9/WG.VI/WP.94***. The IWG has also considered the Draft Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-ninth session (Vienna, 19th- 23rd April 2021) document bearing identification number ***A/CN.9/1053***. Document number A/CN.9/WG.VI/WP.94 refers to the Summary document as A/CN.9/1089 however this was not yet available at the time of the preparation of these notes.

As it had done following the publication of the First, Second, Third and Fourth Revision of the Beijing Draft, the IWG has considered that it could be of benefit to annotate and share some preliminary considerations through these meeting notes in preparation for the 40th Session of UNICTRAL Working Group VI on Judicial sales in New York between the 7th and 11th of February 2022.

The CMI also fully understands that in view of the report of Working Group VI presented to the UNCITRAL Commission in July of 2021 and the extent of the progress made during the deliberations of Working Group VI so far, there is an expectation that by the end of the 40th session deliberations on the Beijing Draft could be sufficiently advanced to enable its presentation to the UNCITRAL Commission in June of 2022. The CMI comprehends only too well the challenges of communicating with delegations in the virtual format adopted in the last 3 sessions, particularly in the context of delegations coming from very different time zones. Indeed the work and efforts which have gone into this important work have been executed against the limitations presented by the pandemic and it is remarkable how notwithstanding the challenging circumstances such advances have been made with every meeting.

The CMI is of the view that agreement has been reached on all issues of principle and what now remains is the expected additional fine tuning.

By way of general comment, the CMI would once again like to express its gratitude to the Secretariat for the detailed Note accompanying the 5th Revision. This Note totally captures the discussions that took place during the 39th session on the first five articles of the Convention as well as other articles in so far as the discussions on the first five articles spilled over and effected the content of other articles. Again the Secretariat has excelled in understanding the views and desires expressed by delegations in the Working Group and has expertly presented these views in the Note which are in turn expertly reflected in the Annotated 5th Revision.

The CMI is most satisfied with the fact that so much progress has been achieved with the underlying *raison d'être* of the draft Convention being that a properly held judicial sale in a state party which gives a clean and unencumbered title to the purchaser, resulting in a certificate of judicial sale being issued by the state of judicial sale, is given full effect in other state parties whilst ensuring that the procedural laws of the state of judicial sale remain totally respected and even enhanced by the document

With this in mind the CMI has the following observations:

1. Article 1 - Purpose

The wording fits well with what was agreed during the 39th session. No further comments.

2. Article 2 - Definitions

No further comment other than a suggested addition of wording to the definition of "***Subsequent Purchaser***" to take into account possible misunderstandings that can result from an incorrect interpretation of Article 7 (1) which will be explained when dealing with Article 7 (1) below (see page 5 below) and the comments offered by the Secretariat in paragraph of their note. It is being suggested that the definition of "Subsequent Purchaser" be substituted by the following:

"Subsequent purchaser means any person who purchases the ship previously sold to a purchaser in the judicial sale and who is the first to request the deletion or re-registration of the vessel following the judicial sale."

3. Article 3 – Scope of Application

The wording fits well with what was agreed during the 39th session. No further comments.

4. Article 4 – Notice of Judicial sale

The wording fits well with what was deliberated and agreed during the 39th session.

The CMI has some observations and suggestions.

- i. Article 4 (3). The Secretariat in paragraph 33 of its Note raises the point that it is important for the Working Group to ensure that Article 4 (3) is aligned to Article 7 (1).

It is noted that Article 4 (3) speaks solely of the “**Registrar**” whereas in Article 7 (1) – Action by Registrar - there is the acceptance that there are states where the activities and functions normally done by a Registrar are carried out by other competent authorities.

It is the view of the CMI that the substitution of the words “Registrar” by “Registry” in Article 4 (3) will cater for the notification of the Judicial sale in cases where the registration of vessels and mortgages and hypothecs are not dealt with by registrars but other competent authorities in charge of the registry.

In order to have further clarity the CMI would like to recommend the following changes to Article 4(3) which would not complicate the text unnecessarily:

- (a) Article 4, 3 (a), the words “**registrar of the register,**” be substituted by “**registry**”.
 - (b) Article 4, 3 (b), the words “**with the registrar**” in the third line be struck out.
 - (c) Article 4,3 (b) the word “**registrar**” in the last line be substituted by the word “**registry**”
 - (d) Article 4, 3, (e) (ii) the word “**registrar of the**” be struck out, and the last word “register” be substituted by the word “**registry**”. Thus the sub-paragraph would read: “**The bareboat charter registry**”.
- ii. Article 4 (4) In line 2 the word “Sale” should have a small “s” to read “**sale**”.
 - iii. In paragraph 18 of its Note the Secretariat has referred us to Appendix 1 containing minimum information to be contained in the notice of judicial sale.

The CMI has reviewed this Appendix and has the following observation with regard to paragraph 6.

The Convention acknowledges that judicial sales can be by public auction or private treaty. In the latter case the court would approve a private sale. The dynamics of the sale by public auction on the one hand and the sale by private treaty are fundamentally different. Whilst in the case of a sale by auction, the court would in advance announce the auction date, in a private treaty sale, the court would approve the private sale. The treatment of the two for the purposes of paragraph 6 of Appendix 1 has therefore got to be different. The CMI would like to suggest the following changes to paragraph 6:

We would like to propose that paragraph 6 of Appendix 1 reads as follows:

“ 6. Anticipated date and time and place of judicial sale

“6.1 In the case of a judicial sale by public auction:

Anticipated date and time and place of judicial sale

6.2 In the case of a judicial sale by private treaty:

All relevant details including a time period of the sale by private treaty as ordered by the court of judicial sale according to the law of the state of judicial sale.

5. Article 5 - Certificate of judicial sale

The wording fits well with what was agreed during the 39th session.

The CMI has the following observations:

- i. Article 5 (1): The CMI would like to suggest the introduction of the words **“*court of the state of judicial sale or,*”** in line 3 between the words “Convention,” and “the competent authority”. We are of the view that the norm would be that the certificate of judicial sale is issued by the court of the state of judicial sale and that we need to cater for those circumstances in which other competent authorities would carry out this function.
- ii. In paragraph 21 and paragraph 22 of the Note the Secretariat has provided two alternatives.

The CMI is of the view that the 2nd alternative reproduced in the current Article 5 (1) is preferable and reflects the objective being sought of providing one combined list of important criteria (conditions of issuance, matters being certified and other content requirements) which should be reflected in the certificate of judicial sale.

The existing Article 5 (1) is clean and clear and leaves no room for alternative interpretation.

6. Article 5 bis

The CMI agrees with the recommendation of the Secretariat that the content of 5 bis be added to Article 5.

7. Article 7 – Action by Registrar

i. Article 7 (1)

Reference is made to the Secretariat's Note.

a. Paragraph 26 – (a)

The CMI would like to share the following observations.

It submits that the need for registries to recognise the free and unencumbered title of the Purchaser arises at the time of the deletion of the vessel following the judicial sale and at the time of re registration. Deletion needs to occur after the sale and re-registration needs to occur once the original purchaser in the judicial sale (or his assigns – in the event that he buys say in his personal name but needs a company to re-register) needs to re-register the vessel. We are therefore right at the beginning of the process. Once the deletion and first registration are effected, free and unencumbered, then any subsequent sale and purchase does not have the need to refer to the clean title in the earlier judicial sale.

The registry, for the purposes of this Convention, only needs to action the first deletion and the first re-registration. Any subsequent deletions and re-registrations are unrelated to the judicial sale and outside scope. The trigger should therefore be the moment when the deletion occurs or the first re-registration occurs. This could be by the purchaser in the judicial sale or any subsequent purchaser (could be the first, or second or third in complex structures) who **FIRST** deletes the vessel and who **FIRST** re-registers the vessel following the judicial sale. The key remains when the deletion or re-registration following the judicial sale occurs.

Therefore and to ensure clarity and practicality, it is being suggested that the definition of "Subsequent Purchaser" be changed as has been suggested earlier.

b. Paragraph 26 (b)

It is the view of the CMI that the content of this paragraph of the Note deals with what occurs in reality at the respective registry. If the purchaser is going to retain the vessel's flag, all that will be required is a change of ownership not a deletion. The words are sufficiently clear with no need of further amendment.

c. Paragraph 26 (c)

In this paragraph of the Note the Secretariat first asks whether the draft Convention should only apply if the State of registration is a party to the Convention. We concluded that the effects of a judicial sale of a ship held in a State Party would be the same irrespective of whether or not the vessel itself is registered in a State party or not. However the Convention cannot regulate how a non State party will react to a judicial sale of one of its own vessels.

d. We recall the debate that was had in the 37th session leading to the words “***in accordance with the law of that State***”. We also recall the debate surrounding the need in Article 7 (1) for the addition of the words in square brackets. We are reminded of these debates when we review footnote 32 in document number A/CN.9/WG.VI/WP.90.

The CMI would like to suggest that this explanation in footnote 32 be maintained in any explanatory notes or narrative which may be published together with the Convention.

In addition the CMI would like to suggest some tweaking to the words and would suggest that the words in square brackets: “***but without prejudice to article 6***” be replaced by the possibly clearer language “***subject to Article 6***”.

ii. Article 7 (2)

In order to maintain consistency with Article 7 (1) CMI is of the opinion that the words in square brackets “***or other competent authority***” should be retained.

iii. Article 7 (3)

CMI is of the view that the word “***certified***” in brackets should be retained. Furthermore in order to avoid uncertainty the CMI would like to suggest that the following sentence be added to the end of the paragraph: “***Certified translations should be authenticated in accordance with the law of the State of registry.***” The State of the registry is being recommended due to the fact that certification needs to be in line with the law of the country which requires it.

iv. Article 7 (4)

CMI is of the view that for the sake of consistency the words “***or other competent authority***” should be inserted between the words “registrar” and “may”.

CMI is also of the view that the word “***certified***” in brackets should also be retained.

v. Article 7 (5)

We would agree with the deletion of the square bracket around the word “manifestly”. The raison d’être of the CMI regarding the retention of the word “manifestly” here as well as in Article 10 is discussed later. We are of the view that the word “manifestly” is a term quite

commonly used. See for instance Article 6 UNCITRAL Model Law on Cross-Border Insolvency or Article 34 CONVENTION on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

vi. Article 7

Throughout Article 7, "**subsequent purchaser**" is to be replaced with "**Subsequent purchaser**" (x4). Throughout the whole draft Convention, "**purchaser**" is to be replaced with "**Purchaser**".

8. Article 8 - No Arrest of a Ship

The CMI is of the view that the word "**certified**" in square brackets in article 8 (3) should be maintained, and that the word "**manifestly**" in square brackets in article 8 (4) 4 should also be maintained.

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

- i. The Secretariat is asking whether we are agreeable to limiting the exclusive jurisdiction clause of the state of judicial sale to those sales conferring clean title.

In truth having this additional limitation or not, does not make the slightest bit of difference to our case as long as it is the State of judicial sale which has exclusive jurisdiction to hear these cases where the sale of the ship is free and unencumbered.

However the group agreed that again an unscrupulous plaintiff with entirely wrong intentions may try to commence an action in another state and conjure up some fictitious reason for commencing an action in another state. Therefore the preferred route was to leave the wording as is on the grounds that the Working Group has agreed many sessions ago that a fundamental principle of the Convention is that it is only the court of the state of judicial sale that should look into the validity of the sales conducted within its jurisdiction whether these be Convention sales or not.

- ii. Article 9 (3) and (4)

CMI is firmly of the view that it should be the State of judicial sale which has exclusive jurisdiction over any challenge to the validity of such a sale and consequently it is the domestic law of the state of judicial sale that should decide what is to happen in the unlikely event that such a state avoids a judicial sale or suspends a judicial sale. Therefore and for this reason, Article 9 (3) and 9 (4) should be deleted as had been deleted by the Secretariat in foot note 26 of document A/CN.9/WG.VI/WP.92.

iii. Article 9 (5).

For the same reasons expressed above, the CMI is of the view that paragraph 5 currently in square brackets should be retained. However the CMI would like to recommend that for further clarity, the words ***“in the state of judicial sale”*** be added to the sentence, so that paragraph 5 would read: ***“The effects of avoidance of a judicial sale shall be determined by applicable law in the state of judicial sale.”***

iv. Additional paragraph to Article 9.

The CMI would like to repeat a recommendation it made on the 4th revision of the Beijing Draft. It believes that it would be useful to add the following additional paragraph which would be paragraph (4):

“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 court of the state of judicial sale or the competent authority shall promptly transmit to the repository referred to in article 11 the decision of the court of judicial sale to avoid or suspend the judicial sale.”

10. Article 10 - Circumstances in which judicial sale as no international effect

The CMI finds that the word *“manifestly”* in square brackets is a term quite commonly used in context with the notion of public policy in international instruments regulating issues of comity between State parties and is used there to emphasize the principle (which may well otherwise apply) that a State party may only refuse to comply with the effect regulated by the respective Convention (in our case the clean title transfer to the new owner), only if there are compelling reasons to do so. It is considered in the legal community that the term *“manifestly”* in the context of public policy is a clarification that sets the bar higher and safeguards that the threshold is kept for very exceptional cases. We are of the view that the word *“manifestly”* should remain in the text and the brackets deleted.

11. Article 11 – Repository

The Secretariat is suggesting the addition of the words: ***“in a timely manner, in the form and in the language in which it receives them”***. Given the discussions in the Working Group. We believe this is something we can accommodate.

In the event that the suggestion of the CMI to insert an additional paragraph to article 9 is accepted, then it would recommend that the following words be added following the words ***“Article 5”*** in paragraph 1

“ and court decisions under article 9 (4)”

12. Article 12 – Communication between Parties

Reference is made to the Secretariat's Note paragraphs 32, 33 34, 35 and 36

- i. Paragraph 32: We agree that the content of this paragraph should find itself in the explanatory notes accompanying the Convention.
- ii. Paragraph 33: The CMI has considered the content of paragraph 33 and has offered a solution with regard to the wording of Article 4 (3) above.
- iii. Paragraph 34 and paragraph 35 : The CMI is of the view that the creation of a mechanism which would involve the production of a list of "designated competent authorities" may unwittingly lend itself to more confusion. It was felt that since these authorities could very well change from time to time, failure or delay in conveying this to the depository would almost certainly lead to uncertainty and thus would not assist in clarification. We have concluded therefore that having such a mechanism would not be of any useful purpose.

As a result and with a view to providing clarity for the purposes of Article 2 (a) (i), it is being suggested that there is no need for the additional paragraph in the Convention as is being suggested in paragraph 35 (b) and that all that is required is for the words in Article 2 (a) (1) "public authority" to be substituted by "competent authority". This would also be in line with the wording of Article 5 (1).

- iv. Paragraph 37: We agree that it makes sense that reference to Articles 7 and 8 be substituted by "***for the purposes of the convention***".

13. Article 13 – Relationship with other international conventions

The Secretariat is suggesting a new paragraph 3 in 13 to ensure that nothing stops state parties from recognising other forms of judicial sales.

The CMI is in agreement with this however with a view to ensuring that such a clause is not misinterpreted it is being suggested that the Working Group considers this slightly amended wording:

" Nothing in this Convention prevents the recognition by a State under its national law of other judicial sales not covered by this Convention."

14. Article 14 – Matters not covered by this Convention

The CMI does not have any particular views on the position of this article. It is happy to agree to the position as it stands in this fourth revision.

A handwritten signature in blue ink, appearing to read 'Ann Fenech', with a horizontal line underneath.

Ann Fenech
Co-Chair IWG on Judicial Sales
CMI Co-Ordinator at Working Group V1 UNCITRAL