

YEARBOOK 2021-2022 ANNUAIRE



YEARBOOK

2021-2022

ANNUAIRE



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CONFERENCE IN ANTWERP
18-21 OCTOBER 2022**

SPEAKERS' PRESENTATIONS

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PART I

**Organization of
the CMI**

CONSTITUTION

COMITÉ MARITIME INTERNATIONAL ARTICLES OF ASSOCIATION¹

2022

PART I – GENERAL

Article 1 Name and Object

The name of this organisation is “Comité Maritime International”, which may be abbreviated to “CMI”. The name of the organisation may be used in full or in its abbreviated form. It is a non-governmental not-for-profit international organisation established in Antwerp in 1897 for an unlimited duration, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organisations. The CMI shall promote research, education and discussion in the field of maritime law. It can achieve its goal through the following activities:

- organising of seminars and conferences as a platform for academic discussions;
- encouraging the cooperation regarding research and education;
- organising new activities of research and education;
- providing – upon request or on its own initiative – advice and recommendations to intergovernmental organisations, other international bodies or institutions, governments, parliaments, political parties, judicial authorities, legal professions, etc.
- publishing articles, books, reviews, reports, brochures and other informative documents related to the activities of the CMI, both printed and electronical versions.

The CMI can in general develop any and all activities that contribute directly or indirectly to the achievement of the aforementioned non-profitable goals, including commercial and profitable activities within the limits of what is allowed by law and of which the proceeds shall be destined at all times for the achievement of the non-profitable goals of the CMI. The CMI can amongst others cooperate with, grant loans to, invest

¹ Please be advised that the amendment of art. 1 of the Articles of Association have been approved at the General Assembly of October 21 2022, under the condition precedent of approval by the Belgian King as imposed by Belgian law. The application for this approval has been filed by the CMI but it is not yet known when the approval by the King will be granted. Until that moment, the amendment of art. 1 is not yet final.

in the capital of, or in whatever way, participate directly or indirectly in other legal incorporated bodies, associations and companies of private or public nature, governed by Belgian or foreign law.

- Establishing committees, international subcommittees, working groups, divisions or establishments within the CMI.

Article 2

Existence and Statutory Seat

The CMI is incorporated in Belgium as an *Association internationale sans but lucratif* (AISBL) / *Internationale Vereniging zonder Winstoogmerk* (IVZW) under the Belgian Act of 27 June 1921 as later amended. It has been granted juridical personality by Royal Decree of 9 November 2003. It shall at all times consist of at least 2 Member Associations. Its statutory seat is located in the Flemish Region (Vlaams Gewest). Within the Flemish Region (Vlaams Gewest), the statutory seat can be changed by decision of the Executive Council without amending the Articles of association. The actual statutory seat is located at Ernest Van Dijckkaai 8, 2000 Antwerp. Every change of the statutory seat shall be published in the annexes of the Belgian State Gazette.

PART II – MEMBERSHIP AND LIABILITY OF MEMBERS

Article 3

Member Associations

- (a) Subject to Article 28, the voting Members of the CMI are national (or multinational) Associations of Maritime Law elected to membership by the General Assembly, further “Member Associations”, the object of which Associations must conform to that of the CMI and the membership of which must be fully open to persons (individuals or bodies having juridical personality in accordance with their national law and custom) who either are involved in maritime activities or are specialists in maritime law. Member Associations must be democratically constituted and governed, and must endeavour to present a balanced view of the interests represented in their Association.
- (b) Where in a State there is no national Association of Maritime Law in existence, and an organisation in that State applies for membership of the CMI, the General Assembly may accept such organisation as a Member of the CMI if it is satisfied that the object of such organisation, or one of its objects, is the unification of maritime law in all its aspects. Whenever reference is made in these Articles of association to Member Associations, it will be deemed to include any organisation admitted as a Member pursuant to this Article.
- (c) Only one organisation in each State shall be eligible for membership, unless the General Assembly otherwise decides. A multinational Association is eligible for membership only if there is no Member Association in any of its constituent States.

Constitution

- (d) Where a Member Association does not possess juridical personality according to the law of the country where it is established, the members of such Member Association who are individuals or bodies having juridical personality in accordance with their national law and custom, acting together in accordance with their national law, shall be deemed to constitute that Member Association for purposes of its membership of the CMI.
- (e) Member Associations of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.
- (f) Member Associations are entitled to attend and vote, each with only one vote, at General Assemblies.

Article 4 **Titulary Members**

Individual members of Member Associations may be elected by the General Assembly as Titulary Members of the CMI upon the proposal of the Association concerned, endorsed by the Executive Council. Individual persons may also be elected by the General Assembly as Titulary Members upon the proposal of the Executive Council. Titulary Membership is of an honorary nature and shall be decided having regard to the contributions of the candidates to the work of the CMI and/or to their services rendered in legal or maritime affairs in furtherance of international uniformity of maritime law or related commercial practice. Titulary Members presently or formerly belonging to an Association which is no longer a member of the CMI may remain individual Titulary Members at large pending the formation of a new Member Association in their State.

Titulary Members of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 5 **Provisional Members**

Nationals of States where there is no Member Association in existence and who have demonstrated an interest in the object of the CMI may upon the proposal of the Executive Council be elected as Provisional Members by the General Assembly. A primary objective of Provisional Membership is to facilitate the organisation and establishment of new Member national or regional Associations of Maritime Law. Provisional Membership is not normally intended to be permanent, and the status of each Provisional Member will be reviewed at three-year intervals. However, individuals who have been Provisional Members for not less than five years may upon the proposal of the Executive Council be elected by the General Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State where there is no Member Association. Provisional Members of the CMI are identified in

a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 6

Members *Honoris Causa*

The General Assembly may elect to Membership *honoris causa* any individual person who has rendered exceptional service to the CMI or in the attainment of its object, with all of the rights and privileges of a Titulary Member. Members *honoris causa* shall not be attributed to any Member Association or State, but shall be individual members of the CMI as a whole.

Members *honoris causa* of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 7

Consultative Members

International organisations which are interested in the object of the CMI may be elected by the General Assembly as Consultative Members. Consultative Members of the CMI are identified in a list published on the CMI Website or as may otherwise be determined by the Executive Council.

Article 8

Expulsion of Members

- (a) Members may be expelled from the CMI by reason of:
 - (i) default in payment of subscriptions;
 - (ii) conduct obstructive to the object of the CMI; or
 - (iii) conduct likely to bring the CMI or its work into disrepute.
- (b) (i) A motion to expel a Member may be made by:
 - a) any Member Association or Titulary Member of the CMI; or
 - b) the Executive Council.
 - (ii) Such motion shall be made in writing and shall set forth the reason(s) for the motion.
 - (iii) Such motion must be filed with the Secretary-General or Administrator, and shall be copied to the Member in question.
- (c) A motion to expel made under Article 8(b)(i)(a) shall be forwarded to the Executive Council for first consideration.
 - (i) If such motion is approved by the Executive Council, it shall be forwarded to the General Assembly for consideration pursuant to Article 11(b).
 - (ii) If such motion is not approved by the Executive Council, the motion may nevertheless be laid before the General Assembly by the Member Association or Titulary Member at its meeting next following the meeting of the Executive Council at which the motion was considered.

Constitution

- (d) A motion to expel shall not be debated in or acted upon by the General Assembly until at least ninety (90) days have elapsed since the original motion was copied to the Member in question. If less than ninety (90) days have elapsed, consideration of the motion shall be deferred to the next succeeding General Assembly.
- (e) (i) The Member in question may offer a written response to the motion to expel, and/or may address the General Assembly for a reasonable period in debate upon the motion.
- (ii) In the case of a motion to expel which is based upon default in payment under Article 8(a)(i), actual payment in full of all arrears currently owed by the Member in question shall constitute a complete defence to the motion, and upon acknowledgment of payment by the Treasurer the motion shall be deemed withdrawn.
- (f) (i) In the case of a motion to expel which is based upon default in payment under Article 8(a)(i), expulsion shall require the affirmative vote of a simple majority of the Member Associations present, entitled to vote, and voting.
- (ii) In the case of a motion to expel which is based upon Article 8(a)(ii) and (iii), expulsion shall require the affirmative vote of a two-thirds majority of the Member Associations present, entitled to vote, and voting.

Article 9

Limitation of Liability of Members

The liability of Members for obligations of the CMI shall be limited to the amounts of their subscriptions paid or currently due and payable to the CMI.

PART III – GENERAL ASSEMBLY

Article 10

Composition of the General Assembly

The General Assembly shall consist of the Member Associations, the members of the Executive Council and the Immediate Past President.

The President shall preside all General Assemblies, and shall be accompanied by the persons designated by the Executive Council to assist in the efficient handling of the business before the General Assembly.

When approved by the Executive Council, the President may invite other classes of Members and Observers to attend all or parts of the meetings, including the General Assembly. However, the other classes of Members or Observers shall not be part of the composition of the General Assembly.

Article 11

Functions of the General Assembly

The functions of the General Assembly are:

- (a) To elect the Councillors of the CMI;
- (b) To elect Members of and to suspend or expel Members from the CMI;
- (c) To fix the amounts of subscriptions payable by Members to the CMI;
- (d) To elect auditors;
- (e) To consider and, if thought fit, approve the accounts and the budget;
- (f) To consider reports of the Executive Council and to take decisions on the activities of the CMI, including the location for the holding of meetings, and in particular, meetings of the General Assembly;
- (g) To approve the convening of, and ultimately approve resolutions adopted by, International Conferences;
- (h) To adopt Rules of Procedure not inconsistent with the provisions of this Articles of association and make such additional Rules of Procedure as may be necessary when so doing to take account of any transitional issues that arise; and
- (i) To amend the Articles of association pursuant to Article 14.

Article 12

Meetings and Quorum of the General Assembly

The annual General Assembly shall meet at a time and place determined by the Executive Council in conformity with the requirements of Belgian law. A General Assembly can also be organised by means of a telephone or video conference or via any other means of telecommunication that guarantees an effective and simultaneous deliberation between all the participants. The General Assembly shall also meet at any other time, with a fixed agenda, if requested by the President, by ten of its Member Associations or by the Vice-Presidents. At least six weeks' notice shall be given of such meetings.

Unless otherwise provided elsewhere in the present Articles of association, any General Assembly shall be validly constituted if at least five Member Associations are present.

Article 13

Agenda and Voting of the General Assembly

Matters to be dealt with by the General Assembly, including election to vacant offices, shall be set out in the agenda accompanying the notice of the meeting. Decisions may be taken on matters not set out in the agenda, other than amendments to the Articles of association, provided no Member Association represented in the General Assembly objects to such procedure.

Members *honoris causa* and Titulary, Provisional and Consultative Members shall enjoy the rights of presence and voice, but only Member Associations who are not in arrears of payment of their subscription, shall have the right to vote.

Constitution

Each Member Association present at the General Assembly and entitled to vote shall have one vote. The vote of a Member Association shall be cast by its President, or by another of its members duly authorised by that Member Association.

The right to vote by proxy is excluded.

Unless otherwise provided in the Articles of association and subject to Article 8(f)(ii) and Article 14, all decisions of the General Assembly shall be taken by a simple majority of Member Associations present, entitled to vote, and voting. However, amendments to any Rules of Procedure adopted pursuant to Article 11(h) shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting.

If it is provided in the convocation to the General Assembly, the members can be granted the right to vote via electronic way or in writing on all or some of the matters set out in the agenda, prior to the time that the General Assembly is held. These prior votes will be taken into account for the calculation of the quorum and the majority required for the relevant General Assembly. If the convocation provides that the right to vote via electronic way or in writing prior to the General Assembly only applies for a limited number of matters on the agenda, the prior votes shall only be taken into account for the calculation of the quorum and the majority required for these limited number of matters. The CMI shall verify the identity and the right to vote of members who make use of the right of prior voting. Those members shall act in accordance with the identification procedure imposed by the Executive Council.

Article 14

Amendments to the Articles of association

Amendments to the Articles of association shall be made in writing and shall be transmitted to all National Associations at least six weeks prior to the meeting of the General Assembly at which the proposed amendments will be considered.

Amendments to the Articles of association shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting. Their effectiveness and entry into force shall be subject to Belgian law.

PART IV – COUNCILLORS

Article 15

Designation

The Executive Council is the governing body of the CMI. It shall consist of a maximum of 14 Councillors who shall be elected by the General Assembly. The Executive Council shall include the following:

- (a) The President,
- (b) Two Vice-Presidents,
- (c) The Secretary-General,

- (d) The Treasurer (and Head Office Councillor) (hereafter “The Treasurer”),
- (e) The Administrator (if an individual), and
- (f) Up to eight Executive Councillors.

Article 16

President

The President of the CMI shall preside over the General Assembly, the Executive Council, and the International Conferences convened by the CMI. He or she shall be an *ex-officio* member of any Committee, International Sub-Committee or Working Group appointed by the Executive Council.

With the assistance of the Secretary-General and the Administrator he or she shall carry out the decisions of the General Assembly and of the Executive Council, supervise the work of the International Sub-Committees and Working Groups, and represent the CMI externally.

The President shall have authority to conclude and execute agreements on behalf of the CMI, and to delegate this authority to other Councillors of the CMI.

The President shall have authority to institute legal action in the name and on behalf of the CMI, and to delegate such authority to other Councillors of the CMI. In case of the impeachment of the President or other circumstances in which the President is prevented from acting and urgent measures are required, five Councillors together may decide to institute such legal action provided notice is given to the other members of the Executive Council. The five Councillors taking such decision shall not take any further measures by themselves unless required by the urgency of the situation.

In general, the duty of the President shall be to ensure the continuity and the development of the work of the CMI.

The President shall be elected for a term of three years and shall be eligible for re-election for one additional term.

Article 17

Vice-Presidents

There shall be two Vice-Presidents of the CMI, whose principal duty shall be to advise the President and the Executive Council, and whose other duties shall be assigned by the Executive Council.

The Vice-Presidents, in order of their seniority as Councillors of the CMI, shall substitute for the President when the President is absent or is unable to act.

Each Vice-President shall be elected for a term of three years and shall be eligible for re-election for one additional term.

Article 18

Secretary-General

The Secretary-General shall undertake and be responsible for the tasks and duties assigned to him or her from time to time by the President or the Executive Council.

Constitution

The Secretary-General shall have particular responsibility for organisation of the intellectual and social content, and all non-administrative preparations for International Conferences, Colloquia, Symposia and Seminars convened by the CMI.

The Secretary-General shall liaise with appropriate international bodies, especially Consultative Members of the CMI and may represent the CMI at any forum when so requested by the President or the Executive Council.

The Secretary-General shall be elected for a term of three years and shall be eligible for re-election without limitation upon the number of terms.

Article 19 Treasurer

The Treasurer shall undertake and be responsible for the tasks and duties assigned to him/her from time to time by the President or the Executive Council.

In particular, the Treasurer shall:

- (a) be responsible for the funds of the CMI, and shall collect and disburse, or authorise disbursement of, funds as directed by the Executive Council, in accordance with protocols prescribed from time to time by the Executive Council;
- (b) maintain adequate accounting records for the CMI;
- (c) prepare the annual accounts for the preceding accounting year in accordance with current Accounting Standards imposed by Belgian law, and shall prepare proposed budgets for the current and next succeeding accounting years;
- (d) submit the draft annual accounts and the proposed budgets for review by the auditors and the Audit Committee appointed by the Executive Council, and following any revisions, present them for review by the Executive Council, in view of their approval by the General Assembly in conformity with the requirements of Belgian law.
- (e) at the request of the Executive Council, open such bank accounts and other financial facilities, such as credit cards, as are necessary to facilitate the financial operations of the CMI, and take all steps necessary to manage the finances of the CMI including arranging the deposit of funds and payment of accounts.

In his/her capacity as Head Office Councillor, the Treasurer shall be:

- (f) the line manager of the Administrative Assistant in Antwerp in relation to his/her office duties and in general to oversee the day by day business of the Secretariat of the CMI.
- (g) authorised to give, and be responsible for, all formal and informal notifications of amendments to the Articles of association of the CMI; official notifications of the appointment and termination of Councillors of the Executive Council; and all other notifications required by the laws of Belgium from time to time. And in this regard, the Treasurer shall appoint and liaise with a practising Belgian lawyer to ensure compliance with all formal and legislative prerequisites in

relation to the Executive Council, the General Assembly, and the CMI in general.

The Treasurer shall be elected for a term of three years, and shall be eligible for re-election without limitation upon the number of terms.

Article 20 **Administrator**

The Administrator shall undertake and be responsible for the tasks and duties assigned to him or her from time to time by the President or the Executive Council.

The Administrator shall have particular responsibility for the formal administrative preparations for meetings of the CMI, and to that end, shall:

- (a) give official notice of all meetings of the General Assembly and the Executive Council, of International Conferences, Symposia, Colloquia and Seminars, and of all meetings of Committees, International Sub-Committees and Working Groups;
- (b) circulate the agendas, minutes and reports of such meetings;
- (c) make all necessary administrative arrangements for such meetings (such as the liaison with the host Maritime Law Association for the booking of venues and associated social activities);
- (d) take such actions, either directly or by appropriate delegation, as are necessary to give effect to administrative decisions of the General Assembly, the Executive Council, and the President;
- (e) circulate such reports and/or documents as may be requested by the President, the Secretary-General or the Treasurer, or as may be approved by the Executive Council; and
- (f) keep current and ensure publication of the lists of Members pursuant to Articles 3, 4, 5, 6 and 7.

The Administrator may represent the CMI at any forum when so requested by the President or the Executive Council.

The Administrator may be an individual or a body having juridical personality. If a body having juridical personality, the Administrator shall be represented on the Executive Council by one natural individual person. If an individual, the Administrator may also serve, if elected to that office, as Treasurer of the CMI.

The Administrator, if an individual, shall be elected for a term of three years and shall be eligible for re-election without limitation upon the number of terms. If a body having juridical personality, the Administrator shall be appointed by the General Assembly upon the recommendation of the Executive Council, and shall serve until a successor is appointed.

PART V – EXECUTIVE COUNCIL

Article 21

Composition, criteria for election and terms of office of the Executive Council

The Executive Council shall comprise the Councillors of the CMI as described in Article 15.

The Executive Councillors shall be elected by the General Assembly upon individual merit, also having due regard to balanced representation of the legal systems and geographical areas of the world characterised by the Member Associations.

Each elected Councillor shall be elected to his or her specific office in the Executive Council for a term of three years and shall be eligible for re-election for one additional term to each such office, except that (as provided in Articles 18, 19 and 20) there shall be no such limit on the number of re-elections of the Secretary-General, Administrator or Treasurer.

Article 22

Functions of the Executive Council

The functions of the Executive Council are:

- (a) To receive and review reports concerning contact with:
 - (i) The Member Associations,
 - (ii) The CMI Charitable Trust, and
 - (iii) International organisations;
- (b) To review documents and/or studies intended for:
 - (i) The General Assembly,
 - (ii) The Member Associations, relating to the work of the CMI or otherwise advising them of developments, and
 - (iii) International organisations, informing them of the views of the CMI on relevant subjects;
- (c) To initiate new work within the object of the CMI, to establish Standing Committees, International Sub-Committees and Working Groups to undertake such work, to appoint Chairs, Deputy Chairs and Rapporteurs for such bodies, and to supervise their work; reports of such Committees, Sub-Committees and Working Groups shall be submitted to the Executive Council and/or the General Assembly as requested by the President;
- (d) To initiate and to appoint persons to carry out by other methods any particular work appropriate to further achieve the object of the CMI; reports of such persons shall be submitted to the Executive Council and/or the General Assembly as requested by the President;
- (e) To encourage and facilitate the recruitment of new members of the CMI;
- (f) To oversee the finances of the CMI and to appoint an Audit Committee;
- (g) To make interim appointments, if necessary, to the offices of Secretary-General, Treasurer and Administrator;

- (h) To nominate, for election by the General Assembly, an independent auditor for the annual financial statements prepared by the Treasurer and/or the accounts of the CMI, and to make interim appointments of an accountant or an auditor if necessary;
- (i) To review and approve proposals for publications of the CMI;
- (j) To set the dates and places of its own meetings and, subject to Article 11, of the meetings of the General Assembly, and of Seminars, Symposia and Colloquia convened by the CMI;
- (k) To propose the agenda of meetings of the General Assembly and of International Conferences, and to decide its own agenda and those of Seminars, Symposia and Colloquia convened by the CMI;
- (l) To carry into effect the decisions of the General Assembly;
- (m) To report to the General Assembly on the work done and on the initiatives adopted.
- (n) To pay an honorarium to the Secretary-General, Administrator and Treasurer if it considers it appropriate to do so.

Article 23

Meetings and Quorum of the Executive Council

The Executive Council shall meet at least twice annually; it may when necessary meet by electronic means, a telephone or video conference or via any other means of telecommunication guaranteeing at the same time a proper deliberation, but shall meet in person at least once annually unless prevented by circumstances beyond its control.

The Executive Council may, however, take decisions when circumstances so require without a meeting having been convened, provided that all its members are fully informed and a majority respond affirmatively in writing.

Any actions taken without a meeting shall be ratified when the Executive Council next meets. At any meeting of the Executive Council seven members, including the President or a Vice-President and at least three Councillors, shall constitute a lawful quorum. All decisions shall be taken by a simple majority vote. The President or, in his absence, the senior Vice-President in attendance shall have a casting vote where the votes are otherwise equally divided.

Article 24

Immediate Past President

The Immediate Past President of the CMI shall have the option to attend all meetings of the Executive Council, and at his or her discretion shall advise the President and the Executive Council. His or her expenses in so attending shall be met in the same way as those of the Executive Council.

PART VI – NOMINATING PROCEDURES

Article 25 Nominating Committee

A Nominating Committee shall be established for the purpose of nominating individuals for election to any office of the CMI.

The Nominating Committee shall consist of:

- (a) A Chair, who shall have a casting vote where the votes are otherwise equally divided, and who shall be appointed by the Executive Council;
- (b) The President and Immediate Past President of the CMI (provided that a Past President may resign from the Nominating Committee at any time upon giving written notice to the President);
- (c) Two members proposed by Member Associations through the procedures of the Nominating Committee, *mutatis mutandis*, and thereafter nominated by the Nominating Committee for election by the General Assembly;
- (d) One further member appointed by the Executive Council.

Notwithstanding the foregoing paragraph, no person who is a candidate for office may serve as a member of the Nominating Committee during consideration of nominations to the office for which he or she is a candidate.

All members of the Nominating Committee other than the President and Immediate Past President (who respectively shall hold office *ex officio*) shall hold office for a term of three years and shall be eligible for re-appointment or re-election for one additional term.

Article 26 Nomination Procedures

On behalf of the Nominating Committee, the Chair shall determine first:

- (a) whether any Councillors eligible for re-election are available to serve for an additional term in which event he or she shall obtain a statement from such Councillors as to the contributions they have made to the Executive Council or the Nominating Committee during their term(s);
- (b) whether Member Associations wish to propose candidates for possible nomination by the Nominating Committee as a Councillor, or, where applicable, to serve on the Nominating Committee.

The Chair shall then notify the Member Associations and seek their views concerning the candidates for nomination. The Nominating Committee shall then make nominations taking such views into account.

Following the decisions of the Nominating Committee, the Chair shall forward its nominations to the Administrator in ample time for distribution not less than six weeks before the meeting of the General Assembly at which nominees are to be elected.

Member Associations may make nominations for election to any office independently of the Nominating Committee, provided such nominations

are forwarded to the Administrator in writing not less than 15 working days before the meeting of the General Assembly at which nominees are to be elected. In the absence of any such nominations from Member Associations, the only nominations for election by the General Assembly shall be the nominations of the Nominating Committee.

The Executive Council may make nominations to the Nominating Committee for election by the General Assembly to the offices of Secretary-General, Treasurer and/or Administrator. Such nominations shall be forwarded to the Chair of the Nominating Committee at least fourteen weeks before the meeting of the General Assembly at which nominees are to be elected.

PART VII - INTERNATIONAL CONFERENCES

Article 27

Composition and Voting

The CMI shall meet in International Conferences at places approved by the General Assembly, for the purpose of discussing and adopting resolutions upon subjects on an agenda approved by the Executive Council.

The International Conference shall be composed of all Members of the CMI and such Observers as are approved by the Executive Council.

Each Member Association which has the right to vote may be represented by its delegates present and by Titulary Members present who are members of that Association. Each Consultative Member may be represented by three delegates. Each Observer may be represented by one delegate only.

Each Member Association present and entitled to vote shall have one vote in an International Conference; no other Member and no Councillor of the CMI shall have the right to vote in such capacity. The right to vote cannot be delegated or exercised by proxy.

The resolutions of International Conferences shall be adopted by a simple majority of the Member Associations present, entitled to vote, and voting.

Clerical mistakes, or errors arising from an accidental mistake, omission or oversight, or an amendment to provide for any matter which should have been but was not dealt with at an International Conference can be corrected by a resolution at a subsequent General Assembly meeting.

PART VIII - FINANCE

Article 28 **Arrears of Subscriptions**

A Member Association remaining in arrears of payment of its subscription for more than one year from the end of the accounting year for which the subscription is due shall be in default and shall not be entitled to vote until such default is cured.

Members liable to pay subscriptions and who remain in arrears of payment for two or more years from the end of the accounting year for which the subscription is due shall, unless the Executive Council decides otherwise, receive no publications or other rights and benefits of membership until such default is cured.

Failure to make full payment of subscriptions owed for three or more accounting years shall be sufficient cause for expulsion of the Member in default. A Member expelled by the General Assembly solely for failure to make payment of subscriptions may be reinstated by vote of the Executive Council following payment of arrears, subject to ratification by the General Assembly. The General Assembly may authorise the President and/or Treasurer to negotiate the amount and payment of arrears with Members in default, subject to approval of any such agreement by the Executive Council.

Subscriptions received from a Member in default shall, unless otherwise provided in a negotiated and approved agreement, be applied to reduce arrears in chronological order, beginning with the earliest accounting year of default.

Article 29 **Fees and Expenses**

The Secretary-General, Administrator and Treasurer shall receive such *honoraria* as may be determined by the Executive Council and the accountants/auditors shall receive such fee as may be approved by the Executive Council.

Members of the Executive Council, the Immediate Past President, and Chairs of Standing Committees, Chairs and Rapporteurs of International Sub-Committees and Working Groups, when travelling on behalf of the CMI, shall be entitled to reimbursement of travelling expenses, as directed by the President or the Executive Council.

The President or the Executive Council may also authorise the reimbursement of other expenses incurred on behalf of the CMI.

Article 30 **Accounting year**

The accounting year of the CMI shall terminate on April 30 each year, unless otherwise determined in conformity with the requirements of Belgian law

PART IX – FINAL PROVISIONS

Article 31 Liability

The CMI shall not be liable for the acts or omissions of its Members. The liability of the CMI shall be limited to its assets.

Article 32 Languages

1. The official language of the CMI shall be Dutch. The formal working languages of the CMI however shall be English and French. The use of other languages is permitted under the condition that the Member, using such other language, shall provide a translation, by preference simultaneous translation, in a working language.
2. The official Dutch language shall prevail in case of a conflict with other languages. In the absence of a document in the official Dutch language, the English and French working languages shall prevail.

Article 33 Dissolution and Procedure for Liquidation

The General Assembly may, upon written motion received by the Administrator not less than six months prior to the meeting of the General Assembly at which the motion is debated, vote to dissolve the CMI. At such meeting a quorum of not less than one-half of the Member Associations entitled to vote have to be present in order to take a vote on the proposed dissolution. Dissolution shall require the affirmative vote of a three-fourths majority of all Member Associations present, entitled to vote, and voting. Upon a vote in favour of dissolution, liquidation shall take place in accordance with the laws of Belgium. Following the discharge of all outstanding liabilities and the payment of all reasonable expenses of liquidation, the net assets of the CMI, if any, shall devolve to the CMI Charitable Trust, a registered charity established under the laws of the United Kingdom.

Article 34 Governing Law

Any issue not resolved by reference to the Articles of association shall be resolved by reference to Belgian law.

Article 35 Entry into Force

The Articles of association shall enter into force on the tenth day following its publication in the *Annexes du Moniteur belge*.

RULES OF PROCEDURE

1996, as amended 2017

Rule 1 Right of Presence

In the Assembly, only Members of the Comité Maritime International as defined in Article 3(a) of the Constitution, members of the Executive Council as provided in Article 10, the Immediate Past President and Observers invited pursuant to Article 10 may be present as of right.

At International Conferences, only Members of the CMI as defined in Article 3 of the Constitution (including non-delegate members of national Member Associations), Officers of the CMI as defined in Article 15, the Immediate Past President and Observers invited pursuant to Article 27 may be present as of right.

Observers may, however, be excluded during consideration of certain items of the agenda if the President so determines.

All other persons must seek the leave of the President in order to attend any part of the proceedings.

Rule 2 Right of Voice

Only Members of the Comité Maritime International as defined in Article 3 of the Constitution, members of the Executive Council and the Immediate Past President may speak as of right; all others must seek the leave of the President before speaking. In the case of a Member Association, only a listed delegate may speak for that Member; with the leave of the President such delegate may yield the floor to another member of that Member Association for the purpose of addressing a particular and specified matter.

Rule 3 Points of Order

During the debate of any proposal or motion any Member or Officer of the Comité Maritime International having the right of voice under Rule 2 may rise to a point of order and the point of order shall immediately be ruled upon by the President. No one rising to a point of order shall speak on the substance of the matter under discussion.

All rulings of the President on matters of procedure shall be final unless immediately appealed and overruled by motion duly made, seconded and carried.

Rule 4 Voting

For the purpose of application of Article 13 of the Constitution, the phrase “Member Association present, entitled to vote, and voting” shall mean Member Associations whose right to vote has not been suspended pursuant to Articles 14 or 28, whose voting delegate is present at the time the vote is taken, and whose delegate casts an affirmative or negative vote. Member Associations abstaining from voting or casting an invalid vote shall be considered as not voting.

Voting shall normally be by show of hands. However, the President may order or any Member Association present and entitled to vote may request a roll-call vote, which shall be taken in the alphabetical order of the names of the Member Associations as listed in the current CMI Yearbook.

If a vote is equally divided, the proposal or motion shall be deemed rejected.

Notwithstanding the foregoing, all contested elections of Officers shall be decided by a secret written ballot in each category. Four ballots shall be taken if necessary. If the vote is equally divided on the fourth ballot, the election shall be decided by drawing lots.

If no nominations for an office are made in addition to the nomination(s) of the Nominating Committee pursuant to Article 26, then the candidate(s) nominated by the Nominating Committee may be declared by the President to be elected to that office by acclamation. If the Nominating Committee nominates more candidates than there are vacancies for any office, then the Assembly shall conduct an election in accordance with the procedures of this Rule.

Rule 5 Amendments to Proposals

An amendment shall be voted upon before the proposal to which it relates is put to the vote, and if the amendment is carried the proposal shall then be voted upon in its amended form.

If two or more amendments are moved to a proposal, the first vote shall be taken on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote.

Rule 6 Secretary and Minutes

The Secretary-General or, in his absence, an Officer of the Comité Maritime International appointed by the President, shall act as secretary and shall take note of the proceedings and prepare minutes of Assembly meetings. Minutes of the Assembly shall be published on the CMI website (where practical) in the two official languages of the CMI, English and French, and in the CMI News Letter and/or otherwise distributed in writing to Member Associations.

Rules of Procedure

Rule 7
Amendment of these Rules

Amendments to these Rules of Procedure may be adopted by the Assembly. Proposed amendments must be in writing and circulated to all Member Associations at least six weeks before the annual meeting of the Assembly at which the proposed amendments will be considered.

Rule 8
Application and Prevailing Authority

These Rules shall apply not only to meetings of the Assembly and International Conferences, but shall also constitute, *mutatis mutandis*, the Rules of Procedure for meetings of the Executive Council, International Sub-Committees, or any other group convened by the Comité Maritime International.

In the event of an apparent conflict between any of these Rules and any provision of the Constitution, the Constitutional provision shall prevail. Any amendment to the Constitution having an effect upon the matters covered by these Rules shall be deemed as necessary to have amended these Rules *mutatis mutandis*, pending formal amendment of the Rules of Procedure in accordance with Rule 7.

Rule 9
Carry-over of terms when electoral process is changed

Where the Assembly amends the Constitution by changing the manner in which the members of a Committee or body of the Comité Maritime International are to be elected, the Assembly may by resolution agree to permit the terms of office of members of such Committee or body, who were elected under the previous process specified under this Constitution, to be extended until the next Assembly meeting, and for such persons to carry out their functions on that Committee or body until their terms expire at the subsequent Assembly meeting.

GUIDELINES FOR PROPOSING THE ELECTION OF TITULARY AND PROVISIONAL MEMBERS

1999¹

Titulary Members

No person shall be proposed for election as a Titulary Member of the Comité Maritime International without supporting documentation establishing in detail the qualifications of the candidate in accordance with Article 3 (I)(c) of the Constitution. The Administrator shall receive any proposals for Titulary Membership, with such documentation, not less than sixty (60) days prior to the meeting of the Assembly at which the proposal is to be considered

Contributions to the work of the Comité may include active participation as a voting Delegate to two or more International Conferences or Assemblies of the CMI, service on a CMI Working Group or International Sub-Committee, delivery of a paper at a seminar or colloquium conducted by the CMI, or other comparable activity which has made a direct contribution to the CMI's work. Services rendered in furtherance of international uniformity may include those rendered primarily in or to another international organization, or published writing that tends to promote uniformity of maritime law or related commercial practice. Services otherwise rendered to or work within a Member Association must be clearly shown to have made a significant contribution to work undertaken by the Comité or to furtherance of international uniformity of maritime law or related commercial practice.

Provisional Members

Candidates for Provisional Membership must not merely express an interest in the object of the CMI, but must have demonstrated such interest by relevant published writings, by activity promoting uniformity of maritime law and/or related commercial practice, or by presenting a plan for the organization and establishment of a new Member Association.

Periodic Review

Every three years, not less than sixty (60) days prior to the meeting of the Assembly, each Provisional Member shall be required to submit a concise report to the Secretary-General of the CMI concerning the activities organized or undertaken by that Provisional Member during the reporting period in pursuance of the object of the Comité Maritime International.

¹ Adopted in New York, 8th May 1999, pursuant to Article 3 (I)(c) and (d) of the Constitution.

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STANDING COMMITTEES

[As constituted during EXCO meeting, Antwerp, October 2022]

Note: In terms of Art 16 of the CMI Constitution, the President is ex officio a member of all Committees and Working Groups.

Carriage of Goods by Sea

(including Rotterdam Rules)

Tomotaka FUJITA [Japan] *Chair*
 Michael STURLEY [USA] *Rapporteur*
 Stuart BEARE [UK]
 Philippe DELEBECQUE [France]
 Vincent DE ORCHIS [USA]
 Miriam GOLDBY [Malta/UK]
 Hannu HONKA [Finland]
 Kofi MBIAH [Ghana]
 Mario RICCOMAGNO [Italy]
 Gertjan VAN DER ZIEL [Netherlands]
 José VICENTE GUZMAN [Colombia]

General Average

(including Guidelines to the

York Antwerp Rules 2016)

Jörn GRONINGER [Germany] *Chair*
 Paula BÄCKDÉN [Sweden]
 Richard CORNAH [UK]
 Nick COLEMAN [UK-IUMI]
 Michael HARVEY [UK]
 Kiran KHOSLA [UK - ICS]
 Jiro KUBO [Japan]
 Sveinung MÅKESTAD [Norway]
 Karen SCHANDY [Uruguay]
 Dieter SCHWAMPE [Germany]
 Jonathan SPENCER [USA]
 Esteban VIVANCO [Argentina]

General Average Interest Rates

Bent NIELSEN [Denmark] *Chair*
 Taco VAN DER VALK [Netherlands]
Rapporteur
 Andrew TAYLOR [UK]

Marine Insurance

Joseph GRASSO [USA] *Chair*
 Sarah DERRINGTON [Australia]
Rapporteur
 Andreas BACH [Switzerland]
 Pierangelo CELLE [Italy]
 Shelley CHAPELSKI [Canada]
 Charles FERNANDEZ [UK]
 Jiro KUBO [Japan]
 Hernan LOPEZ SAAVEDRA [Argentina]
 Dieter SCHWAMPE [Germany]

Andrea SIGNORINO [Uruguay]

Jonathan SPENCER [USA]

Rhidian THOMAS [UK]

Pengnan WANG [China]

Beatrice WITVOET [France]

CMI Young Lawyers

Robert HOEPEL [Netherlands] *Chair*
 Paula BÄCKDÉN [Sweden] *EXCO Rep*
 Lorenzo FABRO [Italy]
 Javier FRANCO-ZARATE [Colombia]
 Mišo MUDRIĆ [Croatia]
 Massimiliano MUSI [Italy]
 Evangeline QUEK [Hong Kong/China]
 Violeta RADOVICH [Argentina]
 Harold SONDERGARD [Denmark]
 Ioannis TIMAGENIS [Greece]

Collection of Outstanding Contributions

John O'CONNOR [Canada] *Chair*
 Frank STEVENS [Belgium]
 Benoit GOEMANS [Belgium]
 Aurelio FERNANDEZE-CONCHESO [Venezuela]

Constitution Committee

Jean Francois PETERS [Belgium] *Chair*
 Benoit GOEMANS [Belgium]
 John HARE [South Africa]
 John O'CONNOR [Canada]
 Patrice REMBAUVILLE-NICOLLE [France]

Implementation of International Conventions and Promotion of Maritime Conventions

Deucalion REDIADIS [Greece] *Chair*
 Maria BORG BARTHET [UK]
Rapporteur: IMO Technical Cooperation
 Dimitri CHRISTODOULOU [Greece]
Rapporteur: Implementation
 Peter LAURIJSEN [Belgium]
Rapporteur: Promotion
 Jose M. ALCANTARA [Spain]
 Rosalie BALKIN [Australia]
 Giorgio BERLINGIERI [Italy]
 Vincent FOLEY [UK]

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Nicholas GASKELL [UK]
 Benoit GOEMANS [Belgium]
 Patrick HOLLOWAY [South Africa]
 Luke Chidi ILOGU [Nigeria]
 Måns JACOBSSON [Sweden]
 Kiran KHOSLA [UK/ICS]
 Elizabeth SALAS [Colombia]
 Leven SIANO [Brasil]

**Database of Judicial Decisions on
 International Conventions**

Stephen GIRVIN [Singapore] *Chair*
 Lawrence TEH [Singapore]
 Taco VAN DER VALK [Netherlands]
 Alexander VON ZIEGLER [Switzerland]
 Katerina VUSKOVIC [Peru]

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 Chris GIASCHI [Canada]

CMI Archives

Jean-Francois PETERS [Belgium] *Chair*
 Rosalie BALKIN [Australia – New Zealand]
 Evelien PEETERS [Belgium]

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Giorgio BERLINGIERI [Italy] *Chair*
 Ann FENECH [Malta] *Ex Officio*
 Tomotaka FUJITA [Japan]
 Jorge RADOVICH [Argentina]
 Andrew TAYLOR [UK]

Planning Committee

Rosalie BALKIN [Australia-New Zealand]
Chair
 Giorgio BERLINGIERI [Italy]
 Blythe DALY [USA]
 Tomotaka FUJITA [Japan]
 In Hyeon KIM [S Korea]
 Dihuang SONG [China]
 Michael STURLEY [USA]
 Edmund SWEETMAN [Ireland/Spain]

Ad Hoc Committee: The Future of the CMI

Stephen KNUDTZON [Norway] *Chair*
 Jesus CASAS [Spain]
 Edmund SWEETMAN [Ireland/Spain]
 Harold K. WATSON [USA]

Ad Hoc Committee; COVID-19

Ann FENECH [Malta]
 John MARKIANOS DANILOLOS [Greece]

**Liaison with National Associations
 (*Provisional)**

Paula BACKDEN *Cameroon, Congo,
 Senegal, South Africa, Nigeria*
 Rosalie BALKIN *Israel*
 Tom BIRCH REYNARDSON *Ireland,
 United Kingdom*
 Ann FENECH *Croatia, Greece, Italy,
 Malta, Romania, Slovenia, Spain, Turkey*
 Aurelio FERNANDEZ CONCHESO
*Argentina, Brazil, Chile, Colombia,
 Ecuador, Panama, Peru, Mexico,
 Uruguay, Venezuela*
 Petar KRAGIC *Switzerland*
 John O'CONNOR *Canada*
 Dieter SCHWAMPE *Denmark, Finland,
 Germany, Japan, Norway, Poland,
 Sweden, Ukraine*
 Lawrence TEH *India, Malaysia ,
 People's Republic of China (incl Hong
 Kong), Republic of Korea, Democratic
 People's Republic of Korea, Philippines,
 Singapore*

**CMI Charitable Trust Trustees [Appointed
 by the Trustees, with written consent of
 the CMI as required by Clause 19(1) of the
 Trust Deed]**

Thomas BIRCH REYNARDSON, [UK]
Chair
 Giorgio BERLINGIERI [Italy]
 Ann FENECH [Malta]
 Alexander VON ZIEGLER [Switzerland]

INTERNATIONAL WORKING GROUPS

[As constituted during EXCO meeting Antwerp, October 2022]

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The Work of the CMI

POLAR SHIPPING 2021

POLAR SHIPPING 2021

WORKING PAPER ON THE LEGAL FRAMEWORK FOR SHIP'S PASSENGER RIGHTS IN ARCTIC WATERS

FINAL REPORT

*(6 September 2021)
(rev. no. 1 of 21 September 2022)*

This report was prepared by the passenger rights sub-committee of the CMI International Working Group on Polar shipping with contributions from members of the committee and assistance from local lawyers as detailed in the text. It is our hope that the report will shed light on the conditions that this highly specialized tourist industry operates under and some of the legal issues that it entails.

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1. Introduction

It is anticipated by the Sub-Group that cruise and adventure passenger vessels will increasingly extend their range and frequency of operations in Arctic and Antarctic waters. Navigation risks in these environments are increased because many navigable waters and channels are uncharted at all or the charts have not been updated. Navigation aids might be minimal, and search and rescue services are generally located far away. Further, in case of major casualties with many injured passengers, there may not be enough hospital beds available. As this type of passenger shipping increases in such areas, the question arises: how are passenger rights addressed, with respect to the specific risk exposure? It is an added complication that a number of jurisdictions are potentially in play and so this report addresses the issues from the perspective of the Arctic coastal states.

Readers are encouraged to seek additional information from additional sources such as Association of Arctic Expedition Cruise Operators¹ and the Arctic Council.²

2. Scope of the report

This report is intended as a comparative study of passengers' rights when travelling in the Arctic for leisure with an emphasis on accidents and personal injury. The report covers the five Arctic states and includes factual details about each state relevant to the carriage of passengers at sea, policies and regulations. Further, the national legislation with respect to passenger rights is set out for each individual state.

The scope is commercial carriage of passengers; including cruise but not shore based adventure tourism or scientific expeditions. The ambition is to give an overview rather than to resolve individual cases.

3. Particularities/special risks, facilities and national policies

3.1 United States – Alaska³

Towns and Villages Along Alaska's Arctic Coastline That Might Provide Support to Vessels or Passengers in Distress

The coastline of arctic Alaska extends from Alaska's border with Canada to the Bering Strait that separates Alaska from the east coast of Russia. The northern coastline is bounded by the Beaufort Sea, which lies to the east of Point Barrow, while the Chukchi Sea extends westward from Point Barrow to the tip of the Seward Peninsula, which forms the eastern side of the Bering Strait.

Like other polar regions, arctic Alaska is remote. Uninhabited shorelines extend for hundreds of kilometers between small towns and villages, which

¹ AECO | Association of Arctic Expedition Cruise Operators.

² Arctic Council - As Arctic marine tourism increases, how can we ensure it's sustainable? (arctic-council.org).

³ Contributed by Bert Ray, Schwabe Williamson & Wyatt.

have limited resources to assist vessels or passengers in distress. Sea ice forms in the fall and remains nearshore until late spring/early summer. Due to ice and weather, passenger excursion vessels can only operate in this region from July through October. South of the Bering Strait lies the Bering Sea which, while not technically above the Arctic Circle, is also a remote region in which passenger excursion vessels face many of the same challenges as those operating in the remote Arctic.



As noted, a few small towns and villages located along Alaska's arctic coast might be able to provide aid to passengers with medical problems or vessels in distress. However, due to shallow coastal waters and little or no harbor infrastructure in those towns, a passenger needing emergency medical assistance onshore might need to be transported to shore by a helicopter or a small skiff, depending on the location of the vessel. If needed, a medevac flight can be arranged from airfields located in these towns and villages to Anchorage, Alaska, approximately 1,000 kilometers to the south, where most medical facilities in the state are located.

Deadhorse is a small, unincorporated community at Prudhoe Bay, a large industrial oil field complex located approximately 320 kilometers west of the Canadian border. A wharf and dock support vessels engaged in offshore exploration work are used to unload barges delivering cargo for energy companies operating on Alaska's North Slope. Due to shallow water, only barges and shallow draft vessels can reach these structures. Commercial jets operate from a large airfield at Deadhorse. Privately chartered helicopters are sometimes present at the airfield at Deadhorse, but these are typically engaged in work for oil exploration companies and may not be available to respond to a request for assistance from a passenger vessel.

Approximately 500 kilometers to the east of Deadhorse, near Point Barrow, lies the town of Utqiagvik (formerly Barrow). With a population of approximately 4,200, Utqiagvik is the largest town in the Alaskan arctic. In addition to a commercial airport, the town has a hospital, several hotels and restaurants, and commercial stores. There are no commercial docks or waterfront facilities at Utqiagvik due to the shallow offshore water.

The town of Kotzebue, located on the western coast of Alaska on the Chukchi Sea, is the shipping and transportation hub for northwest Alaska. Passengers can be ferried ashore by skiffs to a pier near the town. Hotels, restaurants, and commercial stores are located in Kotzebue, as well as a primary health care facility. Commercial jet service is available year-round at the local airport. A few exploration cruise voyages start or end their voyage in Kotzebue.

The city of Nome, Alaska is located approximately 300 kilometers south of Kotzebue, just south of the Bering Strait. Located on the Norton Sound, an extension of the Bering Sea, Nome is a regional transportation hub, serviced by air and marine traffic. Passenger vessels and cargo ships call at Nome. Facilities in Nome include hotels, restaurants, commercial shops and a hospital. Several passenger excursion vessels begin or end their voyages in Nome.

In addition to Deadhorse, Utqiagvik and Kotzebue, there are a number of small native villages located along the arctic coastline of Alaska. However, these towns have no developed port facilities and very limited infrastructure. Air transportation to these villages is limited to small planes, and requires good weather.

United States Coast Guard Resources

In order to expand the United States' presence in the Arctic, the United States Coast Guard ("USCG") adopted an Arctic Strategy in 2013.⁴ One of the goals of this strategy is to ensure safe, secure and environmentally responsible maritime activity in the Arctic. The USCG has two polar-class icebreaker cutters in its fleet, but only one is currently operational. The United States Congress has authorized funding to construct additional icebreakers, with the first new icebreaker scheduled for delivery in 2024. During the summer months, other USCG vessels may also be present in ice-free areas of the Arctic.

The USCG operates a seasonal base in the Arctic. In past years, the base has been established in either Kotzebue or Utqiagvik. USCG helicopters and personnel are deployed to this seasonal base. In the event of a medical emergency involving a passenger on a vessel, the USCG may be able to launch a helicopter from this base to bring the passenger to shore, depending on the location of the vessel, the availability of a helicopter, the severity of the medical condition, and weather conditions.

⁴ <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5pw/Arctic%20Policy/USCG%20Arctic%20Strategy.pdf?ver=2017-10-05-123403-330>.

Nautical Charts

Coastal waters in Alaska's arctic region tend to be shallow, with shifting shoals due to the action of ice and currents. Small-scale nautical charts (ranging in scale from 1:1.5 million to 1:5 million) are available for many areas lying offshore of the Alaska Arctic. However, many of these offshore areas were surveyed with imprecise technology, in some cases dating back to the 1800's. Consequently, confidence in the region's nautical charts is low.

Generally speaking, surveying offshore arctic waters has not been considered a high priority for the National Ocean Service, due to the low volume of commercial traffic in the area. As of 2018, only 4.1 percent of U.S. maritime Arctic had been charted to modern international navigation standards. However, the National Ocean Service has designated 38,000 square miles of coastal waters as survey priority areas. With current resources, it will take 25 years to survey these areas.

Newer large-scale charts (providing 1:90,000 – 1:400,000 scale coverage) are available for some coastal areas, including the approaches to the harbors in Kotzebue and Nome, and areas where surveys have been conducted to support oil and gas exploration and production activities. Additional new charts are planned as part of the National Ocean Service's strategic plans for the Arctic.

Current Status of Passenger Vessels Transiting Alaska Arctic Waters

With a few exceptions, most passenger vessels operating in Alaska's arctic are small exploration vessels rather than large cruise ships. These vessels offer exploration cruises that explore islands and coastal areas of the Bering or Chukchi Seas, where large numbers of seabirds and marine mammals are found. Most of these vessels have voyages beginning or ending in Nome, Alaska, but a few operate from Kotzebue.

A few large cruise ships have transited Alaska's arctic coast in the past, on voyages between Alaska and the U.S. east coast, Greenland or Europe. But the costs and logistics of such a passage are such that there is not currently a significant demand for such cruises. Some of these larger vessels have sailed with a tug escort and helicopters.

In addition to smaller excursion vessels, large passenger vessels offer cruises along the Aleutian Island chain, at the beginning and end of the Alaska cruise season, as they transition between Alaska and Asia.

National Policies and Regulation

At the request of the United States and Russia, the IMO established six voluntary two-way shipping routes in the Bering Sea and Bering Strait in 2018.⁵

There are no federal statutes that impose any operational requirements specific to passenger vessels operating in arctic waters, other than provisions implementing the Polar Code. The volume of passenger vessel traffic to date has not been significant, and there have been no major casualties or losses that would prompt the adoption of such provisions.

⁵ <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/NCSR5.aspx>.

Both federal law and Alaska law require the operators of passenger vessels greater than 400 gross tons to develop a vessel response plan (VRP) to respond to an oil spill from the vessel.⁶ Limited oil spill response resources are stored in the towns and villages along Alaska's arctic coastline. Because there are inadequate response resources to respond to an oil spill in the arctic within the timeframes required by the federal requirement, VRP's are reviewed by the Coast Guard using Alternative Planning Criteria (APCs) which require the vessel operator to take additional precautionary measures designed to prevent accidents and spills from occurring.

Native Alaskans living on the arctic coastline engage in subsistence hunting of bowhead whales and other marine mammals during the summer open water season. To avoid interfering with these activities, vessels engaged in offshore seismic exploration activities have agreed to avoid hunting areas during times when subsistence hunting is taking place.

The Arctic Waterways Safety Committee (<http://www.arcticwaterways.org/home.html>) was established in 2014 to bring together local marine interests to develop best practices to ensure a safe, efficient and predictable operating environment in arctic Alaska waterways. Members of the committee include representatives of Alaska native subsistence hunters, the oil and gas industry, the tourism industry, local towns and villages, and vessel operators. The goal of the Committee is to develop standards of care for vessels operating in this region.

Vessels operating within three miles of Alaska's coastline are required to carry a state pilot. However, unless a vessel is bound for an Alaskan port, most passenger vessels remain well offshore due to shallow waters along the coast and low confidence in the accuracy of charts. Vessels use skiffs to transport passengers to shore for shore-side excursions.

Under United States law, operators of foreign flagged cruise ships may not use the ship's passenger tender boats or the ship's crew to conduct such excursions. Rather, they must use passenger skiffs built in the United States and must employ United States mariners to operate them.⁷

3.2 Norway - Svalbard⁸

About Svalbard

Svalbard is an archipelago in the Arctic Ocean, situated between the northern coast of Norway and the North Pole, situated between 74 and 81 north latitude and between 10 and 35 east longitude. The largest island is Spitsbergen, followed by Nordaustlandet and Edgeoya. The largest settlement is Longyearbyen. The main industries are coal mining, tourism and research. Cruise ship voyages are a significant part of the tourism industry, including

⁶ 33 U.S.C. §1321(j)(5); 33 C.F.R. 155.5035; Alaska Stat. 46.04.055(f) & 46.04.900(11).

⁷ Passenger Vessel Services Act, 46 U.S.C. §55103; United States Coast Guard Field Notice 01-2018 (Jan. 23, 2018) available at: <https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CSNCOE/Industry%20Notices/CSNCOE%20Field%20Notice%2001-2018%20-%20Tender%20and%20Excursion%20Vessels-signed.pdf?ver=2018-01-24-123444-217>.

⁸ Contributed by Katrine Heier, Kjersti Tusvik, Officer EFTA internal market division and Lars Rosenberg Overby, partner IUNO Law Firm.

both calls by offshore vessels and cruises starting or ending in Svalbard.

More than 60% of Svalbard is covered by glaciers, permanently with snow and ice. The archipelago has many mountains and fjords. In order to preserve the largely untouched and fragile natural environment, more than two thirds of the archipelago are included in national parks and nature reserves. Svalbard has an Arctic climate, however with significantly higher temperatures than other areas situated at the same latitude.

The Svalbard Treaty of 1920 recognises Norwegian sovereignty over Svalbard, and according to the Svalbard Act of 1925 (The Svalbard Act of 7 July 1925 no.11). Svalbard is a full part of the Kingdom of Norway. According to the Treaty, all activity on Svalbard is subject to Norwegian legislation. Administratively, the archipelago is not part of any Norwegian county, but forms an unincorporated area administered by a governor appointed by the Norwegian government.

As a main rule, according to the Svalbard Act section 2, Norwegian civil law, criminal law and laws regarding the applicability of the law applies on Svalbard, unless otherwise stated. Other types of laws do not apply in Svalbard, unless otherwise specifically stated. The Svalbard Act section 3 gives specific rules regarding laws regulating certain public services and their applicability to Svalbard. Regulations for Svalbard on specific areas can be adopted according to the Svalbard Act section 4.

International agreements ratified by Norway will, as a general rule, apply to Svalbard, unless otherwise declared in connection with the ratification of the agreement. The agreement on the European Economic area does not apply to Svalbard. However, EEA relevant legislation incorporated into the EEA Agreement may be given applicability to Svalbard, normally in connection with the implementation of the legislation into Norwegian national law.

Environmental protection

The Svalbard Environmental Protection Act (Svalbard Environmental Protection Act of 15 June 2001 no. 68) and related regulations applies to the islands of Svalbard and the territorial waters which extend 12 nautical miles outside the baseline. The purpose of the Act is to preserve a virtually untouched environment in Svalbard with respect to continuous areas of wilderness, landscape, flora, fauna and cultural heritage.

As a fundamental principle for access and passage in Svalbard, The Svalbard Environmental Protection Act section 73 states that all access and passage in Svalbard shall take place in a way that does not harm, pollute or in any other way damage the natural environment or cultural heritage or result in unnecessary disturbance to humans or animals. Anyone staying in or operating an undertaking in Svalbard shall show due consideration and exercise the caution required to avoid unnecessary damage or disturbance to the natural environment or cultural heritage (section 5).

A head of undertaking shall ensure that every person who carries out work or takes part in the activities for which an undertaking is responsible is aware of the provisions set out in or pursuant to this act regarding the protection of Svalbard's flora, fauna, cultural heritage and the natural environment otherwise (section 5). Exercise of authority under the act shall

build on the precautionary principle and the overall environmental pressure on the natural environment and cultural heritage (sections 7 and 8).

Access and safety precautions

It is required that any person travelling to or living in Svalbard must be able to support her or himself. According to the Svalbard Treaty, citizens of all countries signatories to the treaty have equal right of access to Svalbard. Foreigners do not need a visa to enter Svalbard. However, a visa for the Schengen area is required when travelling via the Norwegian mainland. Everyone travelling to Svalbard must be able to prove their identity with a passport, or, for Norwegian citizens, an ID card, a Norwegian driving licence or a Norwegian bank card.

Safety precautions must be top priority when travelling in Svalbard. The conditions can be challenging in terms of changing weather conditions, winds, difficult waters and landings, sea ice/drift ice, glaciers, fog and polar bears, among other things. Due to the risk of encountering polar bears, visitors travelling in Svalbard must always have firearms and protection devices at hand, such as a big-game rifle and ammunition for self-defence, flare gun or an emergency signal flare pen for driving off polar bears and tripwire with flares for camping. For trips outside Management Area 10 it is required to bring an emergency beacon and a satellite telephone, as there is limited range for mobile phones in Svalbard.

National policies and regulations on pilotage

Norway requires pilots in waters within the baselines. The basic principle set out in the Compulsory Pilotage Regulations Section 3 is that any vessel of 70 meters or more, and with a width of 20 meters or more, requires pilots in waters within the baselines.⁹ For certain categories of vessels stricter rules apply, such as passenger vessels and vessels carrying dangerous and polluting cargo. For passenger ships certified for more than 12 passengers and which are carrying passengers, all vessels over 50 meters are subject to compulsory pilotage.

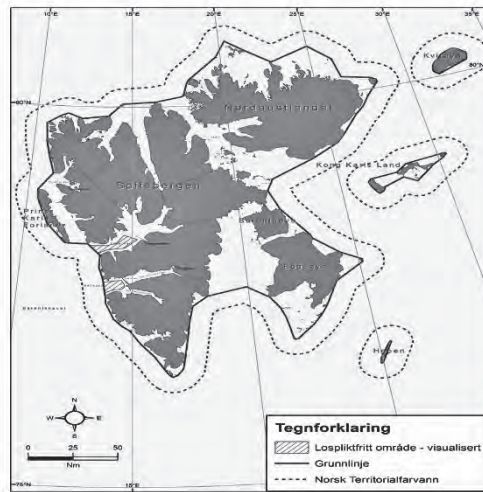
The compulsory pilotage requirement can be met by either using the state pilot service or by obtaining a Pilot Exemption Certificate (PEC). The Norwegian Coastal Administration is responsible for the state pilot service and the administration of the Pilot Exemption Certificate (PEC) scheme. A list of boarding areas has been established in order to enable the enforcement of the pilot requirements. The boarding areas can be found by using the Norwegian Coastal Administration's interactive map.¹⁰ Certain areas are exempt from compulsory pilotage for vessels in transit to or from the pilot boarding area. The pilot boarding areas and exempt areas in Svalbard are

⁹ The Coastal Administration may exempt a vessel from the pilot requirements or using a Pilot Exemption Certificate (PEC) for an individual voyage, in case of pilot shortage or in the event that it is deemed unreasonable to force pilot requirements and it appears obviously safe to provide an exemption cf. the Compulsory Pilotage Regulations Section 8. In certain cases, the Norwegian Coastal Administration may also decide to make the use of a pilot compulsory for a specific sailing, even outside the baselines.

¹⁰ <https://kart.kystverket.no/>.

set out in the regulation relating to ports and fairways on Svalbard § 3 d) and defined geographically in annex 1 to the regulation.

The rules and regulations on pilotage have been made applicable to Svalbard, thus introducing the state pilotage service, compulsory pilotage and PEC on Svalbard, by Regulation relating to ports and fairways in Svalbard of 12 March 2021, which sets out certain amendments for Svalbard in section 3(d). The solid green line in the graphic below represents the baseline. The dashed areas are areas that do not require pilots.



Graphic 2: Pilot requirements in Svalbard.¹¹

National policies and regulations on ports and fairways

Following the Regulation relating to ports and fairways in Svalbard of 12 March 2021, the Ports and Fairways Act is in effect in Svalbard, including territorial waters and internal waters, with certain adjustments stated the regulation. The regulations include provisions on position reporting.

Tour operators

According to the Svalbard Tourism Regulation Section 7, a tour operator must provide insurance – in addition to a travel guarantee – due to the increased risk of rescue operations. The tour operator is also responsible for their participants' security and behaviour at all times under Section 5 and must be competent in fields such as Svalbard regulations, security (polar bear, glacier and avalanche safety) and first aid.¹²

The tour operators are required to report their activities to the Governor

¹¹ Graphic provided by the Coastal Administration .

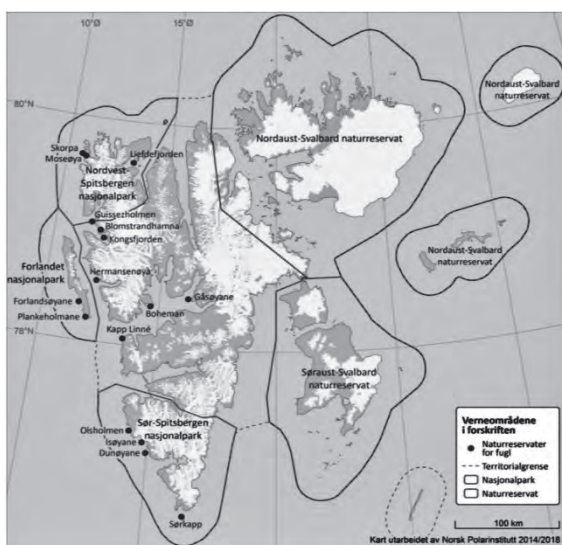
¹² The Svalbard Tourism Regulation Section 6 .

of Svalbard no later than eight weeks before the activities are scheduled to start, and in the event of a voyage by sea, a sailing itinerary must be provided, as well as scheduled disembarkations.¹³ The geographical scope of the Svalbard Tourism Regulation is all the land areas of Svalbard, as well as sea areas until the territorial limits.¹⁴

Generally, tour operators seeking to offer cruises or other types of tourism or expeditions in Svalbard should always seek the assistance of the Governor of Svalbard in relation to current regulations, as the distinctiveness of the regulations in the area cover many aspects of planned tourism or excursion operations.

National parks and nature reserves

Svalbard has several national parks and nature reserves, shown in the graphic below. There are fuel requirements for ships that call in the Svalbard national parks (DMA in accordance with ISO 8217 Fuel Standard). In the nature reserves, ships cannot have more than 200 passengers on board.¹⁵



Graphic 1: *Map of national Parks and Nature Reserves in Svalbard.*¹⁶ The green areas mark the national parks, while the red areas represent the nature reserves. Black circles represent special bird nature reserves.

¹³ The Svalbard Tourism Regulation Section 8.

¹⁴ The Svalbard Tourism Regulation Section 2.

¹⁵ The Svalbard National Park Regulation Section 4 and Section 16.

¹⁶ Map provided by the Norwegian Polar Institute.

Search and rescue in Svalbard

Rescue operations in Svalbard are often carried out under extreme weather and temperature conditions and in exposed areas, which poses great demands on personnel and resources.

The Governor of Svalbard is responsible for planning, leading and coordinating the Rescue Service for Svalbard under the overall direction of the Joint Rescue Coordination Centre of Northern Norway. The search and rescue service is part of the Norwegian rescue service and organized in the same way as on the mainland. It relies on voluntary efforts, including the Red Cross and the Rescue Corps. Government agencies and private companies also have resources and personnel important to the rescue service. The Governor of Svalbard is responsible for all air ambulance services on the archipelago and in adjacent sea areas outside Longyearbyen.

The Governor has access to two rescue helicopters, equipped for flying in extreme cold conditions and with long range, auto hover function and thermal camera, night flying and de-icing equipment. Between March and December, the Governor has the expedition and research vessel MS Polarsyssel at its disposal, including a helicopter deck and an operation command room. In addition, the Governor has access to a variety of emergency response equipment, including glacier rescue equipment and oil spill response equipment.

Several environmental emergency operations have been carried out in Svalbard, sometimes under extreme conditions including extreme cold, darkness, large distances and limited communication possibilities.

Special legislation

Svalbard is a legal unicorn. The laws and regulations described above are only a fraction of the vast number of rules and regulations particular to Svalbard.

3.3 Greenland (Denmark)¹⁷*About Greenland*

Greenland is a self-governing country within the Kingdom of Denmark. It is located in the Arctic and has a population of approx. 56,000 people; most of whom are Inuit. Greenland's area is about 2.2 mill. km² and 80% is covered by ice.

Greenland enjoys extensive self-governance but areas such as defence, security and foreign affairs are not taken over by the government of Greenland but are governed by the government of Denmark. Greenland is not a member of the EU but an OTC ("Overseas Countries and Territories). In 2009 the Act on Greenland Self-Government was granted to Greenland and was an extension of powers and included some achievements in international law such as the recognition of Kalaallit (Greenlanders) as people, but also

¹⁷ Contributed to by Lena Holm Saxtoft Assistant Vice President, Skuld and Lars Rosenberg Overby, partner IUNO Law Firm.

the opportunity to become an independent state. Today, Greenland is a self-governing unit within the Danish realm and the Danish constitution also applies to Greenland. Most laws adopted by the Danish parliament also apply to Greenland unless Greenland is specifically exempted but Greenland also have their own laws. Greenland has jurisdiction over its inner territorial waters (3 NM).

National policies

The maritime traffic continues to increase in Greenland with ice receding due to climate change. This means that passenger vessels –may now navigate waters in the summer that were not previously accessible and hence growing tourism. New routes through the Northern Sea Route and the Northwest passage generate increased traffic by cargo vessels and this in turn enhances the navigational risks.

In addition, the extreme weather, ice, wind and low temperatures pose objective hazards to passenger vessels. Greenland's coastline is approx. 44,000 km and it is sparsely populated. Onshore resources are limited, and, in some areas, basic survival needs like food, running water and access to hospitals and/or doctors could be in short supply.

The Danish Maritime Authorities have adopted various regulations and policies in order to prevent accidents and mitigate the effect of such accidents. Cruise vessels receive special attention.

The work is performed in a dialogue with the self-rule government of Greenland and maritime safety is also a priority of the Arctic Council.¹⁸ Interestingly, the Arctic Expedition Tour Operators are regarded as a potential asset response-wise by the Arctic Council's Emergency Prevention, Preparedness and Response Working Group (EPPR).¹⁹

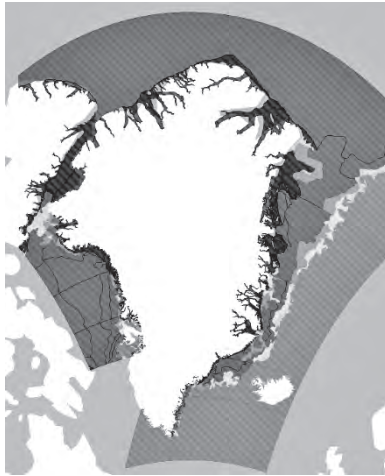
Information about national and international orders, regulations and guidelines is available on the web page of the Danish Maritime Authority.²⁰ The authority participates in the *Arctinfo* programme managed by the Norwegian Coastal Administration ("Kystverket"). Arctinfo is an Internet based service that collects and communicates information to those navigating the Arctic.²¹

¹⁸ The Danish Arctic policy is described Henriksen, "Norway, Denmark (in respect of Greenland) and Iceland" in Beckman and other (eds.) *Governance of Arctic Shipping: Balancing Rights and Interests of Arctic States and Use States* (Brill Nijhoff 2017).

¹⁹ See Arctic Council - From Risk to Rescue (arctic-council.org).

²⁰ See Navigation in Greenland (dma.dk).

²¹ See ArcticInfo | ArcticInfo - BarentsWatch.



Snapshot of Greenland and its waters from Arctinfo 13 May 2021 depicting total ice concentration of varying degrees from grey (10/10), brown, yellow to light green (2/10). Blue areas are open waters.

The Polar Code

Denmark and Greenland have not enacted the Polar Code *en bloc* but have adopted it in various legislation depending on the nature of the regulation.²² The CDME (Construction, Design, Manning, Equipment) rules and requirements are stricter than contemplated in the Polar Code. For example, a vessel with a capacity of more than 250 passengers is subject to stricter construction requirements, such as a minimum ice class of Baltic Ice Class 1 C or equivalent when trading in the Northern navigation zone, whether or not there is any ice.

There are additional rules regarding voyage planning and preparedness for maritime accidents. This entails i.a. submitting a voyage plan before entering Greenland water that takes limited SAR availability into account. If the capacity exceeds 200 passengers the vessel must document assistance from other vessels or that SAR facilities are available within a reasonable time horizon. This means that passenger vessels of this size have to travel in tandem. Regular reports shall be submitted to the authorities and risk assessment is a continuing obligation. Open lifeboats are not allowed and vessels must have ice search lights. Recommended sea routes outside Nuuk must be followed and the master is responsible for ensuring safe distance to icebergs.

²² For a detailed summary see Rosenberg Overby, The implementation of the Polar Code in Denmark and Greenland in JIML vol. 24 issue 6 (2018).

Mandatory pilotage

Vessels carrying more than 250 passengers are obliged to use a certified pilot in the inner and outer territorial waters of Greenland (that is 3 NM from the baseline).

*The search and rescue service in Greenlandic waters*²³

The management of the search and rescue service (SAR) in Greenland is divided between Joint Arctic Command (JACMD), the Air Rescue Coordination Center and the Commissioner of Police in Greenland. Joint Arctic Command Denmark is a joint operational territorial command comprised of personnel from all services in the Royal Danish Armed Forces; Navy, Airforce, Special Forces and Army. It also employs civilians from Denmark, Greenland the Faroe Islands. Joint Arctic Command and the Air Rescue Coordination Center are co-located in Nuuk. JACMD, which operate the Joint Rescue and Coordination Centre (JRCC) Greenland, is responsible for the management of the maritime rescue service, meaning the search and rescue of vessels in distress of any type on or below the surface of the sea, irrespective of whether the measures are carried out at sea, from the air or ashore. The Danish Transport Authority, which operates the Flight Information Center (FIC) Sondrestrom, is responsible for the management of the air navigation service, meaning search and rescue of persons in distress by aircraft, irrespective of whether the measures are carried out from the air, at sea or ashore. Air Greenland currently represents the civilian SAR helicopter emergency response in Greenland in cooperation with JACMD and the Police in Greenland. The Commissioner of Police in Greenland is responsible for the management of the local rescue service, meaning search and rescue operations in local sea areas, as well as for search and rescue operations ashore. However, at any time each individual master bears the full responsibility for their own ship and crew. In this connection, attention is drawn to chapter V, regulation 33, of Notice B from the Danish Maritime Authority (identical to SOLAS convention, chapter V, regulation 33), according to which the master of a ship, be it Danish or foreign, who receives information from any source while at sea that persons are in distress at sea and who is able to provide assistance is bound to proceed with full speed to their assistance. Any master who, at his own initiative, launches a search or rescue operation in Greenland waters must, as soon as possible, inform JACMD about the decision taken.

3.4 Russian Federation²⁴

Background

The Russian Federation is expanding its Arctic transport capabilities, paying special attention to the transportation of goods and attracting carriers for these purposes on the basis of a public-private partnership. Passenger

²³ Information as stated at Message List (soefartsstyrelsen.dk).

²⁴ Contributed by Alexander Skaridov, Professor St. Petersburg Maritime University, Head International and Maritime law Chair.

shipping between individual ports is extremely poorly developed, and cruise shipping is practically absent. The main projects for the development of the port infrastructure of the Arctic Basin are associated with the development of oil and gas fields in Yamal, as well as the comprehensive development of the Murmansk transport hub. These projects are the modern growth points for the Arctic regions.

Many travelers, both Russians and foreigners, dream of going through the Northern Sea Route. The melting of ice has significantly increased the duration of the shipping season, but only a few tours are offered by Russian travel agencies. All that could be offered are excursion tours on an icebreaker to the North Pole, cruises on expedition ships along the Northern Sea Route (as a rule, twice a year) from Anadyr to Murmansk lasting 27 days, including landing on uninhabited islands, visiting Franz Land -Yosef, Novaya Zemlya, Novosibirsk Islands and Wrangel Island.

Special risks

- low level of development of transport infrastructure, including those designed for the functioning of small aircraft and the implementation of year-round air transportation at affordable prices, the high cost of creating such infrastructure facilities;
- the lack in the development of the infrastructure of the Northern Sea Route, the construction of icebreaker, rescue and auxiliary fleets from the deadlines for the implementation of economic projects in the Arctic zone;
- the lack of an emergency evacuation system and the provision of medical assistance to passengers and crew members of ships in the water area of the Northern Sea Route;
- inconsistency between the rates of development of the emergency rescue infrastructure and the public safety system and the rates of growth of economic activity in the Arctic zone.

The above risks are mentioned in the “Strategy for the Development of the Arctic Zone of the Russian Federation and ensuring National Security for the Period until 2035”.

Also, lack of special passenger ships suitable for passenger traffic in Polar waters should be mentioned, as well as terrible weather and ice conditions are traditionally singled out as threats, but they are not recorded in the legislation framework.

National policies

Russian maritime transport is an essential component of the state program for development of the Polar territories. Russian national maritime transport policy (MNTP) in the Arctic regional area is determined by the priority to ensure the free access to the Arctic spaces, control the NS routes and provide safety exploration of the natural resources on the continental shelf and sustainable development of biological species in exclusive economic zone of the Russian Federation.

No particular provisions are devoted to maritime tourism in Polar areas, yet.

3.5 Canada²⁵

Navigation risks

Many areas of Canadian Arctic waters have not been surveyed and the navigation risk this presents to Arctic shipping, particularly eco-tourism/passenger vessels who often navigate close to shore or in confined waters, is exemplified in the 2017 decision of Canada's Federal Court in *Adventurer Owner Ltd vs Her Majesty The Queen in Right of Canada* (the M/V CLIPPER ADVENTURER)²⁶.

The waters in question were in Canada's Coronation Gulf (Nunavut Territory), when the CLIPPER ADVENTURER was en route from Port Epworth to Kugluktuk. The ship was carrying 128 passengers with a crew of 69 and ran hard aground in good weather on an uncharted, submerged shoal (August 27, 2010). This was day 13 of a fourteen-day expedition cruise in the waters of Greenland and Canada. None of those aboard were injured. The passengers and non-essential crew were rescued by a Canadian icebreaker and taken to Kugluktuk.

The incident highlighted three areas of particular risk with respect to such navigation namely (i) rescue, (ii) salvage and recovery and (iii) knowledge of local waters and voyage planning.

From a rescue point of view the passengers and crew remained aboard for two days awaiting the Canadian ice breaker. Fortunately, they were secure (the ship had power and sufficient food and services) and the rescue vessel was not far away. The transfer to the rescue vessel took place without incident. However, the consequences would doubtless have been more dramatic and potentially more dangerous had circumstances not been so favourable.

In terms of salvage and recovery, as the ship was heavily aground (more than half its length of 100 m), four tugs were required to bring the ship afloat (damage to its double bottom tanks was fortunately limited) some 17 days after the incident. Temporary repairs were conducted in northern Canada and in Greenland with further inspection in Iceland. Permanent repairs took place in Poland with a final cost of US\$13.5 million (including salvage cost, business interruption and related matters). The initial and limited repairs (before the Iceland inspection) were to ensure the ship could promptly exit Arctic waters before the onset of the Arctic winter. These efforts highlight the absence of sophisticated local repair facilities and the short navigation window to effect repairs and return to service.

However, the main focus of the case was knowledge of local waters and voyage planning. The shipowners sued the Crown to recover their damages alleging that the Canadian Coast Guard and the Canadian Hydrographic Services, who were aware of the presence of the uncharted shoal, failed to warn seafarers of its presence. They argued that the Crown had a duty to warn the public and failed to do so. In making such arguments it was clear

²⁵ Prepared by Peter J Cullen, Senior Counsel with Stikeman Elliott LLP (Montreal, QC) with the assistance of Simon Ledsham, associate with Stikeman Elliott LLP (Montreal, QC).

²⁶ 2017 FC 105, upheld by the Federal Court of Appeal, 2018 FCA 34.

that the shipowners had relied on a current version of the relevant Canadian Hydrographic chart (Chart 7777) which did not note the shoal in question (a chart issued in 1997 and updated through Notices to Mariners to June, 2004).

While the Court rejected the shipowners' arguments, the decision sheds light on the process by which seafarers in Canadian waters are informed of unmarked shoals and known obstructions, and the duties of shipowners to exercise due diligence in properly updating their charts and their voyage preparations and planning.

The Crown acknowledged that the shoal had been detected in September 2007 (by another Canadian icebreaker on a scientific expedition in those waters) and was noted in a Notice to Shipping at that time – A102/07). While the Crown had yet (as of 2010 when the grounding occurred) to update the material Chart, the Court held that a prudent shipowner would not have relied solely on the Chart but would have ensured (as obliged under s. 7 of Canada's Charts and Nautical Publication Regulations, 1995) that all charts and related documents required by such Regulations, before being used for navigation, were correct and up to date by taking note of all relevant Notices to Shipping.

The Notice to Shipping was initially broadcast via radio for a fixed period of time before being issued in written form, available online, in late 2007 (co-incidentally, the Notice to Shipping was again broadcast by radio from July 1, 2010 to August 20, 2010). Although the process to upgrade the Notice to Shipping to a more formal (and internationally recognized) Notice to Mariners had begun in early 2010, it had not been approved for publicity at the time of the incident.

The facts accepted by the Court were to the effect that the shipowner failed to prudently check all available Notices to Shipping in preparing for the voyage through Coronation Gulf. As such Notices are available to shipowners on line, the trial judge was critical of the shipowners, managers and navigating officers in failing to properly search out such information when planning and executing the voyage north, given that the Chart clearly showed areas (water) that had not been surveyed. Of particular note was the finding of the Court that less than 10% of the vast Arctic waters had been surveyed to modern standards (para. 30), a fact the ship's managers and officers should have been aware of (particularly as the ship's Master had participated in 60 prior Arctic voyages).

General Regulations and Guidelines

ARCTIC SHIPPING SAFETY AND POLLUTION PREVENTION REGULATIONS (THE "ASSPPR")²⁷

Made under the Arctic Waters Pollution Prevention Act,²⁸ the ASSPPR establish safety, operational, and pollution prevention requirements for ships in Arctic waters.

While the ASSPPR do not impose the requirement of embarking a pilot

²⁷ SOR/2017-286 [ASSPPR].

²⁸ R.S.C., 1985, c. A-12.

in Arctic waters, they do require a qualified ice navigator in some situations:

10 (1) Vessels, other than a cargo vessel of 500 gross tonnage or more or a passenger vessel that are certified as meeting the requirements of Chapter I of SOLAS, that navigate in a shipping safety control zone set out in columns 2 to 17 of Schedule 1 during a period other than those set out in item 14 of that schedule must have an ice navigator on board.

Indeed, the requirement to have an ice navigator (a master or deck watchkeeper who satisfies the minimum ice navigation experience or training requirements of s. 10(2) of the ASSPPR) only applies to passenger vessels not certified under Chapter I of SOLAS, which are generally small passenger vessels of less than 500 gross tonnage, and only for navigation outside the specified summer melt season for each arctic shipping safety control zone ("SSCZ").²⁹ The SSCZs are illustrated in Figure 1, below.

For those vessels subject to SOLAS, s. 6 of the ASSPPR makes compliance with Chapter XIV of SOLAS³⁰ (the "Polar Code", which does contain certain ice navigation qualification requirements at regulation 12.3) mandatory. Ice navigators must be qualified as follows, pursuant to s. 10(2) of the ASSPPR:

(2) The ice navigator on a vessel must

a) have all of the qualifications under the Canada Shipping Act, 2001 to act as a master or a person in charge of the deck watch; and

b) either:

(i) have served on a vessel in the capacity of master or person in charge of the deck watch for at least 50 days, of which 30 days must have been served in international Arctic waters while the vessel was in ice conditions that required the vessel to be assisted by an ice-breaker or that required manoeuvres to avoid concentrations of ice that might have endangered the vessel, or

(ii) hold a certificate in advanced training for ships operating in polar waters in accordance with regulation V/4 of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978.

²⁹ See ASSPPR, *supra* note 27 at Schedule 1, row 14.

³⁰ Resolution MSC.385(94) (21 November 2014, effective 1 January 2017); Amendments to the International Convention for the Safety of Life at Sea 1974, Resolution MSC.386(94) (21 November 2014, effective 1 January 2017); International Code for Ships Operating in Polar Waters (Polar Code) Resolution MEPC.265(68) (15 May 2015, effective 1 January 2017); Amendments to MARPOL Annexes I, II, IV and V, Resolution MEPC.266(68) (15 May 2015, effective 1 January 2017); as consolidated at <<https://www.wcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>> [Polar Code].

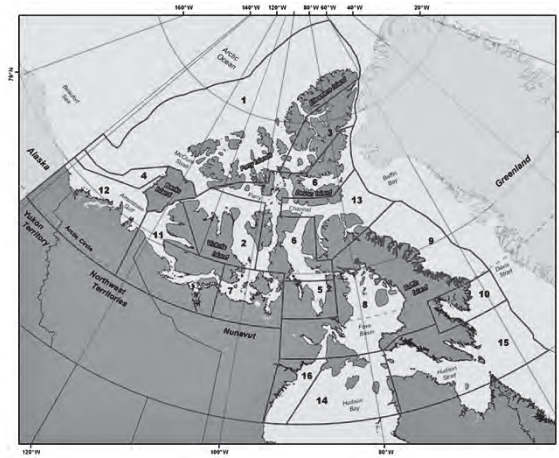


Figure 1. *Transport Canada Map of Shipping Safety Control Zones*³¹

In addition, the ASSPPR establish low air temperature requirements for Canadian vessels constructed in 2017 or later, including the assignment of a cold temperature service or winterization notation, a requirement for cold-weather-certified life rafts or other marine evacuation systems, and a requirement that engines and other systems of all lifeboats and rescue boats aboard can start and operate in cold weather.³²

The ASSPPR also limit the authorized periods of navigation for certain classes or types of vessels in the different SSCZs, based on their ice capabilities.³³ In addition to the classification regime currently in force under the Canada Shipping Act, 2001³⁴ (the “CSA”), designated as “Canadian Arctic Class”, the ASSPPR recognize ice classifications pursuant to the former Arctic regime under the Arctic Shipping Pollution Prevention Regulations³⁵, foreign national regimes, and international regimes, such as the Polar Classes established by the International Association of Classification Societies and incorporated in the Polar Code.³⁶

NAVIGATION SAFETY REGULATIONS, 2020³⁷ (THE “NSR”)

The NSR, made under the CSA, consolidate previous regulations and introduce new requirements relating to navigational safety, pollution prevention, and safety of life at sea.

³¹ See Canadian Coast Guard, *Ice Navigation in Canadian Waters* (Ottawa: Fisheries and Oceans Canada, 2012) at 18 <<https://www.ccg-gcc.gc.ca/publications/icebreaking-deglacage/ice-navigation-glaces/docs/ice-navigation-dans-les-galces-eng.pdf>> [Ice Navigation].

³² See *ibid* at s. 11.

³³ See *ibid* at ss. 7, 8 and Schedule 1.

³⁴ S.C. 2001, c. 26.

³⁵ C.R.C., c. 353 (Repealed, SOR/2017-286, s. 34).

³⁶ See ASSPPR, *supra* note at s. 5 and Schedule 1.

³⁷ SOR/2020-216.

Pursuant to s. 121(1)(c) of the NSR, “*Canadian vessels of more than 150 gross tonnage that are navigating in ice that might cause substantial damage to the vessel*” must be equipped with two searchlights for nighttime ice spotting. The NSR also set out the characteristics of the searchlights and the spare equipment that must be carried (see s.121(4), (5)).

Furthermore, pursuant to s. 142(1)(h), vessels of 100 gross tonnage or more that may encounter ice on their voyage are required to have a copy of the Coast Guard document *Ice Navigation in Canadian Waters* aboard.

NORTHERN CANADA VESSEL TRAFFIC SERVICES ZONE REGULATIONS³⁸

These regulations, also made under the CSA, establish a Vessel Traffic Services (“VTS”) zone in Northern Canada. As illustrated in Figure 2, below, the VTS zone established by these regulations is slightly larger than that covered by the ASSPPR, as it includes some inland waterways in addition to the SSCZs.³⁹ Ships over 300 gross tonnage navigating in the Northern Canada VTS zone must check in with VTS and file various reports indicating their position, status, and sailing intentions.⁴⁰

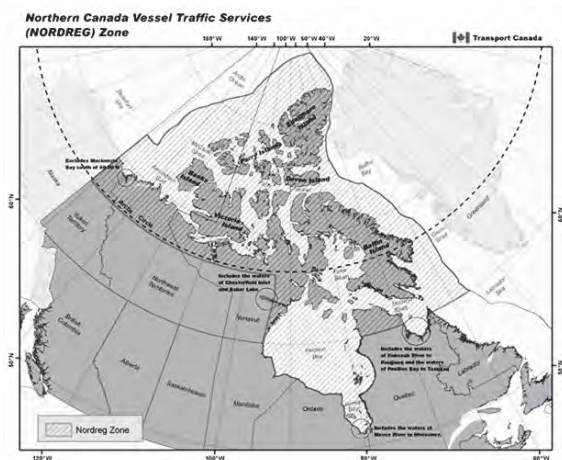


Figure 2: Transport Canada Map of the Northern Canada Vessel Traffic Services Zone⁴¹

CANADIAN COAST GUARD, *ICE NAVIGATION IN CANADIAN WATERS*⁴²

This document is a guide for mariners navigating in ice in all Canadian waters, including the Arctic. While it is not mandatory, it contains useful

³⁸ SOR/2010-127.

³⁹ See *ibid* at s. 2.

⁴⁰ See *ibid* at s. 3.

⁴¹ See *Ice Navigation*, *supra* note 30 at 7.

⁴² See *Ice Navigation*, *supra* note 30.

information regarding ship construction, passage planning, and icebreaking services, inter alia, and it refers to other regulations and guidelines. As stated above, certain vessels in Canadian ice waters are required by the NSR to have a copy of *Ice Navigation in Canadian Waters* on board.

The intent of the document is described as follows:

*“The publication is intended to assist ships operating in ice in all Canadian waters, including the Arctic. This document will provide Masters and watchkeeping crew of vessels transiting Canadian ice-covered waters with the necessary understanding of the regulations, shipping support services, hazards and navigation techniques in ice”.*⁴³

TRANSPORT CANADA, GUIDELINES FOR PASSENGER VESSELS OPERATING IN THE CANADIAN ARCTIC⁴⁴

Like the preceding document, these guidelines are not mandatory but set out best practices for passenger ships conducting Arctic voyages. They refer to the various governmental agencies and stakeholders that may be engaged in the planning and execution of an Arctic voyage, as well as the various applicable laws and regulations. The intent of these guidelines is described as follows:

These guidelines are intended to assist passenger vessel operators and DVR's with planning and achieving a successful voyage, in addition to promoting good relations with residents of Canada's Arctic. Specifically, these guidelines will assist the operator or DVR with making contact with all relevant authorities so that:

- *All relevant publications and certificates are on board the vessel;*
- *Operators have studied the charts and read the publications prior to entering Canadian Arctic waters;*
- *The voyage complies with all applicable acts and regulations;*
- *The voyage adheres to land claim agreement provisions along the planned route; and*
- *That permission from land claim authorities and private property owners is sought and, where appropriate, access to these areas is granted.*⁴⁵

INTERACTION WITH THE POLAR CODE

In general, the safety provisions of the Polar Code are incorporated in the ASSPPR by reference and in case of inconsistency are trumped by Canadian law (which is often stricter, particularly in terms of pollution).⁴⁶ The implementation of the Polar Code in Canada has been described as “largely convergent on most issues, divergent on some specific issues (in

⁴³ See *ibid* at p. iii.

⁴⁴ TP 13670E.

⁴⁵ See *ibid* at p. IV.

⁴⁶ See ASSPPR, *supra* note at ss. 2(2), 6; see Aldo Chircop, Peter Pamel, and Miriam Czarski, Canada's Implementation of the Polar Code (2018) 24 JINL 428 at p. 445.

the sense of retaining uniquely Canadian rules that are viewed as scaling up code expectations) and as extending the application of particular code rules to a wider range of vessels”.⁴⁷

For instance, as explained above, the ASSPPR complete and extend the Polar Code provisions on training and certification of crew operating on ships in arctic waters, both by making the Polar Code’s goal-oriented recommendations in regulation 12.3 mandatory and by adding ice navigator requirements for non-SOLAS vessels, which are not captured by the Polar Code.⁴⁸

The overall result is a regulatory system for arctic shipping that embraces the objectives and provisions of the Polar Code while establishing requirements above and beyond those of the Polar Code to adapt them to the realities of Canada’s arctic.

4. Description of the legislation in the relevant jurisdictions regarding passenger rights

4.1 United States – Alaska⁴⁹

The United States is not a signatory to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974. Moreover, no U.S. legislation directly addresses the rights of passengers to compensation due to injury, delay, loss of luggage, voyage deviation or cancellation. With the exception of claims for wrongful death, the liability of carriers to passengers is governed by the general maritime law of the United States or state law, and the terms of the contract of carriage. The Death on the High Seas Act (“DOHSA”) applies to claims for wrongful death resulting from accidents occurring more than three miles from the U.S. coastline.

A. BASIS OF LIABILITY OF THE CARRIER (PERSONAL INJURY, FATALITIES, CANCELLATION, DELAY AND LUGGAGE)

LIABILITY FOR PERSONAL INJURY

The liability of a passenger vessel operator to passengers who are injured aboard a vessel operating on navigable waters is governed by general maritime law negligence principles. The plaintiff must establish that the carrier had a legal duty to protect the plaintiff against the harm causing the injury, a breach of that duty, proximate cause between the breach and the harm, and actual harm. The carrier owes its passengers a legal duty to transport them safely and to exercise reasonable care under the circumstances of each case. This duty requires the carrier to use the reasonable care that an ordinarily prudent person would render under the circumstances. If the breach of this duty causes a passenger’s injuries, the vessel operator will be liable for the passenger’s resulting damages.

The carrier is vicariously liable for injuries caused by the negligence of its

⁴⁷ See Chircop et. al. (2018), *supra* at p. 447.

⁴⁸ See ASSPPR, *supra* note at s. 10.

⁴⁹ Contributed by Bert Ray, Schwabe Williamson & Wyatt.

servants acting within the scope of their employment or in the discharge of special duties imposed on them. The liability for acts of employees extends to all members of the crew, and other agents of the carrier.

Common defenses to personal injury claims include that the passenger's own negligence contributed to his injuries, that the injuries were the result of third parties, and that the passenger failed to mitigate her damages. In addition to these types of defenses, the carrier may also assert defenses based on provisions in its contract with the passenger, which are discussed in more detail below. Damages awarded for personal injury may include medical costs, lost past income, lost future earning capacity, and general damages such as pain and suffering, loss of consortium, and emotional distress.

If a passenger is injured on a shore-side excursion, such as while hiking to observe wildlife, their claim will be governed by Alaska law, unless the passenger contract contains a valid choice of law clause that specifies the application of another law.⁵⁰ The basic elements of a personal injury claim under Alaska law are the same as those under the maritime law (*i.e.* duty, breach of duty, causation and damages). The same defenses listed above are also available to the carrier. However, there are important differences between Alaska law and the maritime law. If Alaska law applies, an award of non-pecuniary damages is subject to a statutory cap. Defendants in a maritime claim are usually jointly and severally liable for any damages awarded, while under Alaska law each defendant is severally liable for only its share of the damages based on the percentage of fault allocated to it. The prevailing party in a lawsuit brought under Alaska law is entitled to an award of partial attorneys' fees, while attorneys' fees are not generally available in a suit brought under the maritime law.

LIABILITY FOR WRONGFUL DEATH.

The law governing a wrongful death claim involving a passenger depends on where and how the accident causing the death occurred. Regardless of which law applies, the proper claimant is the personal representative of the decedent's estate, who asserts claims on behalf of the estate and the decedent's survivors. The claimant must prove that the carrier's negligence was the proximate cause of the decedent's death. The defenses to personal injury claims discussed above are also available in wrongful death claims.

(i) Deaths on the High Seas.

The Death on the High Seas Act ("DOHSA")⁵¹ applies to claims for wrongful death resulting from accidents occurring more than three miles from the U.S. shoreline.

DOHSA provides the exclusive remedy for the spouse, parents, children

⁵⁰ Passenger contracts often have choice of law clauses that specify the law governing claims arising from injuries onshore. But in *Long v Holland Am. Line Westours*, 26 P.3d 430 (Alaska 2001) the Alaska Supreme Court held that Alaska's statute of limitations applied to a claim arising from a land excursion despite a clause in the excursion contract calling for the application of Washington law to such claims.

⁵¹ 46 U.S.C. §30302.

or dependent relatives of the decedents. For purposes of DOHSA, the “high seas” are waters more than three miles beyond the U.S. shoreline.

Under DOHSA, the personal representative of the estate pursues claims on behalf of the decedent’s estate, as well as the decedent’s spouse, parents, and children. Other relatives of the decedent, such as siblings or grandparents, may only recover if they can prove that they were financially dependent on the decedent.

A claimant in a DOHSA suit may only recover pecuniary losses as damages. Pecuniary damages include medical costs, burial costs, loss of financial support, and loss of inheritance. Non-pecuniary damages such as pre-death pain and suffering and emotional distress are not recoverable under DOHSA.

(ii) Deaths from Accidents Occurring Within Three Miles of U.S. Shoreline.

Claims for wrongful deaths resulting from accidents on vessels operating on navigable waters that occur within three miles of the U.S. shoreline are governed by the maritime law of the United States. Damages awarded under the general maritime law are more generous in that they include both pecuniary and non-pecuniary damages. Thus, in addition to the pecuniary damages recoverable in a suit governed by DOHSA, non-pecuniary damages such as pre-death pain and suffering and loss of consortium are recoverable.

Absent a choice of law clause calling for the application of another law, Alaska law would apply to a wrongful death claim arising from an accident that occurs while passengers are on a shore-side excursion in the arctic. As with the maritime law, Alaska law provides more generous damages to plaintiffs in wrongful death lawsuits than are recoverable under DOHSA. Claimants in such cases may recover both pecuniary and non-pecuniary damages under Alaska law. The important differences between Alaska law and the maritime law, discussed above in the context of personal injury claims, also apply to wrongful death claims.

ENFORCEABILITY OF CONTRACT TERMS LIMITING CARRIER LIABILITY AND GOVERNING PRESENTATION OF CLAIMS.

Carriers frequently insert clauses in their passenger contracts that disclaim or limit their liability to passengers for injuries, losses and damages. U.S. law prohibits and invalidates some types of disclaimers of liability. Contract provisions that are not expressly prohibited by statute will be enforced if they are fundamentally fair, and clearly and timely communicated to the passenger.

(i) Clauses Disclaiming Liability for Carrier’s Own Direct Negligence.

A federal statute prohibits carriers from including provisions in their passenger contracts that limit their liability for personal injury or death caused by their negligence.⁵² Court decisions interpreting this statute have

⁵² 46 U.S.C. §30509(a).

invalidated clauses that disclaim the carrier's direct liability arising from accidents due to the seaworthiness of the vessel,⁵³ accidents where the passenger is contributorily negligent,⁵⁴ injuries occurring while transiting between the vessel and shore,⁵⁵ injuries occurring as a result of the carrier's direct negligence while participating in recreational activities on the vessel or on shore,⁵⁶ or limiting the carrier's liability to a specified dollar amount.⁵⁷

However, the statute allows carriers to insert provisions in their contracts that relieve them from claims for emotional distress, mental suffering, and psychological injuries, as long as those conditions are not the result of physical injury to the claimant, the result of the claimant having been at actual risk of physical injury, or having been intentionally inflicted by the carrier. Thus, clauses disclaiming liability for emotional distress from other causes, such as witnessing another passenger's death or injury, are valid and enforceable.

(ii) **Clauses Disclaiming Liability for the Negligence of Independent Contractors.**

Third party contractors often provide services to passengers such as shore-side transportation, lodging and transportation, and onboard recreation, spas and medical treatment. Often, the carrier promotes such excursions, arranges bookings with the third-party contractors, and receives compensation for doing so. Cruise contracts typically contain clauses that disclaim any responsibility for accidents or injuries resulting from the negligence of such third party contractors. Courts have generally held that such provisions are enforceable against claims that the carrier is vicariously liable for the negligence of such third parties.⁵⁸ But they do not relieve the carrier of liability for its own direct negligence involving the selection and vetting of third party contractors by the carrier, or for failing to warn passengers of known risks associated with dangerous excursions and activities promoted by the carrier.⁵⁹

(iii) **Clauses Limiting Liability for Lost or Damaged Property.**

Federal law provides that a vessel operator is not liable as a carrier for the loss of valuable items such as precious metals, jewelry, money, and

⁵³ *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1985 A.M.C. 826, (11th Cir. 1984), cert. denied, 470 U.S. 1004, 105 S. Ct. 1357, 84 L. Ed. 2d 379, 1985 A.M.C. 2397 (1985).

⁵⁴ *Hawthorne v. Holland-America Line*, 160 F. Supp. 836, 1958 U.S. Dist. LEXIS 2568 (D. Mass. 1958).

⁵⁵ *Lawlor v. Ingres Nassau S.S. Line, Inc.*, 161 F. Supp. 764, 1958 U.S. Dist. LEXIS 3355 (D. Mass. 1958).

⁵⁶ *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 2011 A.M.C. 2941, 2011 U.S. Dist. LEXIS 62446 (S.D. Fla. 2011); *Johnson v. Royal Caribbean Cruises, LTD.*, 449 Fed. Appx. 846, 2011 U.S. App. LEXIS 25240 (11th Cir. 2011).

⁵⁷ *Rosenthal v. Compagnie Generale Transatlantique*, 14 F.R.D. 33, 1953 U.S. Dist. LEXIS 3755 (D.N.Y. 1953).

⁵⁸ *Henderson v. Carnival Corp.*, 125 F. Supp. 2d 1375, 1377 (S.D. Fla. 2000); *Mashburn v. Royal Caribbean Cruises, Ltd.*, 55 F. Supp. 2d 1367, 1370 (S.D. Fla. 1999); *Dubret v. Holland Am. Line Westours, Inc.*, 25 F.Supp.2d, 1151, 1153 (W.D. Wash. 1998).

⁵⁹ *Zapata v. Royal Caribbean Cruises, Ltd.*, No. 12-21897-Civ, 2013 WL 1296298, at 1 (S.D. Fla. Mar. 27, 2013); *Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 2011 AMC 2941 (S.D. Fla. 2011).

securities packed in luggage if the passenger fails to disclose in writing the value of these items.⁶⁰ Many cruise contracts prohibit passengers from stowing valuable items in their luggage, and disclaim liability for the loss or damage of such items stowed in luggage. Cruise contracts also commonly limit the carrier's liability for lost or damaged property, such as luggage, to a nominal amount. Some operators permit passengers to pay a fee in order to declare a higher value for the luggage.

(iv) *Clauses Limiting Liability for Cancellation, Termination or Delay of Cruise.*

No federal statutes directly address the liability of a carrier for cancelling, delaying, or prematurely terminating a cruise. The Cruise Lines International Association ("CLIA") has adopted an International Cruise Line Passenger Bill of Rights that specifies the rights of passengers to receive refunds when a cruise is terminated or cancelled due to mechanical failures.⁶¹ The Bill of Rights also provides that passengers are entitled to timely notices of changes in cruise itineraries, and the right to transportation to the ship's intended port of disembarkation or the passenger's home city if the cruise is terminated early, the right to lodging if a cruise is terminated early. Passenger contracts of cruise operators that are members of CLIA are required to contain clauses consistent with these provisions, and frequently contain other clauses that address the right to partial refunds when a cruise is terminated early. Not all cruise operators are members of CLIA, and their liability for cruise cancellations, deviations and terminations would be governed the terms of their passenger contracts and the general maritime law.

(v) *Notice and Time to Sue Clauses.*

A federal statute prohibits carriers from inserting clauses in passenger contracts that require passengers to give the carrier less than six months' notice of a claim for personal injury or death.⁶² The same statute prohibits clauses that require that a lawsuit be filed earlier than one year after the date of the injury or death.

Ordinarily, the statute of limitations for claims for personal injury or death for maritime claims is three years. However, courts have held valid and enforced provisions in passenger contracts that specify shorter time limits for bringing claims or giving notice of injuries, as long as they do not violate this statute.⁶³

B. LIMITATION OF LIABILITY

The United States is not a signatory to international conventions on limitation of liability. Under United States law, the Shipowner's Limitation of Liability Act provides that the liability of an owner of a vessel for claims arising during a voyage shall be limited to value of the vessel at the end of the

⁶⁰ 46 U.S.C. §30503.

⁶¹ <https://cruising.org/en/about-the-industry/policy-priorities/cruise-industry-policies/Other>.

⁶² 46 U.S.C. §30508.

⁶³ *Hughes v Carnival Cruise Lines*, 2003 U.S. Dist. LEXIS 5065 (S.D.N.Y. 2003).

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voyage plus any pending freight.⁶⁴ However, when the limit of a vessel owner's liability is insufficient to pay all losses in full, and the portion available to pay claims for personal injury or death is less than \$420 per ton of the vessel, that portion must be increased to \$420 per gross ton of the vessel.⁶⁵ An owner's right to limitation of liability under the U.S. statute will be lost if claimant proves that the causes of the accident or injury were within the owner's privity and knowledge.

C. JURISDICTION OPTIONS (FORUM)

Most passenger contracts contain forum selection clauses that require passengers to bring their claims against the carrier in a specific location. Typically, the specified location is the city or county where the carrier has its U.S. base of operations. Such clauses are generally enforceable if they are conspicuous and provided to the passenger at the time of booking.⁶⁶

A federal statute prohibits a carrier from inserting an arbitration clause in a passenger contract that limits the right of a claimant for personal injury or death from a trial by a court of competent jurisdiction.⁶⁷ This clause would seem to prohibit a clause that requires the arbitration of claims for personal injury or death.

D. CONTRACTING AND ACTUAL CARRIERS AND TOUR OPERATORS

No information available

E. INSURANCE REQUIREMENTS

There are no federal or state regulations that require cruise operators to carry any specified limits of insurance to cover claims by passengers.

Both federal and Alaska law require carriers to demonstrate financial responsibility to respond to an oil spill from their vessel.⁶⁸ Both federal law and Alaska law allow the carrier to demonstrate financial responsibility using proof of insurance. However, carriers can use other means to prove financial responsibility such as self-insurance, guarantees, and letters of credit, bonds.

F. PACKAGE TRAVEL REGULATIONS

N/A

G. SPECIAL FEATURES

N/A

⁶⁴ 46 U.S.C. §30505.

⁶⁵ 46 U.S.C. §30506.

⁶⁶ *Carnival Cruise Lines v Shute*, 499 U.S. 585 (1991).

⁶⁷ 46 U.S.C. 30509(a)(1)(B).

⁶⁸ 33 U.S.C. §2716; A.S. 46.04.040.

4.2 Norway⁶⁹

EU REGULATION 392/2009 - THE ATHENS CONVENTION 2002

Regulation (EC) No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents (the “Athens Regulation”), effectively implements the Athens Convention 2002.⁷⁰ The regulation and the convention are further implemented in Norwegian law through the Maritime Act § 418. It is mandatory.

The Athens Convention 2002’s primary scope is International transport but is also relevant to domestic transport if the ship is flying a Member State’s flag or is registered in a Member State, if the parties have entered into the contract in a Member State, or if the departure or arrival port is located in a Member State.⁷¹

The Convention generally applies to economic damages (not punitive or exemplary damages).⁷²

A. BASIS OF LIABILITY OF THE CARRIER (PERSONAL INJURY, FATALITIES, CANCELLATION, DELAY AND LUGGAGE)

Personal injury and death

The liability of the carrier is regulated in the Athens Convention 2002 article 3. In the case of a shipping incident⁷³ that causes death or personal injury, the carrier is strictly liable for losses of up to SDR 250,000, and each incident is counted individually. The convention offers two exceptions from this rule. Firstly, the carrier is exempted from liability if the incident was caused by a force majeure event, such as acts of war or natural disasters. Secondly, the carrier is also exempted from liability in case the event was “wholly caused by an act or omission done with the intent to cause the incident by a third party”.

Furthermore, if the loss exceeds SDR 250,000, the carrier may be exempted from compensating the excess loss by proving that the loss occurred without fault or negligence on the carrier or someone for whom the carrier is responsible.

If the death or injury was not caused by a shipping incident, the carrier is liable, unless it can prove that the loss occurred without fault or negligence. The burden of proof is with the claimant. Finally, the carrier may be wholly or partly exonerated from liability in the event of contributory fault.⁷⁴

Consequently, the Convention operates with three different liability regimes.

⁶⁹ Contributed by Lars Rosenberg Overby, partner IUNO Law Firm and Kjersti Tusvik, Officer EFTA internal market division.

⁷⁰ See the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002 protocol.

⁷¹ Athens Convention Article 2.

⁷² Athens Convention Article 3 (5) (d).

⁷³ Defined in article 3 (5) (a) as «shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship».

⁷⁴ Article 6.

Advance payments

The Athens Regulation has a special feature which the Convention does not have and this is that in case of a shipping incident, the passenger or – in the case of the passenger's death – the dependents are entitled to an advantage payment which is only refundable in special circumstances.⁷⁵

Damage or loss to luggage

Similarly, the carrier is liable for damage to cabin luggage⁷⁶ due to fault or neglect, and in case of damage resulting from a shipping incident, the Athens convention states that it is presumed that the damage was caused by the carrier. For other luggage⁷⁷, the carrier is liable unless it can prove that the loss occurred without fault or negligence. The liability for loss or damage to hand luggage is limited to SDR 2,250, and for other luggage (except vehicles) to SDR 3,375 per passenger per carriage.⁷⁸

Time bar

The time-bar for actions under the Athens Convention 2002 is two years, and there is a final deadline of five years.⁷⁹

EU Regulation 1177/2010 has no specific rules with regards to limitation period, and the general rule of three years will apply, cf. the Norwegian Limitation Act § 2.⁸⁰

B. LIMITATION OF LIABILITY

In case of death or personal damage, the liability is in any case limited to SDR 400,000 per passenger on each distinct occasion⁸¹. This right to limit liability is lost if “*it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result*”.⁸²

Further, chapter 9 of the Maritime Act on global limitation of liability (the 1976 London Convention as amended by the 2002 protocol) applies and the carriers may limit their liability in accordance with these rules.

⁷⁵ Athens Regulation article 6.

⁷⁶ Definition of cabin luggage in the Athens convention article 1 (6): «luggage which the passenger has in his cabin or is otherwise in his possession, custody or control».

⁷⁷ The definition of luggage is set out in article 1 (5).

⁷⁸ Articles 8 (2) and (3).

⁷⁹ Article 16.

⁸⁰ Under EU Regulation 261/2004, the European Court of Justice decided that a claim under the compensation scheme may be time-barred in accordance with national regulations (C-139/11). The Air Passenger Complaint Handling Board later concluded that the two-year limitation period in the Aviation Act did not apply, but rather the general rule under the Limitation Act. A similar approach can be used when interpreting EU Regulation 1177/2010 and the Maritime Act vs. the Limitation Act.

⁸¹ Article 7.

⁸² Article 13 (1).

C. JURISDICTION OPTIONS (FORUM)

The Athens Regulation applies in Norway and articles 17 of the Athens Convention 2002 on jurisdiction have been incorporated in the Norwegian Maritime Act section 429. Hence, the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters⁸³ does not apply. Further, the general rules on jurisdiction as set out in the Civil Procedure Act⁸⁴ apply.

Jurisdiction agreements are not permitted by the 2002 Athens Convention.

In Norway, the Maritime Passenger Complaint Handling Body hears complaints under Regulation 1177/2010⁸⁵. The hearing is free of charge for the passenger.

Actions regarding damages and delay under the Maritime Act may thus be heard by Courts of a) the defendant's permanent principal residence or principal place of business, b) at the place of departure or destination pursuant to the contract of carriage, c) in the State of the claimant's place of residence, provided that the defendant has a place of business in that State or may be sued there, or d) in the State where the contract of carriage was entered into, provided that the defendant has a place of business in that State and may be sued there.⁸⁶

In the event of Svalbard being the legal venue of a court case, these cases will be heard at Nord-Troms District Court in Tromsø and Hålogaland Court of Appeal, also located in Tromsø.

D. CONTRACTING AND PERFORMING CARRIERS AND TOUR OPERATORS

The Athens Convention identifies the party concluding the contract of carriage as the *carrier* cf. articles 1(1) a) and 3. This could be a tour operator as well as the shipowner. However, the convention also provides that actual carriers are responsible for the part of the voyage that they perform (see articles 1 (1) b) and 4).

E. INSURANCE REQUIREMENTS

The Athens Convention article 4a sets out insurance requirements in order to ensure solvency in the event of casualties or injury to a passenger. Article 4a sets out particularly detailed insurance requirements for the carriers that fall within the scope of the Convention. Any carrier that performs part of or the whole carriage under the Athens Convention shall provide bank financial security of at least SDR 250,000 per passenger on each distinct incident. There are further requirements regarding the insurance certification, i.e. language requirements.

In addition, section 182a of the Maritime Code provides that shipowners of vessels larger than 300 gt must hold mandatory liability insurance up to the limits set out in the 1976 London Convention; including the 1996

⁸³ EUR-Lex - 41988A0592 - EN - EUR-Lex (europa.eu).

⁸⁴ Lov om meklings og rettergang i sivile tvister (tvisteloven) LOV-2005-06-17-90.

⁸⁵ www.reiselivsforum.no.

⁸⁶ The Maritime Act, Section 429.

amendments cf. the EU directive 2009/20 on the insurance of shipowners for maritime claims.⁸⁷ The limits are aligned with the Athens Convention 2002.

F. PACKAGE TRAVEL REGULATIONS

Norway has implemented the Directive (EU) 2015/2302 on package travel in the Package Travel Act of 2018. The Package Travel Directive seeks a high protection level for the travellers of package travels, and less favourable conditions for the traveller may not be agreed upon between traveller and provider. A package travel must consist of two or more travel services. Even if a cruise journey is not purchased together with e.g. plane tickets or hotel stays, it is highly likely that a cruise will be considered a package travel, as it includes transportation, accommodation and other travel services. According to the Package Travel Act Section 1, the regulation applies not only for Norwegian tour operators, but also for foreign tour operators and resellers that market and target their business towards travellers in Norway.

In case of a cancellation by the organiser prior to the start of the package, the Package Travel Act requires the organiser to offer the traveller a full refund, even if the cancellation was due to extraordinary and unavoidable circumstances. A force majeure event does, however, limit the organisers liability in terms of additional refunds, such as connecting plane tickets etc.

Regarding the performance of the package, the organiser is responsible when the package has not been executed in accordance with the package travel contract. In such an event, a list of remedies will be relevant, such as full or partial refunds, transportation assistance or additional compensation.

An organiser, who markets and offers package tours to the Norwegian market, is obligated to provide insolvency protection. A bank guarantee must be provided. In Norway, this is managed through the Travel Guarantee Fund. In case of an organiser's insolvency, the Travel Guarantee Fund will cover the travellers' loss if the package tour has not yet started, and if the travellers are at their destination, they will receive assistance from the Travel Guarantee Fund. An organiser is, however, not obligated to provide insolvency protection through the Norwegian scheme, if it can prove that sufficient insolvency protection has been provided in another EU member state. The latter does however not apply in Svalbard.⁸⁸

The Package Travel Act has no specific rules with regards to limitation period, and the general rule of three years will apply, cf. Limitation Act § 2.

Provided the organiser is registered in the Norwegian Travel Guarantee Fund, the traveller may also have any dispute heard by the Package Travel Dispute Resolution Board in accordance with the Package Travel Act Section 50. Both parties may request dispute resolution by the Board, and the hearing is free of charge for the consumer. In the event of a lawsuit, the regulations are set out in the Civil Procedural Act. If the lawsuit is considered international, Norwegian courts may only hear the case if it has an adequate affiliation to the country of Norway.

⁸⁷ EUR-Lex - 32009L0020 - EN - EUR-Lex (europa.eu).

⁸⁸ The Svalbard Tourism Regulation Section 4.

G. SPECIAL FEATURES

Delay compensation under the Maritime Act

According to the Norwegian Maritime Act Section 418 e, the carrier is liable for loss in case of a passenger's delay caused by fault or negligence. The same rule applies for luggage under Section 419, the definition and treatment of cabin luggage and luggage is similar to that under the Athens convention. Proven contributory negligence may lead to reduced liability for the carrier. The liability is limited to SDR 4,150 when a passenger is delayed, SDR 1,800 for hand luggage, SDR 10,000 for vehicles and SDR 2,700 for other luggage⁸⁹. A claim under the Maritime Act will be time-barred two years after the passenger landed or the luggage was delivered, cf. Section 501 (1) 6). The Maritime Act does not set out any insurance requirements for the carriers.

EU Maritime Passenger Rights regarding i.a. delay and cancellation

Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 is implemented in Norwegian Law through the Maritime Act section 418a. Further provisions related to passenger rights are given in the Maritime Act section 418b to 428.

The EU Regulation 1177/2010 on concerning the rights of passengers when travelling by sea and inland waterway seeks to ensure a "high level of protection for passengers [...]".⁹⁰ The regulation is mandatory⁹¹, and applies in the following situations, according to Article 2:

- "(a) on passenger services where the port of embarkation is situated in the territory of Member State;*
- (b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier [...];*
- (c) on a cruise where the port of embarkation is situated in the territory of a Member State".*

Although the above-mentioned cruises fall within the scope of EU 1177/2010, cruise carriers are exempted from some of the obligations set out in chapter III of the regulation.⁹²

Furthermore, ships certified to carry a maximum of twelve passengers are exempted, as well as routes of less than 500 meters one way, excursion

⁸⁹ The Maritime Act Section 422.

⁹⁰ EU 1177/2010 preamble (1).

⁹¹ EU 1177/2010 Article 6.

⁹² Article 16 (2) on the information in case of a missed connection, article 18 on re-routing and reimbursement in the event of cancelled or delayed departures, compensation of the ticket price in the event of delay in arrival, as well as article 20 (1) and (4), which provides exceptions from article 17, 18 and 19 and article 19 respectively

or sightseeing tours other than cruises⁹³, or travel by certain non-mechanical or historic ships.

In the event of a delay or a cancellation, chapter III sets out a series of obligations for the carriers. The passenger is entitled to information about the delay or cancellation, as well as information about alternative connections in case of a missed connection.⁹⁴ Under set premises, the passenger is also entitled to assistance such as refreshments, meals and accommodation in accordance with Article 17 of the Regulation. In case of cancellation or a delay of more than 90 minutes, the passenger may choose between a re-routing at no additional cost or a reimbursement of the ticket price.⁹⁵ Article 19 creates a compensation scheme where 25 per cent of the ticket price shall be refunded in case of lengthy delays, calculated based on the duration of the voyage. The compensation may increase to 50 per cent of the ticket price in the event of delays twice the length or more than the timeframes set out in the provision.

Article 20 sets out a list of exceptions to the carrier's obligations. Passengers who hold a travel pass or a season ticket are not covered by the rights set out in Articles 17, 18 and 19. If the passenger was informed about the cancellation or delay prior to the ticket purchase, they are not entitled to the services set out in Article 17 nor compensation under Article 19. Furthermore, the passenger will not be entitled to accommodation in case the cancellation or delay is "caused by weather conditions endangering the safe operations of the ship".

The carrier is exempted from its liability under Article 19 in the event of such weather conditions as mentioned above, or when the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Section 17 of the 1177/2010 preamble lists certain situations that must be considered such extraordinary circumstances; however, the list should not be considered exhaustive.

High level of consumer protection – exemplified

Firstly, the European Union law provides a particularly high level of consumer protection. While it is pointed out in the Athens Convention preamble (1), that it is "important to ensure a proper level of compensation for passengers involved in maritime accidents", EU Regulation 1177/2010 seeks to ensure a "high level of protection for passengers". The Package Travel Act also seems to be the object of strict interpretation.

The Package Travel Dispute Resolution Board heard a case regarding a cruise organised by Hurtigruten in June 2019.⁹⁶ The traveller had purchased a voyage around Svalbard, which also included the eastern coast, which is

⁹³ A cruise in 1177/2010 is defined as transport operated "exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board".

⁹⁴ EU 1177/2010 Article 16 (1) and (2).

⁹⁵ Article 18 (1).

⁹⁶ PRKN-2019-3733.

normally not included in traditional Svalbard cruise itinerary. The chances of polar bear encounters are greater on the eastern side, which was the reason the traveller had purchased this particular cruise.

After two days on board, the passengers were informed that the trip could not be performed according to contract, as the ice conditions rendered the original itinerary impossible. The passenger was offered a voyage along the west coast, similar to most other Svalbard cruises. Hurtigruten had informed the passengers that there may be changes to the itinerary, but the traveller argued that the journey he received was a completely different travel, and that he was “trapped” on board with no opportunity to cancel the rest of the cruise. Hurtigruten offered the passenger a 60 per cent refund of the total price, an offer the traveller did not accept, as he claimed a 100 per cent refund, as well as a refund of his connecting train and airplane tickets.

The majority of the five members of the Package Travel Dispute Resolution Board concluded that the traveller had the right to a full refund of his purchase. It was not disputed that the carrier had not been able to deliver according to contract, and it was also documented that July was the earliest month journeys around Svalbard had been successfully completed in the last five years. The Board pointed out that the carrier had not made the vast risks of changes clear in their marketing and criticized the carrier for having waited until two days into the cruise before informing the passengers on the new itinerary. Thus, the above case serves as an example on the high consumer protection level of the EU law implemented in Norway, as well as the strict application of passenger rights.

4.3 Greenland (Denmark)⁹⁷

The laws of Greenland and Denmark as such are two different regimes. Danish law is identical to Norwegian law (except as regards the Svalbard particularities and the provisions regarding jurisdiction issues that are covered by the Brussels regulation⁹⁸). Reference is made to section 4.2 above. However, as mentioned above Greenland is not a member of the EU and regulates certain matters itself. In this context the laws of Greenland provide the mandatory⁹⁹ legal position set out below.¹⁰⁰ The applicable rules are a former Danish Merchant Shipping Act (the “MSA”) which is modelled on the 1974 Athens Convention¹⁰¹ but the limits are higher.¹⁰²

⁹⁷ Contributed by Lars Rosenberg Overby, partner IUNO Law Firm.

⁹⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁹⁹ For details see section 430.

¹⁰⁰ See Søløven act no. 170 of 16 March 1994 with later amendments, (the Merchant Shipping Act), chapter 15 jf. AN 1996 8, AN 2001 609 and AN 2005 217

¹⁰¹ See the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea

¹⁰² The said act reflects the former legal position in Danish law as described in Falkanger, Bull & Rosenberg Overby: *Introduktion til søretten* (1996).

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A. BASIS OF LIABILITY OF THE CARRIER (PERSONAL INJURY, FATALITIES, CANCELLATION, DELAY AND LUGGAGE)

Section 401 of the MSA defines the *carrier* as a party that – commercially or for consideration – concludes a contract of carriage of passengers or luggage by ship. Such carrier is liable for personal injury or death and loss or damage to luggage on a negligence basis, but if the loss is caused by shipwreck, collision, stranding, explosion or fire the burden of proof is reversed in favour of the passenger (section 418). The claimant (i.e. the passenger or dependents) remains responsible for proving the extent of the loss.

B. LIMITATION OF LIABILITY

According to section 422 of the MSA the carrier is entitled to limit its liability for the abovementioned losses to SDR 175.000 for personal injury or death and SDR 4.150 for delay. The limitation amount for hand luggage is SDR 1.800, SDR 6.750 for valuables¹⁰³, SDR 10.000 for vehicles and SDR 2.700 for other luggage. These amounts are exclusive of interest and costs. Section 423 allows the carrier to deduct certain small amounts from the compensation as a kind of retention which is designed to exclude minor losses. The right to limit liability may be lost if the loss or damage is caused intentionally or by gross negligence with knowledge that such damage would probably result (section 424).

In addition, the carrier may rely on the 1976 London Convention on limitation of liability for Maritime Claims as implemented in the laws of Greenland which means SDR 175.000 multiplied with the number of passengers that the vessel is certified to carry (section 175 (1)). Accordingly, the limitation amounts are aligned.

C. JURISDICTION OPTIONS (FORUM)

Section 429 contains rules about jurisdiction that dictate the following exclusive jurisdictions: 1) at the respondents domicile and 2) the courts at the agreed place of departure or destination. The parties may however agree on another jurisdiction provided that such agreement is made after the dispute has arisen. These rules are subordinated to the so-called EU Brussels regulation.¹⁰⁴ This entails complicated legal issues with respect to jurisdiction clause that directs disputes to other jurisdictions than the ones specified in the MSA because such agreement are valid as a starting point if the terms of article 25 of the EU Brussels regulation. That said such jurisdictions agreements may in the circumstances be set aside by virtue of the EU unfair consumer contracts directive article 3 as incorporated in Greenlandish law about consumer contracts.¹⁰⁵ This article 3 provides

¹⁰³ As defined in section 419 (2).

¹⁰⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁰⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

“1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”

It is submitted that a jurisdiction clause that refers disputes to a jurisdiction other than the one specified by the MSA which has no connection to the contract of carriage in question or the passenger’s domicile is likely to be set aside.

D. INSURANCE REQUIREMENTS FOR THE CARRIERS

Chapter 15 of the MSA regarding passengers does not contain any rules about insurance requirements and the MSA does not contain rules similar to the Danish MSA that both provides specific passenger liability insurance cover and general EU-law based insurance requirements.¹⁰⁶

E. CONTRACTING AND ACTUAL CARRIERS AND TOUR OPERATORS

The above sets out the liability of the (contracting) carrier and a tour operator often qualifies as such. Section 426 (1) provides that this carrier remains liable towards the passengers even if the voyage is performed by someone else. The performing carrier is liable for part of the voyage that it performs and on the same basis as the contracting carrier (section 426 (2)). Section 426 (3) provides that the contracting and the performing carrier are jointly liable.

F. PACKAGE TRAVEL SPECIAL RULES (EU/EEA)

Whilst these rules (as described above in the Norwegian section) apply in Denmark, they have not been enacted for Greenland.

G. SPECIAL FEATURES

The fact that Greenland’s MSA contains the rules which formerly applied in Danish law with the update that the EU Athens regulation introduced appears to be an oversight. In particular the apparent non-existing insurance requirements (which likely is less relevant in practice because tour operators and shipowners presumably do not engage in Arctic trade without insurance cover).

Consumer protection is a strong feature in Danish law and will work in favour of the passengers in case of doubt with respect to interpretation of legal instruments and disputes regarding the terms of carriage. For Greenland it should be noted that the Consumer Contracts Act also

¹⁰⁶ See Directive 2009/20/EC 1 of the European Parliament and of the Council on the insurance of shipowners for maritime claims.

applies to transportation of passengers (except as regards the information requirements).¹⁰⁷

4.4 Russian Federation¹⁰⁸

Modern Russian legislation does not contain special rules governing passenger navigation in the high North, and the norms of civil legislation and the Merchant Shipping Code contain only general rules for the relationship between a passenger and a carrier, without taking into account the specifics of polar shipping.

SCOPE OF PASSENGERS' RIGHTS WHEN TRAVELING TO THE POLAR AREAS

The scope of the rights of passengers and tourists when traveling to the Arctic/Antarctic by sea is no different from travel to other regions. There are no regulations in Russia that additionally regulate the conditions of travel to the Arctic. On a general basis, the norms of the Civil Code, the Federal Law "On the Basics of Tourist Activity", the Law "On Protection of Consumer Rights", as well as the regulations accepted by Maritime Commercial Code (MCC) with regard to the carriage of passengers by sea are applied. There is no specialized legislation at the federal level. At the local level, some regions have specialized "Arctic" legislation, but it boils down to the concept of zone development, policy priorities, etc. The rights and obligations of passengers are not affected by them.

AREAS WITH INTENSIVE TOURISM (MUNICIPAL REGULATIONS)

Local governments have the right, in order to implement favorable conditions for the development of tourism:

- to implement measures to develop priority areas of tourism development in the territories of municipalities, including social tourism, children's tourism and amateur tourism;
- to promote the creation of favorable conditions for the unhindered access of tourists (excursionists) to tourist resources located in the territories of municipalities, and communication facilities, as well as to receive medical, legal and other types of emergency assistance;
- organize and conduct events in the field of tourism at the municipal level;
- to participate in the organization and conduct of international events in the field of tourism, events in the field of tourism at the all-Russian, inter-regional, regional and inter-municipal level;
- to assist in the creation and operation of tourist information centers in the territories of municipalities.

¹⁰⁷ See Anordning nr. 989 af 2011-10-14 om ikrafttræden for Grønland af lov om visse forbrugeraftaler.

¹⁰⁸ Contributed by Alexander Skaridov, Professor St. Petersburg Maritime University, Head International and Maritime law Chair.

An example is the Murmansk region – in the region there was a program of socio-economic development “Murmansk region – the strategic center of the Arctic zone of the Russian Federation” (Program formally was finished in 2020, but will be continued). The emphasis in the program was made on the development of tourism by attracting entrepreneurship to the region.

In the Arkhangelsk region there is a regional law “On tourism and tourist activities in the Arkhangelsk region”. In particular, tourism is recognized as a priority area for the region’s economy. Arctic tourism stands out as one of the promising areas for development. The document mainly contains the powers of local authorities in the field of tourism development. The rights of a tourist are not separately spelled out, everything that is not regulated in this document is a reference to federal legislation.

A. CARRIER LIABILITY (PERSONAL INJURY, ACCIDENTS, CANCELLATION, DELAY AND BAGGAGE)

Agreements of transport organizations with passengers and cargo owners on the limitation or elimination of the carrier’s liability established by law are invalid, except in cases where the possibility of such agreements for the carriage of goods is provided for by transport charters and codes.

Delay

For a delay in the departure of a vessel carrying a passenger, or late arrival at the destination, the carrier shall pay the passenger a fine in the amount established by the relevant transport charter or code, unless it proves that the delay took place due to force majeure, elimination of vessel malfunction, threatening the life and health of passengers, or other circumstances beyond the control of the carrier.

In the event of a passenger’s refusal of carriage due to a delay in the departure of the vessel, the carrier is obliged to return the carriage charge to the passenger.

Baggage

The carrier is liable for the failure to preserve the cargo or baggage that occurred after it was accepted for carriage and before it was handed over to the consignee, the person authorized by him or the person entitled to receive baggage, unless he proves that the loss, shortage or damage of the cargo or baggage occurred due to circumstances which the carrier could not prevent and the elimination of which did not depend on him.

Damage caused during the carriage of cargo or baggage is compensated by the carrier:

in case of loss or shortage of cargo or baggage – in the amount of the value of the lost or missing cargo or baggage;

- in case of damage (spoilage) of cargo or baggage – in the amount by which its value has decreased, and if it is impossible to restore the damaged cargo or baggage – in the amount of its value;
- in case of loss of cargo or baggage handed over for carriage with the declaration of its value in the amount of the declared value of the cargo or baggage.

The cost of cargo or baggage is determined based on its price indicated in the seller's invoice or provided for by the contract, and in the absence of an invoice or price indication in the contract, based on the price that, under comparable circumstances, is usually charged for similar goods.

The carrier, along with compensation for the established damage caused by loss, shortage or damage (spoilage) of cargo or baggage, returns to the sender (recipient) the carriage charge collected for the carriage of lost, missing, spoiled or damaged cargo or baggage, if this fee is not included in the cost of the cargo.

Documents on the reasons for the failure to preserve the cargo or baggage (commercial act, general form act, etc.) drawn up by the carrier unilaterally are subject to assessment by the court in case of a dispute, along with other documents certifying the circumstances that may serve as a basis for the liability of the carrier, the sender or the recipient of the cargo or baggage.

Personal injury and death

Damage caused to the health of the passenger through the fault of the carrier is compensated according to the general rules of the Civil Code, only if the contract has not established an increased level of responsibility.

If a citizen is injured or otherwise damaged his health, the compensation for the lost earnings (income) that he had or could definitely have, as well as additional costs incurred caused by damage to health, including the cost of treatment, additional food, the purchase of medicines, prosthetics, outside care, spa treatment, purchase of special vehicles, training for another profession, if it is established that the victim needs these types of assistance and care and is not entitled to receive them free of charge.

In determining the lost earnings (income), the disability pension assigned to the victim in connection with injury or other damage to health, as well as other pensions, benefits and other similar payments assigned both before and after the injury to health, are not taken into account and are not entail a reduction in the amount of compensation for harm (not counted towards compensation for harm). The earnings (income) received by the victim after damage to health shall not be counted towards compensation for harm. In the event of injury or other damage to the health of a minor who has not reached fourteen years of age (minor) and does not have earnings (income), the person responsible for the harm caused is obliged to reimburse the costs caused by the damage to health.

Upon reaching the minor victim of fourteen years of age, as well as in the case of causing harm to a minor between the ages of fourteen and eighteen years old who has no earnings (income), the person responsible for the harm caused is obliged to compensate the victim, in addition to the costs caused by damage to health, also the harm associated with the loss or decrease of his working capacity, based on the value of the subsistence minimum of the working-age population as a whole in the Russian Federation established in accordance with the law.

If at the time of damage to his health, the minor had earnings, then the harm is compensated based on the amount of this earnings, but not lower than the minimum subsistence level of the working-age population as a whole in the Russian Federation established in accordance with the law.

B. LIMITATION OF LIABILITY

The law does not limit any rights of the carrier as such. There is a limitation of the carrier's liability (Article 170 of the RF KTM).

C. JURISDICTION OPTIONS

Two procedures are available for the passenger:

1. Conciliation, when, with the help of a lawyer or a representative, a passenger enters into negotiations to reach a pre-trial agreement.
2. The passenger acts as a plaintiff in a court.

D. INSURANCE REQUIREMENTS FOR THE CARRIER

The carrier's civil liability for harm to life, health, property of passengers during transportation is subject to insurance in the manner and under the conditions established by the Federal Law. It is prohibited to carry passengers by a carrier, whose civil liability is not insured.

The object of insurance under a compulsory insurance contract is the carrier's property interests associated with the risk of his civil liability for obligations arising from damage to the life, health, property of passengers during transportation.

The term of the compulsory insurance contract cannot be less than a year. When transporting by inland waterway transport, the validity period of the compulsory insurance contract may be less than a year but may not be less than the navigation period.

The compulsory insurance contract may not establish a deductible for the risks of civil liability of the carrier for causing harm to the life or health of passengers.

E. CONTRACT AND ACTUAL CARRIERS; TOUR OPERATORS

Regulated by article 187 Merchant Shipping Code of RF.

If the actual carrier is entrusted with the carriage of a passenger or part of it, the carrier nevertheless bears responsibility in accordance with the rules for the entire carriage of the passenger. In this case, the actual carrier bears the obligations and has the rights provided for by the rules established by the MSC.

With regard to the carriage of a passenger by the actual carrier, the carrier is responsible for the actions or omissions of the actual carrier, its employees or agents who have acted within the limits of their duties (powers).

Any agreement that the actual carrier assumes obligations not imposed on him by the rules established by the KTM RF, or waives the rights granted by such rules, is valid for the actual carrier only if he has his consent to do so in writing.

In the event that the carrier and the actual carrier are liable, their liability is joint and several.

F. SPECIAL RULES FOR PACKAGE TRAVEL (EU / EEA)

Within the framework of the EVRAZes (Eurasian Economic Community) and CIS regulations, there is no regulatory rules for "package sea travel". The

practice of concluding package travel services is used in the Commonwealth of Independent States, but only in relation to land tourism.

Directive of the European Parliament and the Council of the EU of November 25, 2015 No. 2015/2302 / EC on package tours and related tourist services does not apply for Russia.

G. SPECIAL FEATURES

FEDERAL LEGISLATION REGARDING PASSENGER RIGHTS.

At the federal level, the following acts can be distinguished:

Civil Code of the Russian Federation

Both the contract for the carriage of passengers and the contract for the provision of tourist services, in essence, are a *contract for the provision of services for compensation*, the general provisions of which are regulated by the Civil Code.

Under the contract for the carriage of a passenger, the carrier undertakes to deliver the passenger to the point of destination (as well as the passenger's baggage) and the passenger undertakes to pay the established fare for travel.

The conclusion of the contract for the carriage of a passenger is certified by a *ticket*, and the delivery of baggage by the passenger by a *baggage receipt*.

The passenger has the right, in the manner prescribed by the relevant transport charter, code or other law:

- to carry children with you free of charge or on other preferential terms;
- carry with you hand luggage free of charge within the established norms;
- check in baggage for carriage for a fee at the tariff.

Merchant Shipping Code of the Russian Federation

Under the contract for the carriage of passengers by sea, the carrier undertakes to transport the passenger to the point of destination and, in the event that the passenger deposits luggage, also deliver the luggage to the point of destination (and issue it to the person entitled to receive the luggage). The passenger undertakes to pay the fare set for the journey when checking in the baggage and the baggage transportation fee.

A *carrier* is a person who has entered into an agreement for the carriage of a passenger by sea or on whose behalf such an agreement has been concluded, regardless of whether the passenger is actually carried by such a person or by the actual carrier.

A *passenger* is an individual who has entered into an agreement for the carriage of a passenger by sea, or an individual for the carriage of which a ship charter agreement has been concluded.

The conclusion of the contract for the carriage of passengers by sea is certified by a *ticket*, the passenger's baggage – by a *baggage check*.

The fare of the passenger and the fare for the carriage of his baggage are determined by agreement of the parties.

The fare for the passenger's travel and the payment for the carriage of

his baggage by public transport are determined on the basis of the tariffs approved in the manner established by the legislation of the Russian Federation.

The passenger has the right:

- carry with you free of charge, in foreign traffic – in accordance with the reduced rate for one child under two years of age without providing him with a separate seat. Other children under the age of two, as well as children between the ages of two and twelve, are transported in accordance with a preferential tariff with separate seats;
- carry with you free cabin luggage within the established norm.

The passenger has the right, before the departure of the vessel, as well as after the start of the voyage in any port where the vessel will enter for embarkation or disembarkation of passengers, to withdraw from the contract of carriage of passengers by sea.

If the passenger canceled the contract for the carriage of passengers by sea no later than the period established by the rules for the carriage of passengers by sea, approved by the federal executive body in the field of transport, or did not appear at the departure of the ship due to illness, or, before the departure of the ship, refused the contract of carriage of the passenger by sea due to illness or for reasons beyond the control of the carrier, the passenger shall be refunded all the fare and baggage charges paid by him.

The Consumer Protection Act

The provision of transportation or travel services will be inextricably linked with legislation on the protection of consumer rights, that is, persons purchasing goods or services for personal or family needs. The consumer has the right to refuse to execute the contract, subject to compensation for all costs incurred by the other party. The consumer also has the right to receive compensation (refund) for poor quality services. If the company does not satisfy the consumer's claims on a voluntary basis, the court may also award a forfeit, compensation for non-pecuniary damage and a fine in the amount of 50 % of all satisfied claims.

4.5 Canada¹⁰⁹

Canada is a confederation whose jurisdictions and powers are limited by the Constitution Act, 1867.¹¹⁰ Also limited by this Act are the powers of Canada's federal authority which has sole jurisdiction over navigation and shipping throughout the country's navigable waters, both internal and external.

Canada's authority over its external waters is limited to its territorial sea (12 NM from Canada's jurisdictional coastline) and the adjoining Exclusive Economic Zone (which stretches 200 NM beyond the jurisdictional coastline).¹¹¹ Such waters may be further extended depending on the nature of the underlying continental shelf.

¹⁰⁹ Prepared by Peter J Cullen, Senior Counsel with Stikeman Elliott LLP (Montreal, QC) with the assistance of Simon Ledsham, associate with Stikeman Elliott LLP (Montreal, QC).

¹¹⁰ 30 & 31 Vict, c 3, ss 91 and ff.

¹¹¹ *Oceans Act*, S.C. 1996, c. 31. (NM refers to nautical miles).

Canada is largely, but not solely, a common law jurisdiction with sources deriving from English common law as practiced in its territories and provinces, with the exception of the Province of Quebec. The latter practices civil law, with sources deriving from the civil law traditions of France. It is beyond the scope of this paper to delve into the particular liability regimes of these legal traditions as practised in Canada (in contract and tort, or obligations and delict) which in any event would have limited application to Arctic matters, given Canada's federal jurisdiction over navigable waters and its federal statutory regime with respect to shipping in its Arctic waters.

A. CARRIER LIABILITY (PERSONAL INJURY, ACCIDENTS, CANCELLATION, DELAY AND BAGGAGE)

Through Canada's Marine Liability Act¹¹² (the Act), Part 4, Canada has adopted Articles 1 to 22 of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Schedule 1) as amended by the Protocol of 1990 to amend the Convention (Schedule 2) (collectively, the "Athens Convention"). These articles provide a liability regime for the wrongful death of or personal injury to a passenger and the loss of or damage to luggage during the course of any carriage as defined in the Athens Convention.

However, the Act generally excludes adventure tourism activities that meet the following conditions;

- they expose participants to an aquatic environment;
- they normally require safety equipment and procedures beyond those normally used in the carriage of passengers;
- participants are exposed to greater risks than passengers are normally exposed to in the carriage of passengers;
- the risks have been presented to the participants and they have accepted in writing to be exposed to them;¹¹³

In such instances the liability will be judged by the scope and enforcement of the risk waivers (item (d) below) under applicable law (nevertheless, as the Act's definition of "passenger" for the purposes of limiting liability includes "a participant in an adventure tourism activity," adventure tourism operators are entitled to limit their liability under Part 3 of the Act¹¹⁴). Similarly, the Act does not deal with cancellation issues which, generally speaking, will be subject to the scope and enforcement of contractual terms under applicable law.

We note that what constitutes an "adventure tourism activity" is not entirely clear and will be subject to interpretation, as the Act does not define the term.¹¹⁵ While s. 37.1(1) provides criteria for an adventure

¹¹² S.C. 2001, c. 6 [MLA].

¹¹³ *Ibid* at s. 37.1(1).

¹¹⁴ See MLA, *supra* note 113 at s. 24; note that the inclusive definition of "passenger" at s. 24 does not apply to Part 4, which expressly excludes participants in adventure tourism.

¹¹⁵ Observations from parliamentary debates provide some insight but are not authoritative. See e.g., Canada, Parliament, *House of Commons Debates*, 40th Parl, 2nd Sess, Vol 144, No

tourism activity to benefit from the exclusion from Part 4 of the Act, there are potentially other activities that could meet these criteria but that may not fit the commonly-understood meaning of “adventure tourism”. In this context (for the sake of argument), while a whale-watching expedition in a small rigid-hulled inflatable boat would certainly involve additional safety equipment / procedures and risk, would an operator that ferries passengers aboard such a boat (say at sea, between two remote landings), with similar equipment and risks, fall within the adventure tourism exclusion?

The Act makes clear that rights of recovery include the dependents of the injured or deceased person(s), and that the scope of recovery may include compensation for guidance, care and companionship, as well as any amount to which a public authority may be subrogated in respect of payments consequent on the injury or death that are made to or for the benefit of the injured or deceased person or dependent. In the assessment of damages, any amount paid or payable on the death of the deceased person or any future premiums payable under a contract of insurance are not to be taken into account.

Such claims must be brought within two years after the cause of action arose, or after the time of death.

B. LIMITATION OF LIABILITY

The Act provides for limitation for liability in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol, Articles 1 to 15 which are set forth in Part 1 of Schedule 1 and Article 18 which is set forth in Part 2 of that Schedule as set forth in the Act. In respect of passengers, this includes persons carried on board a commercial vessel (other than paying passengers) and participants in adventure tourism.¹¹⁶

The Act provides a range of limits for loss of life or personal injury depending on the size of the vessel.

C. JURISDICTION OPTIONS (FORUM)

As Articles 1 to 22 of the *Athens Convention* have force of law in Canada pursuant to the Act, an action by a passenger under Part 4 of the Act may be instituted in the following jurisdictions, but only in a state party to the *Athens Convention*:¹¹⁷

36 (30 Mar 2009) at 1600, where Mr. Jim Maloway, M.P. stated that “Upon reading the bill, it seems to me that the current legislation gives equal liability treatment to passengers or customers whether they are riding a ferry or on a sightseeing trip. The same treatment is given to people who are involved in much more risky activities, such as white water rafting, kayaking, whale watching or Zodiacs. People involved in those sorts of activities are accepting a much higher risk than people riding ferries or on sightseeing cruises” (our underlining). See also *Malcolm v. Shubenacadie Tidal Bore Rafting Park Limited*, 2014 NSSC 217 (CanLII) at para 13, where the Court remarked in *obiter* that a river rafting excursion would appear to constitute an “adventure tourism activity” within the meaning of the Act.

¹¹⁶ See note 115, *supra*.

¹¹⁷ While Canada is not a party to, and has not ratified, the *Athens Convention*, s. 38 of the MLA designates Canada as a State Party for the purposes of the application of Schedule 2.

- (a) the court of the place of permanent residence or principal place of business of the defendant, or
- (b) the court of the place of departure or that of the destination according to the contract of carriage, or
- (c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
- (d) a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.¹¹⁸

In Canada, the Federal Court has broad jurisdiction over maritime, navigation and shipping matters pursuant to the Federal Courts Act.¹¹⁹ However, the Superior Courts of each province and territory enjoy concurrent original jurisdiction with the Federal Court in maritime matters, allowing passengers to file an action in either system. Some inferior provincial courts, such as small claims courts, have also been vested with maritime jurisdiction by legislative grant and may hear maritime passenger claims.¹²⁰

While passengers may attempt to sue under provincial consumer protection laws (especially to circumvent choice of forum clauses in contracts of carriage), the expansive reach of Canadian maritime law has led courts to reject consumer protection claims and apply maritime law instead.¹²¹ Canadian courts generally enforce forum selection clauses; however, the statutory choice of forum granted to passengers by Article 17 of the Athens Convention supersedes any such clause for claims made pursuant to the Act.¹²²

D. INSURANCE REQUIREMENTS FOR THE CARRIERS

Since January 11, 2019, the Regulations Respecting Compulsory Insurance for Ships Carrying Passengers¹²³ make liability insurance coverage of \$250,000 per passenger mandatory for carriers of passengers on voyages between Canadian ports. Notable exemptions from this requirement include international cruises (as these sail from or to ports outside of Canada) and “adventure tourism activities” (according to the definition in s. 37.1(1) of the Act).¹²⁴

¹¹⁸ See MLA, *supra* note 113 at Schedule 2, art 17.

¹¹⁹ R.S.C., 1985, c. F-7 at s. 22.

¹²⁰ See Aldo Chircop, William Moreira, Hugh Kindred and Edgar Gold, eds., *Canadian Maritime Law*, 2nd ed. (Toronto: Irwin Law, 2016) at 188-89.

¹²¹ See e.g., *Racette c. Norwegian Cruise Line*, 2019 QCCQ 3817 (CanLII), *Beaumont c. Norwegian Cruise Line Holdings Ltd.*, 2018 QCCQ 6477 (CanLII) and *Princess Cruises v. Nicolazzo*, 2009 CanLII 28217 (ON SCDC). The leading Supreme Court of Canada cases on the definition of Canadian maritime law are *ITO-Int'l Terminal Operators v. Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 and *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 SCR 437.

¹²² See *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII), [2003] 1 SCR 450; see Chircop et. al. (2016), *supra* note 121 at 675; see MLA, *supra* note 113 at Schedule 2, Art 17.

¹²³ SOR/2018-245 [Insurance Regulations].

¹²⁴ See Insurance Regulations, *supra* at s. 2. For discussion of the definition of “adventure tourism activities”, see *note* 16, *supra*.

E. CONTRACTING AND ACTUAL CARRIERS AND TOUR OPERATORS

The Athens Convention, as codified in Schedule 2 of the Act, distinguishes the “carrier”, who concludes the contract of carriage, from the “performing carrier”, who owns, operates or charters the ship performing the voyage.¹²⁵ While the obligations in Schedule 2 apply in full to the carrier, these only apply to a performing carrier for “the part of the carriage performed by him”.¹²⁶ The carrier and performing carrier are jointly and severally liable to the passenger, each conserving his recourse against the other.¹²⁷

F. PACKAGE TRAVEL SPECIAL RULES (EU/EEA)

N/A

G. SPECIAL FEATURES

N/A

5. Terms of carriage or tickets

The above national summaries set out the background law. The actual right of an individual passenger may give rise to *choice of law* and *forum shopping* issues that must be resolved on the facts of the individual case. Further, calculating the recoverable loss and which types of damages are allowed will likely differ from jurisdiction to jurisdiction.

Shipowners and tour operators traditionally provide their services subject to certain terms and conditions; possibly stated in the ticket or other travel document. Such terms normally address at least the following issues:

- Carrier’s/Operators’ liberties
- Cancellation and changes to the schedule
- Exclusion of liability for excursions
- Exclusion of liability for loss of baggage
- Limitation of liability
- Disclaimer for acts and omissions by third parties
- Obligations on the part of the passenger to comply with applicable law and guidelines
- Choice of law
- Jurisdiction/venue for disputes
- Price changes
- Duty to notify complaints
- Time limits
- Force majeure
- Reference to applicable conventions

¹²⁵ See MLA, *supra* note 113 at Schedule 2, Art 1(1); see Chircop et. al. (2016), *supra* note 121 at 669.

¹²⁶ See MLA, *supra* note 113 at Schedule 2, Art 4(1); see Chircop et. al. (2016), *supra* note 121 at 669.

¹²⁷ See MLA, *supra* note 113 at Schedule 2, Arts 4(4), 4(5); see Chircop et. al. (2016), *supra* note 121 at 669.

Only the price, time for travel and level of accommodation are normally agreed with the passengers individually. And this “agreement” usually entails that the passengers picks from the options that are available from the carrier.

The unique nature of the travel and special risks are sometimes highlighted by the operator:

“The trips offered by [] are mainly conducted in “marginal zones” and require the qualification of expedition trips to places where infrastructure and (medical) facilities are often lacking. On booking the trip, the contracting party fully understands that those trips can not be comparable with any other trip. If for any reason such as but not limited to weather conditions, sea currents, nautical reasons, ice-conditions etc., the decision is taken by [] to change the programme and/or the programme cannot be carried out according to the travel description and (certain) places described in the travel programme cannot be visited and/or [] deviates from the programme, if [] has the opinion that such deviation will benefit the quality of the programme, or the trip has to be postponed or (partly) cancelled, [] is not liable for any claims, such as but not limited to refunds, damages, non-fulfilled expectations etc. of the contracting party.”¹²⁸

This business practice is not different from other contracts involving carriage of passengers at sea and cruises. Thus, it entails the same generic problems such as formation of contracts and whether certain terms have been agreed (e.g. the “red hand” duty to highlight onerous terms, violation of mandatory law, the implication online contracting, consumer protection aspects of the contractual relationship and the non-contractual liability of actual/performing carriers. These problems are complex and may be treated differently in the five jurisdictions, but falls outside the scope of this report.¹²⁹

6. Conclusions

The above discussion supports the following high-level conclusions:

- Generally speaking, the passengers appears to be well protected; certainly not to a lesser degree just because of the setting

¹²⁸ Cf. those of the operator Oceanwide terms and conditions (oceanwide-expeditions.com).

¹²⁹ Reference is made to the available textbooks on the subject such as Lewins: International Carriage of Passengers by Sea (2016), Chircop et al: Canadian Maritime Law, (2nd ed 2016), Falkanger, & Bull & Brautaset: Scandinavian Maritime Law (4th ed 2017), Griggs et al: Limitation of Maritime Claims Limitation of Liability for Maritime Claims (4th ed. 2005), Tsimplis: “Carriage of Passengers”, Ch 6 in Y. Baatz et al, Maritime Law (4th ed 2018), F Berlingieri: International Maritime Conventions Volume I, the Carriage of Goods and Passengers by Sea (2014), Ch 4 “Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002”, Tsimplis, M. (2009): ‘Liability in respect of passenger claims and its limitation’, 15 JIML. A number of articles have further been published about particular passenger rights issues.

- “*It is what it is*”; the experience of Arctic tourism involves certain objective hazards, but the operators’ associations, national authorities and bodies like the Arctic Council appear to prioritize this business. All the Arctic coastline states have designated regulation of maritime traffic that serves to manage the special risks. Yet limited SAR capabilities seems to be a common trait of all the Arctic states; this will (or at least should) likely change as traffic increases
- The vast geographical area and scarce population/infrastructure create objective hazards that seem to be inherent
- The Arctic coastline states cooperates with a view to improving safety
- Some jurisdictions have special rules for adventure tourism. The passenger rights are not uniform. There are 4-5 different legal regimes
- As the US and Russia have not adopted the Athens Convention, their regimes differ
- Overall, the liability analysis is similar for most Arctic states due to the adoption of the Athens Convention in various forms, yet there are peculiarities in each jurisdiction
- Alaska and Greenland do not have mandatory insurance requirements
- Special hazards appear not to have had an impact on the law so far as liability for death and personal injury is concerned
- The terms of carriage may have a significant impact on the outcome of a dispute between a passenger and a carrier
- Greenland’s passenger capacity restrictions are an interesting mitigation measure for limited SAR resources
- The scarcity of accurate navigational surveys of Arctic waters, as evidenced in the case of the *Clipper Adventurer*, is clearly a risk common to all Arctic states
- Probably due to their scale, Canadian Arctic waters seem less tightly regulated than those of Alaska, Svalbard, and Greenland (e.g. no mandatory pilotage within a certain distance of the shore; there is no northern pilotage authority pursuant to the *Pilotage Act*)
- The adventure tourism exception seems to be unique to Canada
- Svalbard/Norway and Greenland seem very strong on consumer protection for package travel, delays, cancellations, etc.

JUDICIAL SALES OF SHIPS

JUDICIAL SALES OF SHIPS UPDATE

ANN FENECH

During 2021, the judicial sales of ships project continued to make extraordinary progress at working group VI at UNCITRAL. Reference is here being made to the reports to be found in the 2017- 2018 and 2020 year books which provide a detailed account of this very exciting CMI project and its progression from 2017 to 2020.

During 2021, the extent of the progress made enabled the completion of the project by working group VI in 2022 and this notwithstanding the fact that the years 2020 and 2021 were hampered by the covid pandemic which effectively prohibited in person meetings. In June of this year 2022 the Commission approved the Convention and it is now in the process of sending this to the General Assembly of the United Nations for adoption. This historic event continues to underline the important role of the Comité Maritime International in the unification of international maritime law.

The report in the 2020 year book concluded by stating that following the 37th session of working group VI held in December 2020, the UNCITRAL secretariat would be preparing the annotated third revision of the Beijing Draft for consideration at its 38th session scheduled to take place in New York between the 19th and 23rd April 2021.

The Secretariat indeed presented the annotated third revision in March and immediately this draft was circulated to all the NMLAs and we commenced our analysis of the draft. Later on in the month we were informed that due to the Covid Pandemic which was still very much prohibiting in person meetings, the 38th session scheduled to take place in New York was not going to take place in New York but in Vienna. It would be taking place virtually via the previously used Interpretify platform which was very successful in the previous December session. However arrangements would also be made to allow delegations to attend in person. We were also informed that there would only be a one two hour session and thus the Chair of the working group Prof. Beate Czerwenka informed us that given the reduced hours the debate at the 38th session would focus on articles 3 (1) (b), 5, 11, 9 and the definitions in article 2.

We therefore set about preparing the CMI Meeting Notes for the 38th session focusing on these articles and giving the views of the CMI on how the relevant issues in those articles could be resolved offering suggestions for the consideration of the working group.

The 38th session went ahead as planned with the Secretariat present in Vienna and the Chair and all delegations taking part virtually. However the fact that there were many less working hours than usual could have meant that there would not have been sufficient time for the necessary progress to be made. The Chair therefore suggested that it may be useful for there to be “informal” sessions before or after the official 2 hour session. These informal sessions were in fact held and were very useful indeed enabling the exchange of a number of ideas so that when the matter was discussed during the formal session, it assisted the delegates to move faster.

The CMI was very grateful indeed that the session was held at all given the covid pandemic restraints however undeniably the short sessions coupled with the fact that as delegates we could not interact and exchange views there and then with each other during the break out sessions or coffee breaks made it more challenging and made depending on email and “whats ap” communications all the more important. Additionally it must have been very difficult indeed for delegations who were not on the central European time zone, particularly our colleagues in Austral-Asia and across the Atlantic. For them the sessions were either late at night sessions, or before the crack of dawn. However we were all determined that the sessions take place and were as fruitful as possible. Thanks to the co-operation of all and the expert handling by the Secretariat and the Chair, the 38th session was concluded leading to the production of the annotated 4th revision of the Beijing Draft for deliberation at the 39th session of working group V1.

In August 2021, the Secretariat circulated the annotated fourth revision of the Beijing Draft for consideration at the 39th session of Working Group V1 to be held also in Vienna between the 18th and 22nd October 2021. We were all very conscious of the fact that substantial progress needed to be made in the forthcoming 39th session to enable the possible finalisation of the draft and its presentation to the Commission in 2022 as had been envisaged by the Chair of the working group as early as the 37th session.

As in previous occasions our IWG started to work in earnest on considering the annotated fourth revision with a view to highlighting those parts which needed some fine tuning and produced the CMI meeting notes for the 39th session. As was in fact expressed in these CMI working notes, on a review of the entire document we were of the view that the potential stumbling blocks had been overcome and that what was required was the fine tuning of certain aspects and final decisions on what still appeared in square brackets.

The CMI notes were prepared by the IWG and circulated to all NMLAs with a request to ensure that these notes were circulated to the delegates representing member states.

During the run up to the 39th session, it became evident that there was the wish among delegations to learn more about how the *repository* which was provided for in article 10 would actually work. We were therefore very happy indeed to facilitate the attendance of Frederick Kenney Director, Legal and

External Affairs at the IMO at the 39th session . He gave a presentation on the cost, language and functionality of hosting the centralized online repository as an additional module of the Global Integrated Shipping Information System (GISIS), how the notices of judicial sale and certificates would be posted in the system by authorised users and how the information thereon could be viewed by members of the public via a public GISIS account.

Much progress was registered during this 39th session with consensus reached between delegations on important issues including the definitions, the scope of application, the procedure and notice of judicial sales and the certificate of judicial sales. By the end of it, it was evident that there was a very strong possibility that the entire draft could be concluded and agreed during the next 40th session scheduled to be held in New York between the 7th and 11th of February 2022. If this were to occur then the working group would be on track to present a final draft to the Commission for its consideration during the 55th meeting of the Commission scheduled for June of 2022.

It was in December 2021 that the Secretariat circulated the annotated 5th revision of the Beijing Draft for deliberation at the 40th session of working group VI. The annotated 5th revision contained the latest amendments as had been agreed upon in the 39th session and was accompanied by a note prepared by the Secretariat which as usual, in its most expert of manners, succeeded in highlighting the most important points capturing the entire gist of the previous discussions in an exceptionally effective and efficient manner.

The CMI remains very grateful indeed to the Secretariat for its continuous ability to describe with such clarity what occurred throughout the deliberations and for the many an occasion when it offered possible alternative solutions for the consideration of the working group.

Again and for the fifth time our IWG worked on going through this annotated fifth revision with a view to producing CMI Notes for the February session. We worked throughout Christmas and New Year to ensure that NMLAs would receive the notes well in advance of the February meeting. The approach to the Notes on this occasion was however slightly different in that we were very conscious of the fact that the entire aim this time round was to draw attention purely to issues which were mainly of an editorial nature and which needed correction for the purposes of the finalisation and agreement on a final text at the next session.

We were also informed in due course that the 40th session would be held in New York in a hybrid fashion meaning that delegations could attend in person in New York but those wishing to participate virtually could do so.

Thus 2021 ended with a tremendous level of expectation that 2022 would indeed be the year when the Beijing draft approved by the CMI general assembly in Hamburg in 2014 would after four years of deliberation at UNCITRAL actually become a Convention.

The intention behind this account is to describe what occurred during 2021 given that it is being produced for the purposes of the 2021 yearbook. However this 2021 yearbook is being finalised in 2022 in time for the special CMI Antwerp conference being held in October 2022 celebrating the 125 Anniversary of the CMI. It was therefore felt that it would be appropriate to include even if only briefly what has occurred up to now during 2022, given the importance of the events that did in fact occur.

So by February 2022, airline travel for a number of us had been resumed in part, and armed with 1 covid vaccine and 2 boosters, I made the trip to New York to represent the CMI in person.

There were indeed only a handful of us in attendance in person at the United Nations Building in New York between the 7th and 11th of February 2022, with all the common areas in the building closed down and with very substantial precautions being taken against the spread of Covid 19. It was certainly very good however to be attending in person. Unfortunately the Chair of working group VI Prof. Beate Czerwenka was unable to attend in person, however what was quite extraordinary was the fact that over 100 participants took part on line.

This posed additional challenges for the Chair but between the ability of Chair and the expert guidance of the Secretariat attending in person in New York as well as the sheer determination of the delegations to get through all the articles in the convention, the 5 days of deliberations were taken up with the conclusion of the article by article review, discussion on the preamble and the finalisation of the draft convention on the judicial sales of ships with consensus reached on a final draft to be presented to the Commission in time for the Commission's 55th Session to be held in June in 2022.

This was truly a momentous occasion for the CMI. We were now very conscious of the fact that all depended upon whether or not the Commission in its 55th session later on in June of the same year would approve the Draft Convention.

Prior to the 55th Session of the Commission the Secretariat circulated a number of documents. It circulated what was now no longer an "annotated revision," but "the draft convention on the international effects of judicial sales of ships." This was accompanied by a detailed note and by a request to delegations to present any comments they may have on the draft by the first week of May. Later on we were provided with a copy of the comments received by various delegations as well as with the much awaited "Draft Explanatory note of the Convention on the International effects of Judicial sales of ships." This was presented in 3 parts.

As far as the CMI was concerned, this was it. We were in the home stretch. Yet we were still anxious that last minute hurdles may have to be overcome and there was no knowing in advance what these may be. Again our IWG worked on getting the final set of CMI meeting notes out in preparation for the Commission meeting and by the 3rd of May our CMI Meeting notes were in circulation and presented to the Secretariat. We emphasised in our Notes that

Judicial Sale of Ships Up date

in view of the fact that this document has been discussed and debated at great length and given that the Secretariat has generously given all delegations further time to consider the text up until the 6th May, the CMI would like to encourage all NMLAs to impress upon their national delegations to ensure that if they have any additional comments to make following this latest draft, that these are sent to the Secretariat in time by the 6th May. This would assist in focusing the debate during the meeting, avoid digression and would be useful to other delegations who would be able to properly prepare their reactions, if any to the issues raised by the 6th May.

The Secretariat then put together all the responses received from the delegations which had responded to its invitation for comments ahead of the meeting. This was extremely useful and it enabled the Chair during the 55th Commission session to focus on the issues raised by the delegations which had presented their comments.

The 55th session of the Commission opened on Monday 27th June and the first 4 days were dedicated to a consideration of the draft convention on the international effects of judicial sales of ships.

It was indeed wonderful to be back in person with a number of other delegations. It was also very good indeed to have a number of CMI persons as members of state or NGO delegations. Alex von Zeigler represented Switzerland, Tomotaka Fujita represented Japan, Frank Nolan was adviser to the American delegation, John O'Connor was adviser to the Canadian delegation, Jan Erik Poetschke was adviser to the German delegation, Peter Laurijssen represented BIMCO and the International Chamber of Shipping and Steward Hetherington and I represented the CMI. It would not be inappropriate to state at this juncture that for the first time in all the physical sessions that had been held, Henry Li representing China was unable to attend in person. He was missed.

To the sheer delight of the delegations, Chair and Secretariat, by Thursday 30th June the Commission was able to adopt by consensus a decision and recommendation to the seventy seventh session of the General Assembly of the United Nations whereby it submitted the draft convention on the international effects of judicial sales of ships, it recommended that the General Assembly considers the draft convention with a view to (a) adopting the Convention, (b) authorising a signing ceremony to be held as soon as practicable in 2023 upon which the Convention would be open for signature and (c) recommending that the Convention be known as the Beijing Convention on the Judicial sales of ships, and it requested that the Secretary General of the UN publishes the Convention upon adoption including electronically in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies.

At the end of the last session, on behalf of the CMI I thanked all the delegates of working group VI, the Secretariat of UNCITRAL and the Chair for the extraordinary efforts made by all throughout this challenging yet remarkable journey which resulted in this most satisfactory conclusion.

Even here and now so much thanks and appreciation to and for the efforts made by so many is in order however that will be saved for the report on this subject that will appear in the 2022 year book.

To conclude, the final report on the 55th session of the Commission is in the process of being finalised and this will include the final decision and recommendation of the Commission to the General Assembly as well as the final text of the Convention as agreed. The report will then be sent to the General Assembly of the United Nations in time for its 77th session which is scheduled to start in September of this year where it is expected that the General Assembly will adopt the Convention.

UN General Assembly Document A/CN.9/WG.VI/WP.90

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International Trade Law**
Working Group VI (Judicial Sale of Ships)
Thirty-eighth session
New York, 19–23 April 2021

Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft

Note by the Secretariat

1. The annex to this document contains an annotated third revision of the Beijing Draft ("third revision" or "present draft"), which the Secretariat has prepared to incorporate the deliberations and decisions of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, paras. 13–109). The Working Group may wish to use the third revision as a basis for its deliberations at its thirty-eighth session.
2. The annotations make reference to the "second revision" of the Beijing Draft (A/CN.9/WG.VI/WP.87) and the "original" Beijing Draft (A/CN.9/WG.VI/WP.82).

A/CN.9/WG.VI/WP.90

Annex**Third Revision of the Beijing Draft***The State Parties to this Convention,*

Recognizing that the needs of the maritime industry and ship finance require that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the owners of ships,

Concerned that any uncertainty for the prospective purchaser regarding the international recognition of a judicial sale of a ship and the deletion or transfer of registry may have an adverse effect upon the price realized by a ship sold at a judicial sale to the detriment of interested parties,

Convinced that necessary and sufficient protection should be provided to purchasers of ships at judicial sales by limiting the remedies available to interested parties to challenge the validity of the judicial sale and the subsequent transfers of the ownership in the ship,

Considering that once a ship is sold by way of a judicial sale, the ship should in principle no longer be subject to arrest for any claim arising prior to its judicial sale,

Considering further that the objective of recognition of the judicial sale of ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the judicial sale, the legal effects of that sale and the deregistration or registration of the ship,

Have agreed as follows:¹

Article 1. Purpose

This Convention governs the effects, in a State Party, of the judicial sale of a ship conducted in another State Party.²

Article 2. Definitions

For the purposes of this Convention:

(a) “Charge” means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage;³

¹ *Preamble*: The preamble was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. The preamble reproduces the preamble contained in the original Beijing Draft.

² *Purpose provision*: Article 1 has been revised to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 20).

³ *Definitions – “charge”*: The definition of “charge” was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. Although the Working Group had agreed at its thirty-fifth session to delete “arrest” from the definition on the grounds that it was a remedy and not a right (A/CN.9/973, para. 79), at the thirty-sixth session there was support for including reference to a “right to arrest” in the definition, noting that such a right should be understood in many jurisdictions since both the International Convention Relating to the Arrest of Seagoing Ships (1952) (United Nations, *Treaty Series*, vol. 439, No. 6330) and the International Convention on Arrest of Ships (1999) (*ibid.*, vol. 2797, No. 49196) referred to the arrest of ships in respect of maritime claims. However, concerns were expressed as to the need to distinguish between a charge and the rights and obligations that may arise from it. In response, it was suggested that the definition should focus on rights that gave rise to the right to arrest or right of attachment (A/CN.9/1007, para. 12). The Working Group also agreed to proceed on the understanding that the term “charge”, as used in the instrument, did not include mortgages (*ibid.*, para. 14). At its thirty-seventh session, the Working Group agreed that further adjustments to the definition might need to be considered in view of comments made

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- (b) "Clean title" means title free and clear of any mortgage or charge;⁴
- (c) "Judicial sale" of a ship means any sale of a ship:
 - (i) Which is ordered, approved or confirmed by a court or other public authority⁵ either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and
 - (ii) For which the proceeds of sale are made available to the creditors;⁶
- (d) "Maritime lien" means any claim recognized as a maritime lien or privilège maritime on a ship under applicable law;⁷
- (e) "Mortgage" means any mortgage or hypothèque that is:⁸

during the session in connection with the definition of "clean title" (A/CN.9/1047/Rev.1, paras. 37 and 38). The Working Group may also wish to consider the meaning of the term "registered charge", which is used to define the persons to be notified under article 4(1)(b) and to denote the competent registrars under article 7. In the original Beijing Draft, a "registered charge" was limited to charges entered in the relevant ship registry (article 1(o)), whereas the corresponding provisions of the International Convention on Maritime Liens and Mortgages (1993) (United Nations, *Treaty Series*, vol. 2276, No. 40538) ("MLMC 1993") apply to registrable charges of the same nature as mortgages and hypothèques (articles 1, 11(1)(b) and (c), and 12(5)). See also A/CN.9/WG.VI/WP.88, paragraphs 22 to 23.

⁴ *Definitions – "clean title"*: The definition of "clean title" has been revised to reflect the preference expressed at the thirty-seventh session of the Working Group for the second option presented in the second revision (A/CN.9/1047/Rev.1, para. 38).

⁵ *Definitions – "authority" and "public authority"*: The present draft refers to a "public authority" conducting a judicial sale (article 2(c)(i)) or issuing a certificate of judicial sale (article 5(1)), as well as to an "authority" taking action on the register (article 7) and an "authority" of one State party corresponding directly with that of another State (article 13). It has been suggested that the term "public authority" in article 2(c)(i) should be defined (A/CN.9/1047/Rev.1, para. 32). It has also been suggested that the term "authority" should be defined for the purposes of article 13 (A/CN.9/WG.VI/WP.88, para. 36).

⁶ *Definitions – "judicial sale"*: The definition of "judicial sale" has been amended to reflect the decision of the Working Group at its thirty-seventh session to omit the words "or any other way provided for by the law of the State of judicial sale" in subparagraph (i) (A/CN.9/1047/Rev.1, para. 33). The definition has been further amended: (a) to omit reference to sales "carried out" by a court (as opposed to private treaties that are "carried out"); (b) to insert reference to sales that are "confirmed" by the court (*ibid.*, para. 31); and (c) to clarify that the requirement for court supervision and approval applies only to sale by private treaty (A/CN.9/1007, para. 18). These further amendments are designed to reflect more accurately the practice of conducting judicial sales in the various jurisdictions.

⁷ *Definitions – "maritime lien"*: The definition of "maritime lien" was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. At the thirty-sixth session of the Working Group, it was suggested that the term "maritime lien" should not always be limited to those maritime liens that are recognized "by the law applicable in accordance with the private international law rules of the State of judicial sale", as provided in the original Beijing Draft (A/CN.9/1007, para. 19, *emphasis added*). It was suggested that, while such a limitation should be retained for the purposes of defining the persons entitled to notice (article 4(1)(c) of the present draft), it was neither necessary nor desirable to do so for the purposes of defining the "clean title" conferred by a judicial sale (which might be the subject of enquiry in a State other than the State of judicial sale by virtue of article 6). The Secretariat suggests that this "dual use" might be addressed in all instances of the draft instrument by defining the term "maritime lien" by reference to those maritime liens that are recognized "under applicable law", and invites the Working Group to consider the revised definition as drafted in the present draft. See also A/CN.9/WG.VI/WP.88, paragraphs 29 to 30.

⁸ *Definitions – "mortgage"*: The definition of "mortgage" was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. At its thirty-sixth session, the Working Group agreed to include the words "and registered or recorded" after the words "effected on a ship" and to defer further discussion of the definition to the substantive provisions in which the term "mortgage" is used (A/CN.9/1007, para. 21). The term is used in the present draft to define "charge" (article 2(a)), "clean title" (article 2(b)), the persons entitled to notice (article 4(1)(b)), and the obligations of the registrar (article 7(1)(a)). The Working Group may wish to consider whether, for each of these uses, it is appropriate to limit the term "mortgage" to those "recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale", particularly when the term is

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- (i) Effected on a ship and registered or recorded in the State in whose registry of ships or equivalent registry the ship is registered; and
- (ii) Recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale;
- (f) “Owner” of a ship means any person registered as the owner of the ship in the registry of ships or an equivalent registry in which the ship is registered;⁹
- (g) “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions;
- [(h) “Purchaser” means any person to whom the ship is sold in the judicial sale];¹⁰
- (i) “Ship” means any ship or other vessel [registered in a registry that is open to public inspection] 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;¹¹
- (j) “State of judicial sale” means the State in which the judicial sale of a ship is conducted;
- (k) “Subsequent purchaser” means any person who purchases the ship previously sold to a purchaser in the judicial sale.¹²

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:
 - (a) The ship was physically within the territory of the State of judicial sale at the time of the sale;¹³ and

used to define an obligation that is addressed to States other than the State of judicial sale. See also A/CN.9/WG.VI/WP.88, paragraphs 31 to 32.

⁹ *Definitions – “owner”*: The definition of “owner” was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. The Working Group may wish to consider aligning the definition with the definition of “ship” in article 2(i), which has been revised to include a requirement of registration. See also A/CN.9/WG.VI/WP.88, paragraph 33.

¹⁰ *Definitions – “purchaser”*: The definition of “purchaser” was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. At its thirty-sixth session, the Working Group agreed to put the definition in square brackets to indicate its possible deletion and asked the Secretariat to propose text for a definition for future consideration that did not refer to ownership (A/CN.9/1007, para. 27). The present draft of the definition responds to that request.

¹¹ *Definitions – “ship”*: At its thirty-seventh session, the Working Group agreed to insert the words in square brackets to address a concern that the draft convention should only apply to vessels that are registered (A/CN.9/1047/Rev.1, para. 28). The Working Group agreed to revert to the matter at a later stage. As signalled during the session, references to registration in other provisions of the present draft, such as articles 4, 5 and 7, might be relevant in that regard (*ibid.*).

¹² *Definitions – “subsequent purchaser”*: The definition of “subsequent purchaser” was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. The definition has been aligned with the definition of “purchaser”, as requested by the Working Group, and is designed to cover not only the first subsequent purchaser but also later purchasers (A/CN.9/1007, para. 27).

¹³ *Substantive scope – physical presence of ship*: Article 3(1)(a) has been revised to replace “jurisdiction” with “territory” to align the different language versions as well as to stress the need for presence of the ship within the territorial waters of the State of judicial sale and to avoid possible confusion with the exercise of extraterritorial “jurisdiction” by the flag State under the United Nations Convention on the Law of the Sea (1982) (United Nations, *Treaty Series*, vol. 1833, No. 31363) (see A/CN.9/1047/Rev.1, para. 25). Article 5(1)(b) and Appendix II have been revised accordingly.

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(b) Under the law of that State, the judicial sale confers clean title to the ship on the purchaser.¹⁴

2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, at the time of judicial sale, only on government non-commercial service.¹⁵

Article 4. Notice of judicial sale¹⁶

1. Prior to a judicial sale of a ship, a notice of the sale shall be given to:

(a) The registrar of the registry of ships or equivalent registry in which the ship is registered;

(b) All holders of any mortgage or registered charge, provided that the registry in which it is registered, and any instrument required to be registered with the registrar under the law of the State of the registry, are open to public inspection, and that extracts from the registry and copies of such instruments are obtainable from the registrar;¹⁷

(c) All holders of any maritime lien, provided that they have notified the court or other authority conducting the judicial sale of the claim secured by the maritime lien [in accordance with its regulations and procedures];¹⁸

¹⁴ *Substantive scope – clean title sales*: Wide agreement has been expressed in the Working Group to limit the scope of the convention to judicial sales that (already) provide clean title under the domestic law of the State of judicial sale (A/CN.9/1007, para. 43). It was agreed at the thirty-seventh session to retain article 3(1)(b) but to revisit its drafting at a later stage (A/CN.9/1047/Rev.1, para. 44).

¹⁵ *Substantive scope – exclusions from scope*: Article 3(2) of the second revision provided for two exclusions from scope – sales following seizure by tax, customs and other law enforcement authorities (article 3(2)(a)) and State-owned ships (article 3(2)(b)). At the thirty-seventh session, there was broad agreement within the Working Group that the first exclusion should be omitted (A/CN.9/1047/Rev.1, para. 30). Article 3(2) of the present draft has been amended accordingly, and thus provides only for the second exclusion. The exclusion has been amended to reflect the agreement of the Working Group to replace the words “for the time being” with “at the time of judicial sale” (ibid., para. 46). The words “at the time of [judicial] sale” are also used in article 3(1)(a). The draft convention does not govern arrest of the ship prior to its judicial sale or the conduct of the judicial sale itself. The immunity of State-owned ships from those measures may be provided for in other treaties or rules of international law.

¹⁶ *Notice requirements – function*: At the thirty-seventh session, different views were expressed as to the function of the notice requirements in article 4. One view was that the notice requirements should serve only as a condition for issuing the certificate of judicial sale, while another view was that the notice requirements should serve as a condition for giving international effect (A/CN.9/1047/Rev.1, para. 49). It was also noted that applying the notice requirements as a stand-alone requirement (as opposed to a condition for issuing the certificate of judicial sale or for giving international effect) might pose difficulties if the convention only applied to “clean title” sales by virtue of article 3(1)(b) (ibid., para. 39).

¹⁷ *Notice requirements – notifying holders of mortgages and registered charges*: Subparagraph (b) remains unchanged from the second revision, reflecting the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 55).

¹⁸ *Notice requirements – notifying holders of maritime liens*: Subparagraph (c) has been revised to reflect the deliberations of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 54). The word “notified” have been used instead of “made their claims known”. The words “in accordance with its regulations and procedures” have been inserted for consideration by the Working Group. Those words acknowledge that (a) in some States, procedures are not in place to receive ad hoc notices from holders of maritime liens (ibid., para. 54), and (b) subparagraph (c) does not require the State of judicial sale to amend its regulations and procedures for conducting judicial sales to accommodate the notification of claims before the judicial sale. A brief survey of procedural rules under domestic law reveals a variety of procedures by which a claim may be notified. For instance, the party requesting the judicial sale may be required to inform the court of any maritime lien that is known to the party. In several common law jurisdictions, the procedure for filing a caveat (or caution) with the court against release of the ship after its arrest allows a holder of a maritime lien to notify the court of particulars of its claim. In other jurisdictions, a special procedure exists for a holder (among other holders of unregistered charges) to intervene in the judicial sale proceedings. To accommodate those various procedures,

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- (d) The owner of the ship for the time being;
 - (e) The person registered as the bareboat charterer of the ship in the registry of ships in which the ship is registered; and
 - (f) The registrar of the registry of ships in any State in which the ship is granted bareboat charter registration.
2. The notice required by paragraph 1 shall be given in accordance with the law of the State of judicial Sale, and shall contain, as a minimum, the information mentioned in the model contained in Appendix I to this Convention.¹⁹
3. The notice shall also be:
- (a) Published by press announcement in the State of judicial sale [and, if required by the law of the State of judicial sale, in other publications published or circulated elsewhere]; and²⁰
 - (b) Transmitted to the repository referred to in article 12 for publication.
4. In determining the identity or address of any person to whom the notice is to be given, reliance may be placed exclusively on:
- (a) Information set forth in the registry of ships or equivalent registry in which the ship is registered or the registry of ships in which it is granted bareboat charter registration;
 - (b) Information set forth in the registry in which the mortgage or charge referred to in paragraph 1, subparagraph (b) is registered or recorded, if different to the registry of ships or equivalent registry; and
 - (c) Information contained in the notice referred to in paragraph 1, subparagraph (c).

Article 5. Certificate of judicial sale

1. At the request of the purchaser [^Aand upon production of any documents necessary to establish the completion of the sale][^Band upon expiry of any time limit for seeking ordinary review of the conduct of the sale],²¹ the public authority designated by the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that:
- (a) The ship was sold in accordance with the law of the State of judicial sale and the notice requirements in article 4;

the Working Group may wish to consider whether subparagraph (c) should require the court to have "been notified" without specifying which person is to notify the court.

¹⁹ *Notice requirements – model form*: The model form contained in Appendix I was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision.

²⁰ *Notice requirements – publication of notice*: Paragraph 3(a) has been amended to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 63). The Working Group may wish to consider whether the words in square brackets are redundant and may thus be omitted.

²¹ *Certificate of judicial sale – conditions for issuance*: The chapeau of article 5(1) has been revised to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 68). It presents two options, reflecting the different proposals put forward during the session (*ibid.*, paras. 66 and 67). The wording of option A is based on article 12(1)(c) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) ("Judgments Convention"). This wording has been adapted to reflect that article 5 is concerned with the finality of a sale and not the res judicata effect of any judgment connected with the sale. The wording of option B is based on article 4(4) of the Judgments Convention. It refers to a review of the "conduct" of the sale as opposed to the avoidance of the "sale" (as referred to in articles 5(6) and 9) in an attempt to limit the forms of redress the availability of which would delay the issuance of the certificate. The chapeau of article 5(1) has also been restructured to reflect the structure of the chapeau of article 7(1).

(b) The ship was physically within the territory of the State of judicial sale at the time of the sale; and

(c) The purchaser acquired clean title to the ship.²²

2. The certificate of judicial sale shall be issued substantially in the form of the model contained in Appendix II and shall contain the following minimum additional particulars:²³

(a) The name of the State of judicial sale;

(b) The name, address and the contact details of the authority issuing the certificate;

(c) The name of the court or other public authority that conducted the judicial sale and the date on which the sale was completed;

(d) The name of the ship and registry of ships or equivalent registry in which the ship is registered;

(e) The IMO number of the ship or, if not available, other information capable of identifying the ship, such as the shipbuilder, time and place of shipbuilding, distinctive number or letters, and recent photographs;

(f) The name, address or residence or principal place of business and contact details, if available, of the owner(s) of the ship immediately prior to the judicial sale;

(g) The name, address or residence or principal place of business and contact details of the purchaser;

(h) The place and date of issuance of the certificate; and

(i) The signature, stamp or other confirmation of authenticity of the certificate.

3. The authority shall promptly transmit the certificate to the repository referred to in article 12.

[4. The authority shall:

(a) Maintain a record of certificates issued, including the particulars of the judicial sale; and

(b) At the request of the registrar or court referred to in articles 7 and 8, verify whether the particulars in the certificate produced correspond with particulars included in the record.²⁴]

²² *Certificate of judicial sale – matters being certified*: At its thirty-seventh session, the Working Group agreed in principle with matching the matters being certified – as listed in subparagraphs (a) to (c) of article 5(1) – to the conditions for issuing the certificate, and asked the Secretariat to propose text to give effect to that approach (A/CN.9/1047/Rev.1, para. 68). As a matter of drafting, presenting the matters being certified also as conditions for issuance in the chapeau of article 5(1) poses some difficulty, particularly in view of the other revisions to the chapeau of article 5(1). As a matter of interpretation, the Working Group may wish to consider whether it is necessary to do so (i.e., whether article 5(1) would require a court to certify legal and factual findings that it was unable to make in the first place). As an alternative, it may wish to consider whether matching the matters being certified to the conditions for issuance can be established by inserting the words “as appropriate” after the word “recording” in the chapeau.

²³ *Certificate of judicial sale – additional particulars*: Article 5(2) has been revised to reflect the deliberations of the Working Group at its thirty-seventh session. Subparagraph (c) has been revised to reflect the prevailing view as to how the place and date of judicial sale should be recorded (A/CN.9/1047/Rev.1, para. 71). The model certificate of judicial sale contained in Appendix has been revised accordingly. Subparagraph (d) has been revised to replace the reference to “port of registry” (ibid., para. 72) and the requirement to specify the purchase price (subparagraph (h) of the second revision) has been removed (ibid.).

²⁴ *Certificate of judicial sale – verification*: The Working Group may wish to consider omitting paragraph 4. For background to the provision, see footnote 25 of the second revision.

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5. The certificate of judicial sale shall constitute conclusive evidence of the particulars therein, including the matters required to be recorded by article 5(1).²⁵

6. A certificate of judicial sale shall have effect under this Convention unless the sale is avoided in the State of judicial sale by a court exercising jurisdiction under article 9 by a judgment that is no longer the subject of review in that State.²⁶

[7. At the request of the purchaser, subsequent purchaser, or any person to whom the notice of judicial sale was to be given, the authority shall transmit to the repository referred to in article 12 the particulars of any decision referred to in paragraph 6.]²⁷

Article 6. International effects of a judicial sale

A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser, provided that the judicial sale was conducted in accordance with the notice requirements in article 4.²⁸

Alternative formulation for article 6

[A State Party shall recognize a certificate of judicial sale issued in another State Party by:

(a) giving effect to the clean title conferred on the purchaser as recorded in the certificate; and

(b) accepting the certificate as conclusive evidence of the additional particulars therein that are required to be recorded by article 5(2).]²⁹

Article 7. Action by registrar

1. At the request of the purchaser [or subsequent purchaser]³⁰ and upon production of the certificate of judicial sale referred to in article 5, the competent registrar or other competent authority³¹ of a State Party shall, in accordance with the law of that State [, but without prejudice to article 6];³²

²⁵ *Certificate of judicial sale – evidentiary value*: Article 5(5) has been revised to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 73).

²⁶ *Certificate of judicial sale – no effect*: Article 5(6) has been revised to reflect the decision of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 74). The word “appeal” has been replaced with “review” to align with the wording of article 4(4) of the Judgments Convention.

²⁷ *Certificate of judicial sale – notification of avoidance*: Article 5(7) has been inserted for the consideration of the Working Group. It is based on a proposal put to the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 74). The word “appeal” has been replaced with “review” to align with the wording of article 4(4) of the Judgments Convention. If this provision is accepted, consequential amendments may need to be made to article 12.

²⁸ *International effects of judicial sale – conditions*: Article 6 (formerly article 6(1) of the second revision) has been amended to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 82).

²⁹ *International effects of judicial sale – alternative formulation*: At its thirty-seventh session, the Working Group requested the Secretariat to propose drafting to reflect an alternative formulation for article 6 based on linking international effect to the production of the certificate (A/CN.9/1047/Rev.1, para. 83). If the alternative formulation is accepted, article 5(5) may be omitted and consequential amendments may need to be made to articles 7(5) and 10.

³⁰ *Action by registrar – application by the purchaser*: Article 7(1) has been revised to reflect the agreement of the Working Group (A/CN.9/1047/Rev.1, para. 94). The wording and structure of the chapeau have been aligned with the chapeau of article 5(1). The Working Group may wish to consider whether article 7 should also require the registrar to take action at the request of a subsequent purchaser (cf. article 6(1) of the original Beijing Draft).

³¹ *Action by registrar – identification of competent authority*: The chapeau of article 7(1) has been revised to insert a reference to any “other competent authority” to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 90).

³² *Action by registrar – compliance with domestic law*: At its thirty-seventh session, the Working Group decided that the requirement of the registrar to take action in accordance with “its

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- (a) Delete any mortgage or registered charge attached to the ship;
 - (b) Delete the ship from the register and issue a certificate of deregistration for the purpose of new registration;
 - (c) Register the ship in the name of the purchaser or subsequent purchaser; and
 - (d) Update the register with any other relevant particulars in the certificate of judicial sale.³³
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 competent registrar [or other competent authority] of a State Party in which the ship was granted bareboat charter registration shall delete the ship from the register and issue a certificate of deletion.³⁴
3. If the certificate of judicial sale is not issued in an official language of the registrar, the registrar or other competent authority may request the purchaser [or subsequent purchaser] to produce a [certified] translation into such an official language.³⁵
4. The registrar 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 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.³⁶

Article 8. No arrest of the ship

1. If an application is brought before a court in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.
2. If a ship is arrested or a similar measure is taken against a ship by order of a court in a State Party for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.
3. If the certificate is not issued in an official language of the court, the court may request the person producing the certificate to produce a [certified] translation into such an official language.

regulations and procedures" should be revised to refer more generally to domestic law requirements (A/CN.9/1047/Rev.1, para. 93). The Working Group agreed that it could consider at a later stage the desirability of an additional provision to the effect that observance of the registration requirements under domestic law would not affect the conferral of clean title on the purchaser (*ibid.*). The words in square brackets have been inserted to assist the Working Group in that regard.

³³ *Action by registrar – updating the register:* Subparagraph (d) has been inserted to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 96).

³⁴ *Action by registrar – bareboat charter registration:* Article 7(2) has been revised to align its wording and structure with article 7(1). The Working Group may wish to confirm whether article 7(2), like article 7(1), should also be addressed to "other competent authorities".

³⁵ *Action by registrar – certification of copies and translations:* At its thirty-seventh session, the Working Group agreed to consider copies and translations in conjunction with article 11. For background to provisions dealing with copies and translations, see A/CN.9/WG.VI/ WP.87/Add.1, paragraphs 17 and 18. In the meantime, article 7(3) has been revised to reflect the agreement of the Working Group at its thirty-seventh session that the registrar should act on the application of the purchaser (see footnote 29 above) and that the application of the purchaser and the production of the certificate of judicial sale are not two separate procedures (A/CN.9/1047/Rev.1, para. 94). Similar revisions have been made to article 7(4).

³⁶ *Action by registrar – grounds for refusal to take action:* Article 7(5) has been revised to reflect the agreement of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 99).

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4. Paragraphs 1 and 2 do not apply if the court determines that dismissing the application or ordering the release of the ship, as the case may be, would be manifestly contrary to the public policy of that State.³⁷

Article 9. Jurisdiction to avoid and suspend judicial sale

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.
2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party or to suspend its effects.
3. A judicial sale of a ship shall [not have][cease to have] the effect provided in article 6 in a State Party if the sale is avoided in the State of judicial sale by a court exercising jurisdiction under paragraph 1 by a judgment that is no longer subject to appeal in that State.³⁸
4. The effects of a judicial sale of a ship provided in this Convention shall be suspended in a State Party if, and for as long as, the effects of the sale are suspended in the State of judicial sale by a court exercising jurisdiction under paragraph 1.

*Article 10. Circumstances in which judicial sale has no international effect*³⁹

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be [manifestly] contrary to the public policy of that other State Party.⁴⁰

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

1. The certificate of judicial sale referred to in article 5 shall be exempt from legalization or similar formality.⁴¹

³⁷ *No arrest – grounds for refusal to take action:* Article 8(4) has been revised to reflect the decision of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 106).

³⁸ *Avoidance of judicial sale – international effect:* Article 9(3) remains unchanged from the second revision. The provision was considered by the Working Group at its thirty-seventh session, where it was agreed that the issue of the effect of avoidance could be revisited at a later stage (A/CN.9/1047/Rev.1, para. 108). In doing so, the Working Group may wish to consider the revisions made to article 5(6).

³⁹ *Grounds for refusal – general:* Article 10 has been revised to reflect the decision of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 85).

⁴⁰ *Grounds for refusal – public policy:* At its thirty-seventh session, the Working Group considered a proposal to delete the word “manifestly” and decided to retain the wording of the public policy ground for the time being (A/CN.9/1047/Rev.1, para. 86).

⁴¹ *Certificate of judicial sale – no legalization:* Article 11(1) has not been considered by the Working Group and remains unchanged from the second revision. It has been noted in the Working Group that the certificate of judicial sale would ordinarily be a public document within the meaning of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) (United Nations, *Treaty Series*, vol. 527, No. 7625) (“Apostille Convention”) and would thus be exempt from legalization under article 2 of that Convention among the over 100 States that are party to it (A/CN.9/973, para. 45; see further analysis in A/CN.9/WG.VI/WP.84, footnote 48). It has been suggested that the Working Group should consider including a provision that removes any requirement of legalization or similar requirement (such as the issuance of an Apostille) for the certificate of judicial sale (*ibid.*). Article 11(1) reflects that suggestion. It is based on similar provisions found in instruments concluded by the Hague Conference on Private International Law, such as article 18 of the Convention on Choice of Court Agreements (United Nations, *Treaty Series*, No. 53483). Nothing in the Apostille Convention precludes a State Party from agreeing to dispense with all requirements for certifying the authenticity of certain public documents, a scenario expressly contemplated in article 3(2) of that Convention. The present provision would not preclude the authority addressed from determining that a document purporting to be a certificate of judicial sale was not authentic. See also A/CN.9/WG.VI/WP.88, paragraph 85.

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2. The certificate of judicial sale may be in the form of an electronic communication provided that:

(a) The information contained therein is accessible so as to be usable for subsequent reference;

(b) A method is used to identify the authority issuing the certificate and to indicate its intention in respect of the information contained therein;

(c) A method is used to detect any alteration to the electronic communication after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(d) The method referred to in subparagraphs (b) and (c) is:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances;

(ii) Proven in fact to have fulfilled the functions described in those subparagraphs, by itself or together with further evidence.⁴²

3. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

*Article 12. Repository*⁴³

1. The repository of notices given under article 4 and certificates issued under article 5 shall be [the Secretary-General of the United Nations or an institution named by UNCITRAL].

2. Upon receipt of a notice or certificate under this Convention, the repository shall promptly make it available to the public.

*Article 13. Communication between Parties*⁴⁴

For the purposes of articles 7 and 8, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.

⁴² *Certificate of judicial sale – issuance in electronic form*: Article 11(2) was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. The Working Group has asked the Secretariat to consider the implications of allowing a certificate of judicial sale to be issued in electronic form (A/CN.9/1007, para. 92). UNCITRAL has developed a number of legislative texts that enable the legal recognition of documents issued in electronic form, most relevantly the Model Law on Electronic Commerce (1996) (United Nations publication, Sales No. E.99.V.4) and the United Nations Convention of the Use of Electronic Communications in International Contracts (2005) (United Nations, *Treaty Series*, vol. 2898, No. 50525) (“ECC”). While those texts are predominantly addressed to business-to-business communications, the functional equivalence rules that they establish could equally be applied to communications involving public authorities. Article 11(2) has been drafted by the Secretariat for consideration by the Working Group. It is a combination of the functional equivalence provisions for the requirement of a document or communication to be in writing (cf. ECC article 9(2)), the requirement that a document or communication be signed (cf. ECC article 9(3)) and the requirement that a document or communication be available in original form (cf. ECC article 9(4)(a)). Article 11(2) establishes minimum requirements for the legal recognition of certificates of judicial sale issued in electronic form; it does not prevent the law or procedures of the issuing authority from specifying additional requirements for the certificates it issues.

⁴³ *Centralized online repository*: While the Working Group discussed the establishment of a centralized online repository at its thirty-seventh session (A/CN.9/1047/Rev.1, paras. 76–81), it did not consider article 12, which therefore remains unchanged from the second revision.

⁴⁴ *Cooperation between authorities*: Article 13 was not considered by the Working Group at its thirty-seventh session, and therefore remains unchanged from the second revision. It reflects a suggestion that the draft instrument contain a provision similar to article 14 of the MLMC 1993, which provides for cooperation between authorities (A/CN.9/973, para. 74). See also A/CN.9/WG.VI/ WP.88, paragraphs 36 and 87.

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Article 14. Relations with other international instruments

1. Nothing in this Convention shall derogate from any other basis for the recognition of a judicial sale of a ship under any other bilateral or multilateral convention, instrument or agreement or principle of comity.⁴⁵
2. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that Convention or Protocol.⁴⁶

[Article 14bis. Matters not governed by this Convention⁴⁷

Nothing in this Convention shall affect:

- (a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
- (b) Any personal claim against a person who owned the ship prior to the judicial sale.]

Article 15. Depositary⁴⁸

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 16. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in [city], [on][from] [date/date range], and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.

⁴⁵ *Relationship with other treaties and national law*: Article 14(1) reproduces article 10 of the Beijing Draft with minor amendments. The provision was not considered by the Working Group at its thirty-sixth or thirty-seventh sessions, although the Working Group did discuss the relationship between the draft convention and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (United Nations, *Treaty Series*, vol. 658, No. 9432) at the latter session (A/CN.9/1047/Rev.1, para. 60). At the thirty-fifth session, there was some discussion about the relationship between the Beijing Draft and the Judgments Convention (A/CN.9/973, para. 24). That issue is considered in document A/CN.9/WG.VI/WP.85. The Working Group may wish to consider simplifying this provision by replacing the words “bilateral or multilateral convention, instrument or agreement or principle of comity” with “treaty”, as well as expanding the provision to preserve the application of national law that is more favourable to the recognition of foreign judicial sales (which may well be based on the principle of comity). See also A/CN.9/WG.VI/WP.88, paragraphs 88 to 89.

⁴⁶ *Relationship with the Geneva Convention*: The Working Group agreed to retain article 14(2) at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 29). For background to the provision, see A/CN.9/WG.VI/WP.87/Add.1, paragraphs 7 to 9.

⁴⁷ *Matters not governed by the Convention*: Article 14bis reproduces article 6(2) of the second revision. At the thirty-seventh session of the Working Group, diverging view were expressed as to the placement of this provision, with support expressed for (a) leaving it in article 6, (b) moving it to the provision on scope of application (article 3), or (c) moving it to a new provision that identifies matters that are not governed by the draft convention (A/CN.9/1047/Rev.1, para. 47). The present draft implements option (c). The placement the provision reflects the approach taken in the Rotterdam Rules (see chapter 17 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, A/Res/63/122, Annex), which lists a broad range of matters. The provision is placed in square brackets to indicate that no decision has been taken on its placement. If no further matters are added, it may be preferable for the provision to be located alongside the provision whose operation it clarifies, namely article 6.

⁴⁸ *Final clauses*: The final clauses in articles 15 to 20 were not considered by the Working Group at its thirty-seventh session, and therefore remain unchanged from the second revision. They are drawn from the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018), the most recent treaty prepared by UNCITRAL.

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3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of States Parties is relevant in this Convention, the regional economic integration organization shall not count as a State Party in addition to its member States that are Parties to the Convention.
2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

Article 18. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:
 - (a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;
 - (b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;
 - (c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.
4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Entry into force

1. This Convention shall enter into force six months after deposit of the [third] instrument of ratification, acceptance, approval or accession.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has

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been extended in accordance with article 18 six months after the notification of the declaration referred to in that article.

Article 20. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the [third] instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 21. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. [The Convention shall continue to apply to judicial sales conducted before the denunciation takes effect.]

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

Appendix I to the [draft instrument on the judicial sale of ships]**Notice of Judicial Sale⁴⁹**

Issued in accordance with the provisions of article 4 of the [draft instrument on the judicial sale of ships]

In accordance with [relevant provisions of the State's rules of civil procedure governing notices of judicial sales], notice is hereby given that by order of [name of court or other public authority conducting the sale and such particulars concerning the sale or the proceedings leading to the judicial sale as the court or other authority determines are sufficient to protect the interests of persons entitled to notice under article 4]

on [date/month/year], **at** [hour] **at** [place] [If the time and place of the judicial sale cannot be determined with certainty, the approximate time and anticipated place of the judicial sale, provided that an additional notice of the actual time and place of the judicial sale shall be provided when known but, in any event, not less than seven days prior to the judicial sale.]⁵⁰

the ship [description by name of the ship, the IMO number (if assigned), or, where not available other information capable of identifying the ship, such as the shipbuilder, time and place of the shipbuilding, licence number, and recent photographs]

physically present at [location of the ship]

owned by [names of the owner of the ship immediately prior to the judicial sale and the bareboat charterer (if any), as appearing in the registry of ships in which the ship is registered or granted bareboat charter registration]

will be **sold by way of judicial sale** free and clear of all mortgages and charges [to the highest bidder at or above the amount as set by the [court or other authority conducting the sale] subject to the terms and conditions set out below.]

Terms of the sale: [such terms and conditions as apply to judicial sales conducted in the Party to the Convention, for instance: disclaimers of warranties or liabilities by the court or other authority; requirements and procedures for registration or admission to bid at the sale; payment conditions; finality of sales; consequences of failure to pay; persons excluded from bidding (e.g. under anticorruption, anti-money-laundering or similar regulations)].⁵¹

⁴⁹ *Notice of judicial sale – notice period:* Article 4(1) requires the notice to be given prior to the judicial sale. The time between the giving of notice and the actual sale should allow the interested parties to make the necessary arrangements to bid if they so wish. While 30 days, as provided for in article 11(2) of the MLMC 1993, would generally constitute an adequate period, the court or other authority conducting the judicial sale may have the discretion to provide a shorter notice period (for instance where the ship faces deterioration). The notice shall be in writing in the manner customarily used by the courts of the State of judicial sale for similar purposes, which may include, (a) registered mail or courier; (b) electronic means; or (c) any other manner agreed to by the person to whom the notice is to be given.

⁵⁰ *Notice of judicial sale – time and place of judicial sale unknown:* This alternative was provided in article 3(3)(b) of the original Beijing Draft, which is based on article 11(2) of the MLMC 1993. A concern has been raised that the proviso for a seven-day notice period in the event that the time and place of the judicial sale cannot be determined with certainty might, in practice, supersede the default 30-day notice period (A/CN.9/973, para. 75). This proviso is contained in the MLMC 1993. The Working Group may wish to consider whether the proviso should be contained in a separate provision in line with the drafting of the MLMC 1993.

⁵¹ *Notice of judicial sale – terms of sale:* The present draft leaves these matters, which include modalities for payment, to the domestic law of the State of judicial sale. Failure to comply with these terms may give rise to legal challenge in the State of judicial sale before a court exercising jurisdiction under article 9.

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Appendix II to the [draft instrument on the judicial sale of ships]**Certificate of judicial sale**

Issued in accordance with the provisions of article 5 of the [draft instrument on the judicial sale of ships]

This is to certify that:

- (a) The ship described below was sold by way of judicial sale in accordance with the law of the State of judicial sale and the notice requirements in article 4 of the Convention;
- (b) The ship was physically within the territory of the State of judicial sale at the time of the sale; and
- (c) The purchaser acquired clean title to the ship.

1. State of judicial sale

2. Authority issuing this certificate

2.1 Name

2.2 Address

2.3 Telephone/fax/email, if available

3. Judicial sale

3.1 Name of court/public authority conducting the sale

3.2 Date of sale (e.g., date of order confirming the sale)

4. Ship

4.1 Name

4.2 IMO number

4.4 Registry

4.5 Other information capable of identifying the ship, such as the shipbuilder, time and place of the shipbuilding, distinctive number or letters, and recent photographs, if available

(Please attach any photos to the certificate)

5. Owner(s) immediately prior to the judicial sale

5.1 Name

5.2 Address or residence or principal place of business

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5.3 Telephone/fax/email

6. Purchaser

6.1 Name

6.2 Address or residence or principal place of business

6.3 Telephone/fax/email

At..... On
(place) (date)

.....
Signature and/or stamp

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

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I. Introduction

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

II. Organization of the session

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

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

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

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

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

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

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

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

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

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Vikum DE ABREW (Sri Lanka)

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

8. The Working Group had before it the following documents:
 - (a) An annotated provisional agenda (A/CN.9/WG.VI/WP.89);
 - (b) An annotated third revision of the Beijing Draft² prepared by the Secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-seventh session (A/CN.9/WG.VI/WP.90) ("third revision").
9. The Working Group adopted the following agenda:
 1. Opening of the session and scheduling of meetings.
 2. Adoption of the agenda.
 3. Future instrument on the judicial sale of ships.

III. Deliberations and decisions

10. The deliberations and decisions of the Working Group on the topic are contained in chapter IV below.
11. The Working Group focused its deliberations on the following issues: (a) dealing with clean title sales; (b) provisions relating to the certificate of judicial sale; (c) provisions of article 9 not considered at the thirty-seventh session; and (d) definitions not considered at the thirty-seventh session. In view of the reduced meeting times owing to limitations arising from the format of the session, informal consultations were held during the session to exchange views on those issues, as well as on proposals put forward during the session on other issues.
12. Differing views were expressed on the merits of the informal consultations. It was observed that, while it was legitimate to use informal consultations to make progress given time constraints, not all delegations had taken part in the informal consultations during the session, and work had been advanced on certain issues without those issues being fully deliberated in the meetings of the Working Group. It was added that the Working Group should not proceed with its work on that basis. In response to those observations, it was noted that the informal consultations had been useful by giving participants in the Working Group session additional time to exchange views on various matters, which had allowed the Working Group to cover all the issues that had been put forward for deliberation. It was pointed out that the informal consultations had been open to all delegations via remote participation and had attracted a relatively large number of delegates. It was added that no decision had been made through informal consultations, and that the views exchanged during the consultations had been consistently reported back to the meetings of the Working Group, where delegates had the opportunity to reiterate views expressed during the consultations. Informal consultations were a common practice in various international bodies, including within the United Nations, and States were always free to exchange views and consult with one another on matters of common interest.

IV. Future instrument on judicial sale of ships

A. Dealing with clean title sales

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

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

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

1. Article 3(1)(b)

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

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

2. Function of the notice requirements

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

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

3. Content of the notice requirements

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

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

4. Article 6

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

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

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

B. Provisions relating to the certificate of judicial sale

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Placement of article 11

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

C. Definitions

1. “Charge” (article 2(a))

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

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

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

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

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

2. “Maritime lien” (article 2(d))

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

3. “Mortgage” (article 2(e))

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

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

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

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

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

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

D. Other issues

1. Time of judicial sale

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

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

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

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

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

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

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

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

2. Grounds for avoidance

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

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

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

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

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

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International Trade Law**
Working Group VI (Judicial Sale of Ships)
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Vienna, 18–22 October 2021

**Draft Instrument on the Judicial Sale of Ships:
Annotated Fourth Revision of the Beijing Draft**

Note by the Secretariat

1. The annex to this document contains an annotated fourth revision of the Beijing Draft (“fourth revision” or “present draft”), which the secretariat has prepared to incorporate the deliberations and decisions of the Working Group at its thirty-eighth session (A/CN.9/1053, paras. 13–60). The Working Group may wish to use the fourth revision as a basis for its deliberations at its thirty-ninth session.

2. The annotations make reference to the “original” Beijing Draft (A/CN.9/WG.VI/WP.82), as well as to its “first revision” (A/CN.9/WG.VI/WP.84), “second revision” (A/CN.9/WG.VI/WP.87) and “third revision” (A/CN.9/WG.VI/WP.90).

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Annex**Fourth Revision of the Beijing Draft***The States Parties to this Convention,*

Recognizing that the needs of the maritime industry and ship finance require that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the owners of ships,

Concerned that any uncertainty for the prospective purchaser regarding the international recognition of a judicial sale of a ship and the deletion or transfer of registry may have an adverse effect upon the price realized by a ship sold at a judicial sale to the detriment of interested parties,

Convinced that necessary and sufficient protection should be provided to purchasers of ships at judicial sales by limiting the remedies available to interested parties to challenge the validity of the judicial sale and the subsequent transfers of the ownership in the ship,

Considering that once a ship is sold by way of a judicial sale, the ship should in principle no longer be subject to arrest for any claim arising prior to its judicial sale,

Considering further that the objective of recognition of the judicial sale of ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the judicial sale, the legal effects of that sale and the deregistration or registration of the ship,

Have agreed as follows:¹

Article 1. Purpose

This Convention governs the effects, in a State Party, of the judicial sale of a ship conducted in another State Party.

Article 2. Definitions

For the purposes of this Convention:

- (a) "Charge" means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or hypothèque;
- (b) "Clean title" means title free and clear of any mortgage, hypothèque or charge;
- (c) "Judicial sale" of a ship means any sale of a ship:
 - (i) Which is ordered, approved or confirmed by a court or other public authority² either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and

¹ *Preamble*: The preamble reproduces the preamble contained in the original Beijing Draft and has not been considered by the Working Group.

² *Definitions – "authority" and "public authority"*: The present draft refers to a "public authority" conducting a judicial sale (article 2(c)(i)) or issuing a certificate of judicial sale (article 5(1)), as well as to an "authority" taking action on the register (article 7) and an "authority" of one State party corresponding directly with that of another State (article 12). It was suggested at the thirty-seventh session that the term "public authority" in article 2(c)(i) should be defined (A/CN.9/1047/Rev.1, para. 32). It has also been suggested that the term "authority" should be defined for the purposes of article 12 (A/CN.9/WG.VI/ WP.88, para. 36). Neither suggestion was considered by the Working Group at its thirty-eighth session.

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- (ii) For which the proceeds of sale are made available to the creditors;
- (d) “Maritime lien” means any charge³ that is recognized as a maritime lien or privilège maritime on a ship under applicable law;
- (e) “Mortgage” or “hypothèque” means any mortgage or hypothèque that is:⁴
 - (i) Effected on a ship and registered in the State in whose registry of ships or equivalent registry the ship is registered; and
 - [(ii) Recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale;]
- (f) “Owner” of a ship means any person registered as the owner of the ship in the registry of ships or an equivalent registry in which the ship is registered;⁵
- (g) “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions;
- [(h) “Purchaser” means any person to whom the ship is sold in the judicial sale];⁶
- (i) “Registered charge” means any charge that is registered in the registry of ships or an equivalent registry in which the ship is registered [or in any different registry in which mortgages or hypothèques are registered in the State in whose registry of ships or equivalent registry the ship is registered];⁷

³ *Definitions – “maritime lien”*: At its thirty-eighth session, the Working Group agreed to retain the definition without amendment (A/CN.9/1053, para. 44). The word “claim” has been replaced with “charge” to reflect that a maritime lien is defined as a charge in article 2(a).

⁴ *Definitions – “mortgage”*: The definition of “mortgage” has been revised to reflect the deliberations of the Working Group at its thirty-eighth session (A/CN.9/1053, paras. 45–49). In particular, subparagraph (i) has been amended to delete reference to recordation (*ibid.*, para. 48), while subparagraph (ii) has been placed in square brackets to indicate its possible deletion, for which broad support was expressed within the Working Group (*ibid.*, para. 47). The present draft has also been amended throughout to refer to “hypothèque” alongside “mortgage”, as agreed by the Working Group (*ibid.*, para. 45: see the definitions of “charge”, “clean title”, “mortgage” and “registered charge”, as well as articles 4(1)(b), 4(4)(b), 7(1)(a) and Appendix I).

⁵ *Definitions – “owner”*: The definition of “owner” was not considered by the Working Group at its thirty-seventh or thirty-eighth sessions, and therefore remains unchanged from the second revision. The Working Group may wish to consider aligning the definition with the definition of “ship” in article 2(j), which has been revised to include a requirement of registration.

⁶ *Definitions – “purchaser”*: The definition of “purchaser” was not considered by the Working Group at its thirty-seventh or thirty-eighth sessions, and therefore remains unchanged from the second revision. At its thirty-sixth session, the Working Group agreed to put the definition in square brackets to indicate its possible deletion and asked the secretariat to propose text for a definition for future consideration that did not refer to ownership (A/CN.9/1007, para. 27). The present draft of the definition responds to that request.

⁷ *Definitions – “registered charge”*: The definition has been inserted to reflect the deliberations of the Working Group at its thirty-eighth session (A/CN.9/1053, para. 43). It is based on the definition of “registered charge” in the original Beijing Draft (A/CN.9/WG.VI/WP.82, art. 1(o)), which refers to the registry of ships. The definition has been revised to reflect how that registry is referenced in the definition of “owner” (see A/CN.9/1007, para. 22). It has been observed in the Working Group that, in some jurisdictions, the registry of ships (or equivalent registry) is separate from the registry of ship mortgages (see A/CN.9/1007, para. 97), and that the practice of registering charges in those separate registries is contemplated in article 4(4)(b) (see A/CN.9/1047/Rev.1, para. 55). The words in square brackets are proposed for the consideration of the Working Group if it wishes to cover charges that are registered in those separate registries. The words refer only to registries of ship mortgages, which may address concerns raised at the thirty-seventh session about the need for a connection between the registry in which the charge is registered and the registry of ships (*ibid.*).

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(j) "Ship" means any ship or other vessel [registered in a registry that is open to public inspection] 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;⁸

(k) "State of judicial sale" means the State in which the judicial sale of a ship is conducted;

(l) "Subsequent purchaser" means any person who purchases the ship previously sold to a purchaser in the judicial sale.⁹

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:

(a) The ship was physically within the territory of the State of judicial sale at the time of the sale; and

(b) Under the law of that State, the judicial sale confers clean title to the ship on the purchaser.

2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, at the time of judicial sale, only on government non-commercial service.

Article 4. Procedure and notice of judicial sale

[1bis. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, including as regards notification. The law of the State of judicial sale shall further determine the time of the sale for the purposes of this Convention.]¹⁰

1. Notwithstanding paragraph 1bis, if a certificate is to be issued in accordance with article 5, prior to the judicial sale of a ship, a notice of the sale shall be given to:¹¹

(a) The registrar of the registry of ships or equivalent registry in which the ship is registered;

(b) All holders of any mortgage, hypothèque or registered charge, provided that the registry in which it is registered, and any instrument required to be registered with the registrar under the law of the State of the registry, are open to public inspection, and that extracts from the registry and copies of such instruments are obtainable from the registrar;

⁸ *Definitions – "ship"*: At its thirty-seventh session, the Working Group agreed to insert the words in square brackets to address a concern that the draft convention should only apply to vessels that are registered (A/CN.9/1047/Rev.1, para. 28). The Working Group agreed to revert to the matter at a later stage. The Working Group did not consider the definition at its thirty-eighth session.

⁹ *Definitions – "subsequent purchaser"*: The definition of "subsequent purchaser" was not considered by the Working Group at its thirty-seventh or thirty-eighth sessions, and therefore remains unchanged from the second revision. The definition has been aligned with the definition of "purchaser", as requested by the Working Group, and is designed to cover not only the first subsequent purchaser but also later purchasers (A/CN.9/1007, para. 27).

¹⁰ *Procedural requirements*: It has been emphasized within the Working Group that the convention should not govern the procedure for judicial sales, and that those procedures differ among States. One area of difference is the requirements under domestic law for notifying or advertising the sale. Another area of difference is the circumstances in which a judicial sale procedure starts and ends, and the various stages of the procedure in between. While article 14 of the present draft already lists several matters not governed by the convention, it may be useful for the convention to include a clear statement that procedural matters are governed by the law of the State of judicial sale. Article 4(1bis) has therefore been inserted for consideration by the Working Group.

¹¹ *Notice requirements – function*: At the thirty-eighth session, the prevailing view within the Working Group was that the notice requirements in article 4 did not serve as a stand-alone requirement but needed to be read together with article 5 (certificate of judicial sale) and following provisions (A/CN.9/1053, para. 17). The chapeau of article 4(1) has been amended for the consideration of the Working Group to confirm that view.

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- (c) All holders of any maritime lien, provided that they have notified the court or other authority conducting the judicial sale of the claim secured by the maritime lien [in accordance with the regulations and procedures of the State of judicial sale];¹²
 - (d) The owner of the ship for the time being; and
 - (e) If the ship is granted bareboat charter registration in a State:
 - (i) The person registered as the bareboat charterer of the ship in the registry of ships or equivalent registry in that State;¹³ and
 - (ii) The registrar of the registry of ships or equivalent registry in that State.
2. The notice shall be given in accordance with the law of the State of judicial Sale, and shall contain, as a minimum, the information mentioned in the model contained in Appendix I to this Convention.¹⁴
3. The notice shall also be:
- (a) Published by press announcement in the State of judicial sale [and, if required by the law of the State of judicial sale, in other publications published or circulated elsewhere];¹⁵ and
 - (b) Transmitted to the repository referred to in article 11 for publication.
4. In determining the identity or address of any person to whom the notice is to be given, reliance may be placed exclusively on:
- (a) Information set forth in the registry of ships or equivalent registry in which the ship is registered or of the State in which it is granted bareboat charter registration;
 - (b) Information set forth in the registry in which the mortgage, hypothèque or charge referred to in paragraph 1, subparagraph (b) is registered, if different to the registry of ships or equivalent registry; and
 - (c) Information contained in the notice referred to in paragraph 1, subparagraph (c).

¹² *Notice requirements – notifying holders of maritime liens*: Subparagraph (c) reflects the deliberations of the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 54). The third revision (A/CN.9/WG.VI/WP.90, footnote 17) invited the Working Group to consider several aspects of the provision which were not considered at the thirty-eighth session, namely (a) the insertion of the words “in accordance with its regulations and procedures”, and (b) whether, owing to the variety of procedures by which a claim secured by a maritime lien may be notified, the proviso should be for the court to be notified without specifying which person is to notify the court, in which case the words “they have notified the court or other authority conducting the judicial sale of the claim secured by the maritime lien” could be replaced with the words “the court or other authority conducting the judicial sale has been notified of the claim secured by the maritime lien”.

¹³ *Notice requirements – bareboat charterer*: The original Beijing Draft did not require notice to be given to bareboat charterers. That requirement was added following a suggestion made at the thirty-sixth session (A/CN.9/1007, para. 63). Subsequent revisions referred to the bareboat charterer registered in the State of registration (see, e.g., article 4(1)(c) of the third revision). The present draft refers to the bareboat charterer registered in the State of bareboat charter registration. The Working Group may wish to confirm that the new reference in subparagraph (e)(i) is correct.

¹⁴ *Notice requirements – model form*: See footnote 33.

¹⁵ *Notice requirements – publication of notice*: Paragraph 3(a) was considered by the Working Group at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 63). The Working Group may wish to consider whether the words in square brackets may be omitted on the basis that publication in such “other publications” is already covered by article 4(2).

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Article 5. Certificate of judicial sale

1. Upon completion of the sale to the purchaser under the law of the State of judicial sale, the public authority designated by the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that:¹⁶

(a) The ship was sold in accordance with the law of the State of judicial sale and the notice requirements in article 4;

(b) The ship was physically within the territory of the State of judicial sale at the time of the sale; and

(c) The purchaser acquired clean title to the ship.

2. The certificate of judicial sale shall be issued substantially in the form of the model contained in Appendix II and shall contain the following minimum additional particulars:

(a) The name of the State of judicial sale;

(b) The name, address and the contact details of the authority issuing the certificate;

(c) The name of the court or other public authority that conducted the judicial sale and the date on which the sale was completed;

(d) The name of the ship and registry of ships or equivalent registry in which the ship is registered;

(e) The IMO number of the ship or, if not available, other information capable of identifying the ship, such as the shipbuilder, time and place of shipbuilding, distinctive number or letters, and recent photographs;

(f) The name, address or residence or principal place of business and contact details, if available, of the owner(s) of the ship immediately prior to the judicial sale;

(g) The name, address or residence or principal place of business and contact details of the purchaser;

(h) The place and date of issuance of the certificate; and

(i) The signature, stamp or other confirmation of authenticity of the certificate.

3. The authority shall promptly transmit the certificate to the repository referred to in article 11.

4. The certificate of judicial sale shall be exempt from legalization or similar formality.¹⁷

5. The certificate of judicial sale shall constitute conclusive evidence of the particulars therein, including the matters required to be recorded by paragraph 1.

[6. A certificate of judicial sale shall have effect under this Convention unless the sale is avoided in the State of judicial sale by a court exercising jurisdiction under article 9 by a judgment that is no longer the subject of review in that State.]¹⁸

¹⁶ *Certificate of judicial sale – conditions for issuance*: The chapeau of article 5(1) has been revised to reflect the amendments agreed upon by the Working Group at its thirty-eighth session (A/CN.9/1053, para. 26).

¹⁷ *Certificate of judicial sale – no legalization*: Article 5(4) of the third revision established a verification procedure for certificates of judicial sale, which the Working Group agreed to delete at its thirty-eighth session (A/CN.9/1053, para. 32). In the present draft, article 5(4) contains the provision on no legalization that was contained in article 11(1) of the third revision, which the Working Group agreed to place in article 5 or in a separate adjacent article (A/CN.9/1053, para. 38).

¹⁸ *Certificate of judicial sale – effect in the event of avoidance*: See footnote 26.

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[7. At the request of the purchaser, subsequent purchaser, or any person to whom the notice of judicial sale was to be given, the authority shall transmit to the repository referred to in article 11 the particulars of any judgment referred to in paragraph 6.]

Article 5bis. Electronic form of the certificate of judicial sale^{19,20}

1. The certificate of judicial sale may be in the form of an electronic record provided that:

- (a) The information contained therein is accessible so as to be usable for subsequent reference;
 - (b) A method is used to identify the authority issuing the certificate; and
 - (c) A method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.
2. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

Article 6. International effects of a judicial sale

A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.²¹

Article 7. Action by registrar

1. At the request of the purchaser or subsequent purchaser²² and upon production of the certificate of judicial sale referred to in article 5, the competent registrar or other competent authority of a State Party shall, in accordance with the law of that State [, but without prejudice to article 6]²³:

- (a) Delete any mortgage, hypothèque or registered charge attached to the ship;
- (b) Delete the ship from the register and issue a certificate of deregistration for the purpose of new registration;

¹⁹ *Additional provisions relating to the certificate of judicial sale – placement*: The provisions of article 5bis reproduce articles 11(2) and (3) of the third revision. The current placement of the provisions reflects the deliberations of the Working Group at its thirty-eighth session (A/CN.9/1053, para. 38). If articles 5(6) and 5(7) are deleted (see footnote 26), it might be desirable for the provisions to be incorporated into article 5 itself.

²⁰ *Additional provisions relating to the certificate of judicial sale – copies and translations*: Articles 7(3) and 8(3) provide for the production of a translation of the certificate of judicial sale. Article 7(4) provides for the production of a copy of the certificate of judicial sale in addition to (not in substitution of) production of the original. The Working Group agreed at its thirty-seventh session to consider translation and copy requirements in conjunction with the provisions of article 11 (A/CN.9/1047/Rev.1, para. 101), which are set out in article 5bis of the present draft. The Working Group did not consider the issue at its thirty-eighth session, although a view in support of maintaining the translation and copy requirements in articles 7(3) and 7(4) was expressed at the session (A/CN.9/1053, para. 34).

²¹ *International effects of judicial sale – conditions*: Article 6 has been amended to reflect the deliberations of the Working Group at its thirty-eighth session (A/CN.9/1053, paras. 19–21).

²² *Action by registrar – application by the purchaser*: The Working Group has agreed that the registrar (or other authority) should act on the application of the purchaser (A/CN.9/1047/Rev.1, para. 94). Considering that paragraph 1(c) contemplates reregistration of the ship in the name of the subsequent purchaser, the secretariat has updated article 7 to accommodate applications by the subsequent purchaser (cf. article 6(1) of the original Beijing Draft).

²³ *Action by registrar – compliance with domestic law*: The words in square brackets were inserted in the third revision following agreement by the Working Group to consider an additional provision to the effect that observance by the registrar of registration requirements under domestic law would not affect the conferral of clean title on the purchaser (see A/CN.9/WG.VI/WP.90, footnote 32). The issue was not considered by the Working Group at its thirty-eighth session.

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- (c) Register the ship in the name of the purchaser or subsequent purchaser; and
 - (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 competent registrar [or other competent authority] of a State Party in which the ship was granted bareboat charter registration shall delete the ship from the register and issue a certificate of deletion.²⁴
 3. If the certificate of judicial sale is not issued in an official language of the registrar, 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 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 Party 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.

Article 8. No arrest of the ship

1. If an application is brought before a court in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.
2. If a ship is arrested or a similar measure is taken against a ship by order of a court in a State Party for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.
3. If the certificate is not issued in an official language of the court, the court may request the person producing the certificate to produce a [certified] translation into such an official language.
4. Paragraphs 1 and 2 do not apply if the court determines that dismissing the application or ordering the release of the ship, as the case may be, would be [manifestly] contrary to the public policy of that State.

Article 9. Jurisdiction to avoid and suspend judicial sale

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.
2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party or to suspend its effects.
- [3. A judicial sale of a ship shall [not have][cease to have] the effect provided in article 6 in a State Party if the sale is avoided in the State of judicial sale by a court exercising jurisdiction under paragraph 1 by a judgment that is no longer subject to appeal in that State.]
- [4. The effects of a judicial sale of a ship provided in this Convention shall be suspended in a State Party if, and for as long as, the effects of the sale are suspended in the State of judicial sale by a court exercising jurisdiction under paragraph 1.]²⁵

²⁴ *Action by registrar – bareboat charter registration:* The Working Group may wish to confirm whether article 7(2), like article 7(1), should also be addressed to “other competent authorities”.

²⁵ *Suspension of judicial sale:* The original Beijing Draft and subsequent revisions deal with suspending the effects of a judicial sale. The Working Group has so far not considered the issue

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[5. The effects of avoidance of a judicial sale shall be determined by applicable law].²⁶

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

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be [manifestly] contrary to the public policy of that other State Party.²⁷

*Article 11. Repository*²⁸

1. The repository of notices given under article 4 and certificates issued under article 5 shall be [the Secretary-General of the United Nations or an institution named by UNCITRAL].

2. Upon receipt of a notice or certificate under this Convention, the repository shall promptly make it available to the public.

*Article 12. Communication between Parties*²⁹

For the purposes of articles 7 and 8, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.

and may wish to consider whether it is necessary for the convention to address it. While the secretariat has identified cases in which a judicial sale has been or may be suspended before completion (e.g., Francesco Berlingieri, "Synopsis of replies from the Maritime Law Associations", CMI Yearbook 2010 (Antwerp, 2011), pp. 295–301 (replies to question 2.3 of a 2010 CMI questionnaire in respect of the recognition of foreign judicial sales of ships); High Court of England and Wales, *Qatar National Bank v. Owners of the Yacht "Force India"*, case No. AD 2018 000096, Judgment, 25 March 2020, *Lloyd's Law Reports*, vol. 2 (2020), p. 348, [2020] EWHC 719), it has not identified any cases in which the effects of the sale have been or may be suspended after completion. Presumably, if a sale is suspended before completion, no certificate of judicial sale will be issued (article 5(1)) and therefore the judicial sale will have no international effect under the convention (article 6).

²⁶ *Avoidance of judicial sale – international effect*: The Working Group engaged in a detailed discussion at its thirty-eighth session of the legal consequences that would flow in the "exceedingly rare" event of a judicial sale being avoided after issuance of the certificate of judicial sale (A/CN.9/1053, paras. 27–31). Different options were put forward for dealing with the issue (*ibid.*, paras. 29 and 30), which the Working Group agreed to consider further (*ibid.*, para. 31). As an alternative, it was suggested that the convention should not seek to find a solution, and therefore that the provisions dealing with the issue should be deleted and replaced by a provision acknowledging that the issue is a matter for the domestic law of the State concerned (*ibid.*). To reflect the outcome of those deliberations, articles 5(7), 9(3) and 9(4) have been placed in square brackets, and article 9(5) has been inserted for consideration by the Working Group as an alternative to those provisions.

²⁷ *Grounds for refusal – public policy*: At its thirty-seventh session, the Working Group considered a proposal to delete the word "manifestly" and decided to retain the wording of the public policy ground for the time being (A/CN.9/1047/Rev.1, para. 86). The issue was not considered by the Working Group at its thirty-eighth session.

²⁸ *Centralized online repository*: Article 11 (article 12 of the second and third revisions) was inserted in the first revision of the Beijing Draft (para. 8(k)) in response to deliberations of the Working Group at its thirty-fifth session (A/CN.9/973, paras. 46 and 73). The Working Group has not yet considered the provision.

²⁹ *Cooperation between authorities*: Article 12 (article 13 of the second and third revisions) was not considered by the Working Group at its thirty-seventh or thirty-eighth sessions, and therefore remains unchanged from the second revision. It reflects a suggestion made at the thirty-fifth session that the draft instrument should contain a provision similar to article 14 of the International Convention on Maritime Liens and Mortgages (1993), which provides for cooperation between authorities (A/CN.9/973, para. 74).

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Article 13. Relations with other international conventions

1. Nothing in this Convention shall derogate from any other basis for the recognition of a judicial sale of a ship under any other international convention.³⁰
2. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that Convention or Protocol.

[Article 14 Matters not governed by this Convention]³¹

Nothing in this Convention shall affect:

- (a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
- (b) Any personal claim against a person who owned the ship prior to the judicial sale.]

Article 15. Depositary³²

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 16. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in [city], [on][from] [date/date range], and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.
3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over

³⁰ *Relationship with other international conventions and domestic law:* Article 13(1) (article 14(1) of the second and third revisions) reproduces article 10 of the Beijing Draft with amendments suggested by the secretariat in the third revision (A/CN.9/WG.VI/ WP.90, footnote 45). The provision has not been considered by the Working Group. The Working Group may wish to consider expanding the provision to preserve the application of domestic laws that are more favourable to the recognition of foreign judicial sale, in which case a third paragraph could be inserted to the effect that nothing in the convention shall prevent the recognition of a judicial sale under domestic law.

³¹ *Matters not governed by the Convention:* Article 14 (article 14bis of the third revision) reproduces article 6(2) of the second revision. At the thirty-seventh session of the Working Group, diverging views were expressed as to the placement of this provision, with support expressed for (a) leaving it in article 6, (b) moving it to the provision on scope of application (article 3), or (c) moving it to a new provision that identifies matters that are not governed by the draft convention (A/CN.9/1047/Rev.1, para. 47). The Working Group did not consider the issue at its thirty-eighth session. The present draft implements option (c). The provision is placed in square brackets to indicate that no decision has been taken on its placement.

³² *Final clauses:* The final clauses in articles 15 to 20 were not considered by the Working Group at its thirty-seventh or thirty-eighth sessions, and therefore remain unchanged from the second revision. They are drawn from the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018), the most recent treaty prepared by UNCITRAL.

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matters governed by this Convention. Where the number of States Parties is relevant in this Convention, the regional economic integration organization shall not count as a State Party in addition to its member States that are Parties to the Convention.

2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

3. Any reference to a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

Article 18. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:

(a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Entry into force

1. This Convention shall enter into force six months after deposit of the [third] instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 18 six months after the notification of the declaration referred to in that article.

Article 20. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

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2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference.
3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.
4. An adopted amendment shall enter into force six months after the date of deposit of the [third] instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties to the Convention that have expressed consent to be bound by it.
5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 21. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. [The Convention shall continue to apply to judicial sales conducted before the denunciation takes effect.]

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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Appendix I to the [draft instrument on the judicial sale of ships]

Notice of Judicial Sale³³

Given in accordance with the provisions of article 4 of the [draft instrument on the judicial sale of ships] and transmitted in the manner customarily used by the courts of the State of judicial sale for similar purposes, which may include (a) registered mail or courier; (b) electronic means; (c) any other manner agreed to by the person to whom the notice is to be given. ^(Sec note 1)

In accordance with [relevant provisions of the State's rules of civil procedure governing notices of judicial sales], notice is hereby given that by order of [name of court or other public authority conducting the sale and such particulars concerning the sale or the proceedings leading to the judicial sale as the court or other authority determines are sufficient to protect the interests of persons entitled to notice under article 4]

the ship [description by name of the ship, the IMO number (if assigned), or, where not available other information capable of identifying the ship, such as the shipbuilder, time and place of the shipbuilding, licence number, and recent photographs]

physically present at [location of the ship]

owned by [names of the owner of the ship immediately prior to the judicial sale and the bareboat charterer (if any), as appearing in the registry of ships in which the ship is registered or granted bareboat charter registration]

will be **sold by way of judicial sale** free and clear of all mortgages, hypothèques and charges [to the highest bidder at or above the amount as set by the [court or other public authority conducting the sale] subject to the terms and conditions set out below.]

[For sale by public auction] The sale will take place by public auction on [date/month/year], at [hour] at [place]. ^(Sec note 2)

[For sale by private treaty] The sale will take place by private treaty for which interested parties are invited to submit bids **by** [date/month/year], at [hour] at [place].

Terms of the sale: [such terms and conditions as apply to judicial sales conducted in the State, for instance: disclaimers of warranties or liabilities by the court or other authority; requirements and procedures for registration or admission to bid at the sale; payment conditions; finality of sales; consequences of failure to pay; persons excluded from bidding (e.g. under anti-corruption, anti-money-laundering or similar regulations)].

Note 1: Article 4(1) requires notice to be given prior to the judicial sale. The time between the giving of notice and the actual sale should allow the interested parties to make the necessary arrangements to bid if they so wish. While 30 days would generally constitute an adequate period, the court or other public authority conducting

³³ Notice of judicial sale – model form: The Working Group has not yet considered the content of the model notice form, which was inserted following the thirty-sixth session (A/CN.9/1007, para. 66). The form has been revised to accommodate judicial sales by private treaty. Guidance on the means for transmitting the notice, previously set out in a footnote, has also been elevated to the body of the form in response to concerns expressed at the thirty-seventh session about the application of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) ("Service Convention") (A/CN.9/1047/Rev.1, para. 60). The Working Group may wish to consider, as an alternative, inserting a provision in the draft convention to the effect that, as between parties to the Service Convention, the latter shall not apply to the transmission of the notice of judicial sale.

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the judicial sale may have the discretion to provide a shorter notice period (for instance where the ship faces deterioration).

Note 2: If the time and place of the judicial sale cannot be determined with certainty, the approximate time and anticipated place of the judicial sale shall be indicated, provided that an additional notice of the actual time and place of the judicial sale shall be given when known but, in any event, not less than seven days prior to the judicial sale.

Appendix II to the [draft instrument on the judicial sale of ships]**Certificate of judicial sale**

Issued in accordance with the provisions of article 5 of the [draft instrument on the judicial sale of ships]

This is to certify that:

(a) The ship described below was sold by way of judicial sale in accordance with the law of the State of judicial sale and the notice requirements in article 4 of the Convention;

(b) The ship was physically within the territory of the State of judicial sale at the time of the sale; and

(c) The purchaser acquired clean title to the ship.

1. State of judicial sale

2. Authority issuing this certificate

2.1 Name

2.2 Address

2.3 Telephone/fax/email, if available

3. Judicial sale

3.1 Name of court/public authority conducting the sale

3.2 Date of sale (e.g., date of order confirming the sale)

4. Ship

4.1 Name

4.2 IMO number

4.3 Registry

4.4 Other information capable of identifying the ship, such as the shipbuilder, time and place of the shipbuilding, distinctive number or letters, and recent photographs, if available

(Please attach any photos to the certificate)

5. Owner(s) immediately prior to the judicial sale

5.1 Name

5.2 Address or residence or principal place of business

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5.3 Telephone/fax/email

6. Purchaser

6.1 Name

6.2 Address or residence or
principal place of business

6.3 Telephone/fax/email

At..... On
(place) (date)

.....
Signature and/or stamp

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

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I. Introduction

1. At its thirty-ninth session, the Working Group continued its work preparing an international instrument on the judicial sale of ships in accordance with a decision taken by the Commission at its fifty-fourth session (Vienna, 28 June–16 July 2021).¹ This was the fifth session at which the topic was considered. Further information on the earlier work of the Working Group on the topic may be found in document A/CN.9/WG.VI/WP.91, paragraphs 4–7.

II. Organization of the session

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

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Libya, Mexico, Pakistan, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Viet Nam.

4. The session was attended by observers from the following States: Angola, Bulgaria, Cambodia, Denmark, Egypt, El Salvador, Greece, Jordan, Kuwait, Luxembourg, Malta, Mauritania, Morocco, Myanmar, Nepal, Panama, Portugal, Qatar and Slovenia.

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

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

(a) *United Nations system*: International Maritime Organization (IMO) and World Maritime University (WMU);

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

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

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

² *Ibid.*, para. 248.

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

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Vikum DE ABREW (Sri Lanka)

8. The Working Group had before it the following documents:
- (a) An annotated provisional agenda (A/CN.9/WG.VI/WP.91);
 - (b) An annotated fourth revision of the Beijing Draft³ prepared by the secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-eighth session (A/CN.9/WG.VI/WP.92) ("fourth revision").
9. The Working Group adopted the following agenda:
- 1. Opening of the session and scheduling of meetings.
 - 2. Adoption of the agenda.
 - 3. Future instrument on the judicial sale of ships.

III. Deliberations and decisions

10. The Working Group focused its discussions on articles 1 to 5 of the draft convention, as set out in the fourth revision. The deliberations and decisions of the Working Group are contained in chapter IV below.

IV. Future instrument on judicial sale of ships

A. Article 1. Purpose

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

B. Article 2. Definitions

1. Order

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

2. "Charge" and "maritime lien"

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

³ In this document, the term "Beijing Draft" or "original Beijing Draft" refers to the draft convention on the recognition of foreign judicial sales of ships, prepared by CMI and approved by the CMI Assembly in 2014, the text of which is set out in A/CN.9/WG.VI/WP.82.

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

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

3. “Clean title” and “mortgage”

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

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

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

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

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

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

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

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

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

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

5. “Owner”

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

6. “Person”

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

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

7. “Purchaser”

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

8. “Registered charge”

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

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

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

9. "Ship"

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

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

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

10. "State of judicial sale"

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

11. "Subsequent purchaser"

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

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

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

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

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

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

C. Article 3. Scope of application

1. Geographic scope

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

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

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

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

2. Dealing with clean title sales

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

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

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

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

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

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

3. Exclusion of State-owned ships

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

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

4. Forced sales in connection with criminal proceedings

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

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

D. Article 4. Procedure and notice of judicial sale

1. Heading

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

2. New article 4(1 bis)

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

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

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

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

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

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

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

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

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

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

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

“1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale. The law of the State of judicial sale determines the time of the sale for the purposes of this Convention.

“2. Notwithstanding paragraph 1, if a certificate is to be issued in accordance with article 5, prior to the judicial sale of a ship, a notice of the sale in accordance with paragraphs 3 to 5, shall be given to:”

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

3. Identity of notice giver

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

4. Persons to be notified

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

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

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

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

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

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

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5. Language requirements

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

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

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

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

6. Model notice form

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

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

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

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

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

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

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

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

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

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7. Publication of notice

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

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

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

8. Repository

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

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

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

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

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

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

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

E. Article 5. Certificate of judicial sale

1. Conditions for issuance

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

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

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

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

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

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

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

2. Identity of issuing authority

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

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

3. Issuance in accordance with “regulations and procedures”

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

4. Matters being certified and contents of the certificate

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

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

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

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

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

5. Transmission of certificate to repository

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

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

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

6. No legalization of certificate

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

7. Evidentiary value of the certificate

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

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

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

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

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

8. International effect of certificate if judicial sale avoided

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

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Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft

Note by the Secretariat
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I. Introduction

1. The annex to this document contains a fifth revision of the Beijing Draft (“fifth revision” or “present draft”), which the secretariat has prepared to incorporate the deliberations and decisions of the Working Group at its thirty-ninth session (A/CN.9/1089, paras. 11–113). At that session, the Working Group considered articles 1 to 5 and Appendix I of the draft convention, as contained in the fourth revision (A/CN.9/WG.VI/WP.92) (“fourth revision” or “previous draft”). Annotations on the revisions to those provisions, as reflected in the fifth revision, are set out in chapter II below.
2. The deliberations of the Working Group also touched on later provisions of the draft convention. For the most part, those provisions remain unchanged in the fifth revision, although some have been revised in light of the deliberations of the Working Group. Annotations on those revisions are set out in chapter III below.
3. The annotations in the document make reference to the “original” Beijing Draft (A/CN.9/WG.VI/WP.82), as well as to its “first revision” (A/CN.9/WG.VI/WP.84), “second revision” (A/CN.9/WG.VI/WP.87), and “third revision” (A/CN.9/WG.VI/WP.90).

II. Annotations on articles 1 to 5

A. Article 1. Purpose

4. Article 1 has been revised to reflect the decisions of the Working Group (A/CN.9/1089, paras. 11, 42 and 47). It now declares the principle that the convention only governs the recognition of clean title sales. The principle is operationalized by article 5 (which provides that a certificate of judicial sale is issued only upon completion of a judicial sale that confers clean title) and article 6, 7 and 8 (which only apply to judicial sales for which a certificate of judicial sale has been issued). As for reflecting the principle in article 9, see below (para. 27).
5. The geographic element has also been removed from article 1 and recast as a matter of scope of application in article 3(1)(a) (see para. 8 below). To that end, article 1 no longer refers to the effects of the judicial sale in another State Party, which in turn acknowledges that aspects of the recognition regime under the draft convention (especially articles 7 and 8) are equally applicable in the State of judicial sale.

B. Article 2. Definitions

1. Order

6. In response to the request by the Working Group (A/CN.9/1089, para. 12), the definitions in article 2 have been reordered as follows:

Defined term	Fifth revision	Fourth revision	Logic
“Judicial sale”	Art. 2(a)	Art. 2(c)	The “judicial sale” of a “ship” that confers “clean title” therein is the primary focus of the draft convention, and thus the definitions for those terms should be presented first.
“Ship”	Art. 2(b)	Art. 2(j)	
“Clean title”	Art. 2(c)	Art. 2(b)	
“Mortgage or hypothèque”	Art. 2(d)	Art. 2(e)	The definitions for the component elements of “clean title” should be presented
“Charge”	Art. 2(e)	Art. 2(a)	

<i>Defined term</i>	<i>Fifth revision</i>	<i>Fourth revision</i>	<i>Logic</i>
			together after the definition of "clean title".
"Registered charge"	Art. 2(f)	Art. 2(i)	The definition for particular types of charges should be presented together after the definition of "charge".
"Maritime lien"	Art. 2(g)	Art. 2(d)	
"Owner"	Art. 2(h)	Art. 2(f)	The definitions for the outgoing and incoming owners of the ship should be presented together in chronological order.
"Purchaser"	Art. 2(i)	Art. 2(h)	
"Subsequent purchaser"	Art. 2(j)	Art. 2(l)	
"State of judicial sale"	Art. 2(k)	Art. 2(k)	

2. Revisions

7. Several definitions have been revised to reflect the decisions of the Working Group:

(a) The term "mortgage or hypothèque" is used throughout the text, including as the term defined in article 2(d) (A/CN.9/1089, para. 17). Consequential amendments have been made to the definition of "clean title" and to articles 4(3)(b), 4(7)(b) and 7(1)(a);

(b) The definition of "mortgage or hypothèque" in article 2(d) has been revised to remove the qualification that the mortgage or hypothèque be must be "recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale" (A/CN.9/1089, para. 16);

(c) The definition of "registered charge" has been revised to simplify the reference to registers in the State of registration other than the register of ships (A/CN.9/1089, para. 29);

(d) The definition of "person" has been deleted (A/CN.9/1089, para. 26).

C. Article 3. Scope of application

8. As noted above (para. 4), article 3(1) has been revised to incorporate the geographic element previously reflected in article 1 (A/CN.9/1089, para. 42) and to remove the conferral of clean title as a matter of scope (A/CN.9/1089, para. 47).

9. Article 3(2) has been revised to focus the enquiry on the use of the ship "immediately prior to the time of judicial sale" rather than "at the time of judicial sale" (A/CN.9/1089, para. 48).

D. Article 4. Notice of judicial sale

1. Heading

10. The heading of article 4 contained in the third revision has been reinstated (A/CN.9/1089, para. 51).

2. Preserving domestic law relating to the procedure for conducting judicial sales

11. Article 4(1) restates article 4(1bis) of the fourth revision with amendments agreed by the Working Group (A/CN.9/1089, paras. 57). The amendments have allowed the text considered by the Working Group (*ibid.*, para. 60) to be collapsed into a single sentence.

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3. Function of the notice requirements and relationship with domestic law

12. Article 4(2) of the previous draft has been split into two separate paragraphs in the present draft:

(a) Article 4(2) of the present draft specifies that it is the notice requirements in articles 4(3) to 4(7) that apply “notwithstanding article 4(1)”. This responds to a request by the Working Group to clarify the relationship between the notice requirements under the convention and the law of the State of judicial sale (A/CN.9/1089, para. 61). The notice requirements consist not only of giving the notice to listed persons (article 4(3)), but also of satisfying minimum content (article 4(4) and language requirements (article 4(6), if included) for the notice, publishing the notice (article 4(5)(a)), and transmitting the notice to the repository (article 4(5)(b));

(b) Article 4(3) of the present draft contains the balance of article 4(2) of the previous draft and is thus concerned solely with listing the persons to be notified. Subparagraphs (c) and (e) have been revised to reflect the decisions of the Working Group (A/CN.9/1089, paras. 64, 66 and 68).

13. Article 4(2) of the present draft has also been revised to state more clearly that the notice requirements serve as a condition for the issuance of the certificate of judicial sale (A/CN.9/1089, paras. 52 and 57). Specifically, the words “for the purposes of article 5” are designed to clarify that the notice requirements are part of the “requirements of this Convention” that must be met by a judicial sale in order for a certificate of judicial sale to be issued under article 5(1), while ensuring that the conditions for issuance are consolidated in a single place (i.e. the chapeau of article 5(1)).

4. Publication of notice

14. Article 4(5)(a) of the present draft has been revised to remove the requirement to publish the notice in other publications if required by the law of the State of judicial sale (A/CN.9/1089, para. 82). The secretariat has also reviewed the provision to ensure that it is drafted in medium-neutral terms, as requested by the Working Group (A/CN.9/1089, para. 84). To avoid doubt as to the scope and medium of announcements in the “press”, the provision has been amended to insert a reference to “other publication”, which could include periodicals published online, such as TradeWinds and Lloyd’s List. Reference is also made to the publications being “available” in the State of judicial sale, to reflect the second element of a proposal that received considerable support in the Working Group (ibid.).

5. Language requirements

15. Article 4(6), which has been inserted for consideration by the Working Group, builds on the outcome of discussions at the thirty-ninth session (A/CN.9/1089, para. 72). It also refers to the working languages of the secretariat of the International Maritime Organization (IMO), which would serve as repository under the arrangement that is currently being explored, rather than the working languages of the Secretariat of the United Nations. The working languages of the IMO secretariat are English, French and Spanish. The paragraph is placed in square brackets to indicate that the Working Group has not decided to include a provision on language requirements, let alone its content.

16. As drafted, article 4(6) applies not to the notice of judicial sale but rather to the minimum content required by article 4(4). As such, it is conceivable that the notice requirements of the convention could be met by using an existing form (in a language other than a working language of the repository) as well as an accompanying document containing the minimum content (in English, French or Spanish). Unlike articles 7(3) and 8(3), which contain translation requirements for the production of the certificate of judicial sale to particular authorities, article 4(6) does not mention a requirement for the translation to be certified.

17. The Working Group may wish to consider whether the language requirement (if included) would apply when the notice is transmitted to the repository, and the extent to which it would apply when the notice is given to a person listed in article 4(3). If a translation is only required when the notice is transmitted to the repository, it is conceivable that the requirement could be satisfied by the notice giver entering the minimum content online – in either English, French or Spanish – in the relevant data fields of a web form (see A/CN.9/1089, para. 88).

6. Appendix I

18. Appendix I has been reformatted and its content revised as agreed by the Working Group (A/CN.9/1089, para. 80).

E. Article 5. Certificate of judicial sale

1. Identity of the issuing authority

19. Article 5 has been revised to refer to the issuance of the certificate by a “competent authority” of the State of judicial sale rather than by a public authority that is “designated” by that State (A/CN.9/1089, para. 99). Some additional commentary on the mechanism for notifying the depositary of designated authorities is set out below (see paras. 34–36).

2. Conditions for issuance

20. The chapeau of article 5(1) has been revised to state the conditions for issuing the certificate of judicial sale, as agreed by the Working Group (A/CN.9/1089, para. 97).

3. Contents of the certificate

21. Two drafting proposals were put forward in the Working Group for presenting the conditions for issuance, the matters being certified, and the other content requirements for the certificate of judicial sale. Article 5(1) of the present draft reflects the second proposal, which called for those elements to be combined in a single paragraph (A/CN.9/1089, para. 101). Accordingly, subparagraphs (a) to (k) of article 5(1) combine the matters listed in subparagraphs (a) and (c) of the previous draft and the minimum content requirements in article 5(2) of the previous draft.

22. Alternatively, the first proposal, by which article 5(1) would deal solely with the conditions for issuance, could be implemented by amending article 5(1) as follows:

“1. Upon completion of a judicial sale which conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the competent authority shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser.”

2. ~~The certificate of judicial sale shall be substantially in the form of the model contained in Appendix II and contain which contains:~~ *[insert subparagraphs (a) to (k) of article 5(1) and renumber the remaining paragraphs of article 5 accordingly]*”

23. The matters being certified and the other content requirements have been revised to reflect the decisions of the Working Group (A/CN.9/1089, paras. 102–104). The model certificate contained in Appendix II has also been revised accordingly.

4. Transmission of certificate to the repository

24. Article 5(2) of the present draft has been reformulated along the lines of article 4(5)(b), as agreed by the Working Group (A/CN.9/1089, para. 107).

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5. Evidentiary value of the certificate

25. Article 5(4) of the present draft has been revised to reflect the agreement of the Working Group (A/CN.9/1089, para. 112).

III. Annotations on later provisions**A. Article 7. Action by registrar**

26. The Working Group may wish to consider the following issues, raised at the thirty-ninth session, in its consideration of article 7:

(a) The extent to which the registrar is required to take action at the request of a subsequent purchaser (see A/CN.9/1089, paras. 36-38). A related issue is whether the draft convention should specify that the actions listed in subparagraphs (a) to (d) of article 7(1) are only required to be taken once, regardless of whether it is at the request of the purchaser or a subsequent purchaser. Another related issue is whether the draft should specify that the action listed in subparagraph (a) only applies with respect to mortgages, hypothèques and registered charges that are effected before the judicial sale;

(b) Whether the requirement for the registrar to act “at the request” of the purchaser or subsequent purchaser is sufficient to clarify that not all actions listed may be required of the registrar. Specifically, if the registrar is requested to reregister the ship in the name of the purchaser under subparagraph (c) of article 7(1), no action would be required to deregister the ship under subparagraph (b). While the original Beijing Draft presented the actions in subparagraphs (b) and (c) as alternatives to be taken “as the purchaser may direct” (c.f. article 12(5) of the International Convention on Maritime Liens and Mortgages (1993) (“MLMC 1993”)), the Working Group agreed at the thirty-seventh session that those words would be redundant if the registrar were required to act “at the request” of the purchaser (A/CN.9/1047/Rev.1, para. 95);

(c) Whether the draft convention should only apply if the State of registration is party to the convention, as has been proposed to the Working Group (see A/CN.9/1089, para. 32). A related issue is the extent to which article 7(1) applies to action taken by the registrar in a State other than the State of registration. For instance, if the registrar in the State of registration takes action to deregister the ship under subparagraph (b) of article 7(1), the purchaser may wish to rely on subparagraph (c) to request new registration in a third State.

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

27. At the thirty-ninth session, it was noted that the Working Group may wish to consider whether, in view of the decision to remove the conferral of clean title as a matter of scope (A/CN.9/1089, para. 47), the exclusive jurisdiction conferred by article 9(1) should apply to any judicial sale or only to a judicial sale conferring clean title (*ibid.*, para. 45).

C. Article 11. Repository

28. Article 11 establishes the repository mechanism, which is operationalized by the transmission requirements in articles 4(5)(b) and 5(2). While aspects of the repository mechanism and transmission requirements were discussed by the Working Group at its thirty-ninth session (A/CN.9/1089, paras. 85-91 and 106-107), article 11 itself was not. The provision is drawn from the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), which establish a “repository” of information published under the rules – known as the Transparency

Registry. The repository function is discharged by the Secretary-General through the International Trade Law Division of the Office of Legal Affairs, which serves as the UNCITRAL secretariat.

29. Article 11(1) is based on article 8 of the Rules on Transparency, while article 11(2) is based on article 2. Article 3(4) of the Rules on Transparency provides an alternative formulation for article 11(2) that the Working Group may consider to be more appropriate in view of subsequent deliberations within the Working Group regarding the limited role of the repository. It requires the repository to make certain documents available to the public “in a timely manner, in the form and in the language in which it receives them”.

30. Another international precedent for establishing a similar mechanism is the United Nations Convention on the Law of the Sea (1982) (“UNCLOS”), which confers on the Secretary-General certain functions related to the deposit by States of charts and/or lists of geographical coordinates of points under UNCLOS. Among other things, article 76(9) of UNCLOS provides that the Secretary-General shall “give due publicity” to material deposited by coastal States concerning the outer limits of the continental shelf. The function is discharged through another division of the Office of Legal Affairs – the Division for Ocean Affairs and the Law of the Sea – which publishes deposited material in an online maritime space database.

31. At its thirty-eighth session, the Working Group reaffirmed that the role of the repository under the draft convention would be limited to publishing information that it received and that the convention would impose no duty on the repository to ensure the accuracy or completeness of published information that was capable of giving rise to liability on its part for failure to do so (A/CN.9/1089, para. 91). Neither the Rules on Transparency nor UNCLOS make further provision disclaiming responsibility of the Secretariat with respect to published information, which is instead addressed in disclaimers published by the Secretariat on the websites used to publish information. A similar disclaimer is published by the IMO secretariat on the GISIS website, which was drawn to the attention of the Working Group at its thirty-ninth session (A/CN.9/1089, para. 89).

D. Article 12. Competent authorities and communication between them

1. Taking stock of authorities

32. Article 12 provides an opportunity for the Working Group to take stock of the various authorities with recognized roles under the draft convention (see A/CN.9/1089, para. 99). The fifth revision refers to roles carried out by the following authorities of States Parties:

<i>Authority</i>	<i>Provision</i>	<i>Role</i>
“Court” or “other public authority”	Article 2(a)(i)	Conducting the judicial sale
“Registrar” of the register of ships	Article 4(3)(a)	Receiving the notice of judicial sale
“Registrar” of the register in which the mortgage or hypothèque is registered	Article 4(3)(b)	Receiving the notice of judicial sale
“Registrar” of the register in which the registered charge is registered	Article 4(3)(b)	Receiving the notice of judicial sale
“Registrar” of the bareboat charter register	Article 4(3)(e)	Receiving the notice of judicial sale

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<i>Authority</i>	<i>Provision</i>	<i>Role</i>
“Competent authority”	Article 5(1)	Issuing the certificate of judicial sale
“Competent registrar” or “other competent authority”	Article 7(1)	Deleting the mortgage or hypothèque or the registered charge from the register Deleting the ship from the register and issuing a certificate of deregistration Registering the ship Updating the register with any other relevant particulars in the certificate of judicial sale
“Competent registrar” or “other competent authority”	Article 7(2)	Deleting the ship from the bareboat charter register and issuing a certificate of deletion
“Court”	Article 8	Dismissing an application to arrest the ship Ordering the release of the ship from arrest
“Court”	Article 9	Hearing or dismissing a claim or application to avoid the judicial sale
“Court”	Article 10	Determining whether a ground for refusal applies

33. The Working Group may wish to confirm that the roles provided for in article 7, to be carried out by the “registrar” or “other competent authority” align with the roles carried out by the “registrar” referred to in article 4(3), noting that the Working Group has previously accepted that not all roles referred to in article 7(1) fall within the competence of a “registrar” (A/CN.9/1047/Rev.1, para. 90).

2. Designating authorities

34. At the thirty-ninth session, the Working Group heard several proposals to clarify the meaning of the term “other public authority” as used in the definition of “judicial sale” (article 2(a)(i) of the present draft). One proposal, which had already been put forward at the thirty-fifth session with respect to the issuing authority under article 5 (A/CN.9/973, para. 19), was to establish a mechanism whereby each State Party would notify the depositary of the authorities competent in its jurisdiction to conduct judicial sales (A/CN.9/1089, para. 20). The proposal received some support during the session, although questions were raised as to the feasibility of maintaining such a mechanism. No decision was taken on the proposal.

35. If the Working Group wishes to pursue this option, the draft convention could be amended by:

(a) Replacing the term “other public authority” with “designated competent authority”;

(b) Inserting a new provision in the final clauses along the following lines, based on article 21 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (“Service Convention”) and in keeping with existing terminology in article 17(2) of the present draft:

“A Party to the Convention may, at the time of signature, ratification, acceptance, approval or accession, or at a later date, notify the depositary of the designation of competent authorities for the purposes of article 2, paragraph (a), subparagraph (i), and shall promptly notify the depositary of any amendment.”

36. Such mechanisms are not uncommon in legal co-operation conventions, such as the Service Convention, and can be used to accommodate the designation of different authorities for the respective territorial units of a particular State. Moreover, although the Working Group has decided to delete reference in article 5(1) to the issuance of the certificate of judicial sale by a “designated” authority (see para. 19 above), the mechanism could readily be applied to the issuing authority by inserting a reference to article 5(1) in the new provision.

3. Scope of application

37. Article 12(1) singles out articles 7 and 8, which require action by the authorities in the State of recognition. Deliberations within the Working Group suggest that other provisions of the draft convention might benefit from cross-border cooperation, such as articles 4 and 5, which require action by the authorities in the State of judicial sale. The Working Group may therefore wish to broaden the provision to authorize communication between authorities “for the purposes of this Convention”. It may also wish to amend the title of the provisions to refer to communication “between authorities” (see A/CN.9/WG.VI/ WP.88, para. 87).

E. Article 13. Relationship with other international instruments and domestic law

1. Residual application of domestic law recognition regimes

38. It has been observed several times within the Working Group that the draft convention does not affect the ability of a State to recognize judicial sales conducted in a non-State Party under its domestic law (A/CN.9/1047/Rev.1, para. 17; A/CN.9/1089, para. 41). However, the Working Group has not considered the residual application of domestic law recognition regimes to judicial sales conducted in a State Party. At its thirty-ninth session, the Working Group agreed to consider the issue in its consideration of article 13. To assist the Working Group in its deliberations, the secretariat has inserted new paragraph 3 into article 13.

2. Avoiding the exclusive application of the Service Convention

39. At its thirty-ninth session, the Working Group agreed to insert a provision in the draft convention that avoided recourse to the channels of transmission provided under the Service Convention where that would lead to notification times that were not suited to the time frames that the judicial sale procedure required (A/CN.9/1089, para. 81). The secretariat has inserted new paragraph 4 into article 13 for the consideration of the Working Group.

F. Other annotations

40. The footnotes in the annex contain additional annotations on the later provisions of the fifth revision, which are largely retained from the fourth revision. Some of the annotations identify issues for possible consideration by the Working Group.

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Annex**Fifth Revision of the Beijing Draft***The States Parties to this Convention,*

Recognizing that the needs of the maritime industry and ship finance require that the judicial sale of ships is maintained as an effective way of securing and enforcing maritime claims and the enforcement of judgments or arbitral awards or other enforceable documents against the owners of ships,

Concerned that any uncertainty for the prospective purchaser regarding the international recognition of a judicial sale of a ship and the deletion or transfer of registry may have an adverse effect upon the price realized by a ship sold at a judicial sale to the detriment of interested parties,

Convinced that necessary and sufficient protection should be provided to purchasers of ships at judicial sales by limiting the remedies available to interested parties to challenge the validity of the judicial sale and the subsequent transfers of the ownership in the ship,

Considering that once a ship is sold by way of a judicial sale, the ship should in principle no longer be subject to arrest for any claim arising prior to its judicial sale,

Considering further that the objective of recognition of the judicial sale of ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the judicial sale, the legal effects of that sale and the deregistration or registration of the ship,

Have agreed as follows:¹

Article 1. Purpose

This Convention governs the effects of a judicial sale of a ship that confers clean title on the purchaser.

Article 2. Definitions

For the purposes of this Convention:

- (a) "Judicial sale" of a ship means any sale of a ship:
 - (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and
 - (ii) For which the proceeds of sale are made available to the creditors;
- (b) "Ship" means any ship or other vessel registered in a register that is open to public inspection 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;
- (c) "Clean title" means title free and clear of any mortgage or hypothèque and of any charge;
- (d) "Mortgage or hypothèque" means any mortgage or hypothèque that is effected on a ship and registered in the State in whose register of ships or equivalent register the ship is registered;
- (e) "Charge" means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and

¹ *Preamble:* The preamble reproduces the preamble contained in the original Beijing Draft. While the Working Group anticipated that certain elements of article 1 and 3(1) of the fourth revision might be re-allocated among those provisions and the preamble (A/CN.9/1089, para. 47), it has not yet considered the preamble, which remains unchanged from the fourth revision.

includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or hypothèque;

(f) "Registered charge" means any charge that is registered in the register of ships or equivalent register in which the ship is registered or in any different register in which mortgages or hypothèques are registered;

(g) "Maritime lien" means any charge that is recognized as a maritime lien or privilege maritime on a ship under applicable law;

(h) "Owner" of a ship means any person registered as the owner of the ship in the register of ships or equivalent register in which the ship is registered;

(i) "Purchaser" means any person to whom the ship is sold in the judicial sale;

(j) "Subsequent purchaser" means any person who purchases the ship previously sold to a purchaser in the judicial sale;

(k) "State of judicial sale" means the State in which the judicial sale of a ship is conducted;

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:

(a) The judicial sale was conducted in a State Party; and

(b) The ship was physically within the territory of the State of judicial sale at the time of the sale.

2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

Article 4. Notice of judicial sale

1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, which also determines the time of the sale for the purposes of this Convention.

2. Notwithstanding paragraph 1, for the purposes of article 5, a notice of judicial sale shall be given prior to the judicial sale of a ship in accordance with the requirements of paragraphs 3 to 7.

3. The notice of judicial sale shall be given to:

(a) The registrar of the register of ships or equivalent register in which the ship is registered;

(b) All holders of any mortgage or hypothèque and of any registered charge, provided that the register in which it is registered, and any instrument required to be registered with the registrar under the law of the State of registration, are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar;

(c) All holders of any maritime lien, provided that they have notified the court or other public authority conducting the judicial sale of the claim secured by the maritime lien in accordance with the regulations and procedures of the State of judicial sale;

(d) The owner of the ship for the time being; and

(e) If the ship is granted bareboat charter registration:

(i) The person registered as the bareboat charterer of the ship in the bareboat charter register; and

(ii) The registrar of the bareboat charter register.

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4. The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in the Appendix I to this Convention.
5. The notice of judicial sale shall also be:
 - (a) Published by announcement in the press or other publication available in the State of judicial sale; and
 - (b) Transmitted to the repository referred to in article 11 for publication.
- [6. If the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation into such a working language of the information mentioned in Appendix I.]
7. In determining the identity or address of any person to whom the notice of judicial sale is to be given, reliance may be placed exclusively on:
 - (a) Information set forth in the register of ships or equivalent register in which the ship is registered or in the bareboat charter register;
 - (b) Information set forth in the register in which the mortgage or hypothèque or the registered charge is registered, if different to the register of ships or equivalent register; and
 - (c) Information notified under paragraph 3, subparagraph (c).

Article 5. Certificate of judicial sale

1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the competent authority of the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser substantially in the form of the model contained in Appendix II which contains:
 - (a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of this Convention;
 - (b) A statement that the purchaser acquired clean title to the ship;
 - (c) The name of the State of judicial sale;
 - (d) The name, address and the contact details of the authority issuing the certificate;
 - (e) The name of the court or other public authority that conducted the judicial sale and the date of the sale;
 - (f) The name of the ship and register of ships or equivalent register in which the ship is registered;
 - (g) The IMO number of the ship or, if not available, other information capable of identifying the ship, such as the shipbuilder, time and place of shipbuilding, distinctive number or letters, and recent photographs;
 - (h) The name, address or residence or principal place of business and contact details, if available, of the owner(s) of the ship immediately prior to the judicial sale;
 - (i) The name, address or residence or principal place of business and contact details of the purchaser;
 - (j) The place and date of issuance of the certificate; and
 - (k) The signature or stamp of the competent authority or other confirmation of authenticity of the certificate.
2. The certificate of judicial sale shall promptly be transmitted to the repository referred to in article 11 for publication.

3. The certificate of judicial sale shall be exempt from legalization or similar formality.
4. Without prejudice to articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

Article 5bis. Electronic form of the certificate of judicial sale²

1. The certificate of judicial sale may be in the form of an electronic record provided that:
 - (a) The information contained therein is accessible so as to be usable for subsequent reference;
 - (b) A method is used to identify the authority issuing the certificate; and
 - (c) A method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.
2. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

Article 6. International effects of a judicial sale³

A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.

Article 7. Action by registrar⁴

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 competent registrar or other competent authority of a State Party shall, in accordance with the law of that State [, but without prejudice to article 6]:⁵
 - (a) Delete any mortgage or hypothèque and any registered charge attached to the ship;
 - (b) Delete the ship from the register⁶ and issue a certificate of deregistration for the purpose of new registration;
 - (c) Register the ship in the name of the purchaser or subsequent purchaser; and
 - (d) Update the register with any other relevant particulars in the certificate of judicial sale.

² *Electronic certificate of judicial sale – general:* Article 5bis remains unchanged from the fourth revision. In view of the decision by the Working Group at its thirty-ninth session to delete articles 5(6) and 5(7) of the fourth revision (A/CN.9/1089, para. 113), and in response to the request by the Working Group at its thirty-eighth session (A/CN.9/1053, para. 38), the secretariat recommends that the provisions be placed at the end of article 5 in the next revision.

³ *International effects of judicial sale – general:* Article 6 remains unchanged from the fourth revision.

⁴ *Action by registrar – general:* Article 7 remains unchanged from the fourth revision save for several changes to reflect terminology agreed by the Working Group at its thirty-ninth session. Specifically, article 7(1)(a) uses the defined term “mortgage or hypothèque” (A/CN.9/1089, para. 17), while article 7(2) refers to the “bareboat charter register” as that term is now used in article 4(3)(c) (*ibid.*, para. 68).

⁵ *Action by registrar – compliance with domestic law:* The words in square brackets were inserted in the third revision following agreement by the Working Group at its thirty-seventh session to consider an additional provision to the effect that observance by the registrar of registration requirements under domestic law would not affect the conferral of clean title on the purchaser (see A/CN.9/WG.VI/WP.90, footnote 32). The Working Group has not yet considered those words.

⁶ *Action by registrar – “register”:* The English version of the present draft uses the term “register” (not “registry”) for the record in which particulars of a ship, mortgage, hypothèque or registered charge are entered. This usage is consistent with terminology used in the United Nations Convention on Conditions for Registration of Ships (1986) and the MLMC 1993.

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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 competent 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.⁷

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 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 Party 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.

*Article 8. No arrest of the ship*⁸

1. If an application is brought before a court in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.

2. If a ship is arrested or a similar measure is taken against a ship by order of a court in a State Party for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.

3. If the certificate is not issued in an official language of the court, the court may request the person producing the certificate to produce a [certified] translation into such an official language.

4. Paragraphs 1 and 2 do not apply if the court determines that dismissing the application or ordering the release of the ship, as the case may be, would be [manifestly] contrary to the public policy of that State.

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

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.

2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party or to suspend its effects.

[3. A judicial sale of a ship shall [not have][cease to have] the effect provided in article 6 in a State Party if the sale is avoided in the State of judicial sale by a court exercising jurisdiction under paragraph 1 by a judgment that is no longer subject to appeal in that State.]

[4. The effects of a judicial sale of a ship provided in this Convention shall be suspended in a State Party if, and for as long as, the effects of the sale are suspended in the State of judicial sale by a court exercising jurisdiction under paragraph 1.]¹⁰

⁷ *Action by registrar – bareboat charter registration*: The Working Group may wish to confirm whether article 7(2), like article 7(1), should also be addressed to “other competent authorities”.

⁸ *No arrest – general*: Article 8 remains unchanged from the fourth revision.

⁹ *Avoidance of judicial sale – general*: Article 9 remains unchanged from the fourth revision.

¹⁰ *Suspension of effects of judicial sale*: The original Beijing Draft and subsequent revisions deal with suspending the effects of a judicial sale. The Working Group has so far not considered the issue and may wish to consider whether it is necessary for the convention to address it. While the

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[5. The effects of avoidance of a judicial sale shall be determined by applicable law].¹¹

*Article 10. Circumstances in which judicial sale has no international effect*¹²

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be [manifestly] contrary to the public policy of that other State Party.¹³

*Article 11. Repository*¹⁴

1. The repository of notices given under article 4 and certificates issued under article 5 shall be [the Secretary-General of the International Maritime Organization].
2. Upon receipt of a notice or certificate under this Convention, the repository shall promptly make it available to the public.

*Article 12. Communication between Parties*¹⁵

1. For the purposes of articles 7 and 8, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.
2. Nothing in this article affects bilateral or multilateral agreements on judicial assistance in respect of civil and commercial matters that may exist between States Parties.

secretariat has identified cases in which a judicial sale has been or may be suspended before completion, it has not identified any cases in which the effects of the sale have been or may be suspended after completion. Presumably, if a sale is suspended before completion, no certificate of judicial sale will be issued (article 5(1)) and therefore the judicial sale will have no international effect under the convention (article 6).

¹¹ *Avoidance of judicial sale – international effect:* Articles 9(3) and 9(4) (including the square brackets) remain unchanged from the second revision. Following initial discussions at the thirty-seventh session (A/CN.9/1047/Rev.1, para. 108), the Working Group engaged in a detailed discussion at its thirty-eighth session of the legal consequences that would flow in the “exceedingly rare” event of a judicial sale being avoided after issuance of the certificate of judicial sale (A/CN.9/1053, paras. 27–31). Different options were put forward for dealing with the issue (*ibid.*, paras. 29 and 30), which the Working Group agreed to consider further (*ibid.*, para. 31). As an alternative, it was suggested that the convention should not seek to find a solution, and therefore that the provisions dealing with the issue should be deleted and replaced by a provision acknowledging that the issue is a matter for the domestic law of the State concerned (*ibid.*). To reflect the outcome of those deliberations, articles 5(6), 9(3) and 9(4) were placed in square brackets in the fourth revision, and article 9(5) was inserted for consideration by the Working Group as an alternative to those provisions. At its thirty-ninth session, the Working Group agreed to delete article 5(6) (and article 5(7)). The Working Group may wish to confirm whether articles 9(3) and 9(4) should also be deleted, and whether article 9(5) should be retained.

¹² *Ground for refusal – general:* Article 10 remains unchanged from the fourth revision.

¹³ *Grounds for refusal – public policy:* At its thirty-seventh session, the Working Group considered a proposal to delete the word “manifestly” and decided to retain the wording of the public policy ground for the time being (A/CN.9/1047/Rev.1, para. 86). The issue has not since been considered by the Working Group.

¹⁴ *Centralized online repository – general:* See paragraph 28 to 31 of the cover note. Article 11 remains unchanged from the fourth revision, except that it now designates the International Maritime Organization as the repository. This designation is in square brackets to indicate that the matter is still the subject of ongoing consultation with the IMO secretariat. A provision establishing the repository mechanism was inserted in the first revision of the Beijing Draft in response to deliberations of the Working Group at its thirty-fifth session (A/CN.9/973, paras. 46 and 73) and has not yet been considered by the Working Group.

¹⁵ *Communication between authorities:* See paragraph 37 of the cover note regarding the scope and title of article 12. Article 12(1) reproduces article 12 of the fourth revision without amendment. A provision authorizing communication between authorities in different States was inserted in the first revision in response to a suggestion made at the thirty-fifth session that the draft instrument contain a provision similar to article 14 of the MLMC 1993 (A/CN.9/973, para. 74). The provision has not yet been considered by the Working Group. Article 12(2) has been inserted for consideration by the Working Group on the assumption that communication between

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Article 13. Relationship with other international conventions

1. Nothing in this Convention shall derogate from any other basis for the recognition of a judicial sale of a ship under any other international convention.¹⁶
2. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that Convention or Protocol.
3. Nothing in this Convention prevents the recognition of a judicial sale under domestic law.¹⁷
4. Without prejudice to article 4, paragraph 4, as between States Parties to this Convention that are also parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the notice of judicial sale may be transmitted abroad using channels other than those provided for in that Convention.¹⁸

[Article 14 Matters not governed by this Convention]¹⁹

Nothing in this Convention shall affect:

- (a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
- (b) Any personal claim against a person who owned the ship prior to the judicial sale.]

authorities with roles under the draft convention may also be covered by other international agreements.

¹⁶ *Relationship with other international conventions*: Article 13(1), which reproduces article 10 of the original Beijing Draft with amendments suggested by the secretariat in the third revision (A/CN.9/WG.VI/WP.90, footnote 45), remains unchanged from the fourth revision. The provision has not been considered by the Working Group. Article 13(2), which the Working Group agreed to retain at its thirty-seventh session (A/CN.9/1047/Rev.1, para. 29, also remains unchanged from the fourth revision.

¹⁷ *Relationship with domestic law*: See paragraph 38 of the cover note. The original Beijing Draft preserved recognition under the "principle of comity" but did not preserve domestic law recognition regimes generally. This new paragraph, foreshadowed in footnote 30 of the fourth revision, is based on article 15 of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019).

¹⁸ *Relationship with the Service Convention*: See paragraph 39 of the cover note. This new paragraph, which has been formulated in consultation with the Permanent Bureau of the Hague Conference on Private International Law, invokes the general principle reflected in article 30(3) of the Vienna Convention on the Law of Treaties (1969) that a later treaty prevails over an earlier treaty to the extent of any incompatibility between the two. It does not seek to oust the application of the Service Convention entirely but rather to avoid the exclusive application of the channels of transmission provided thereunder. The paragraph picks up the wording in article 11 of the Service Convention but does not rely on that provision inasmuch as the draft convention does not specify channels of transmission. Instead, it leaves it to the law of the State of judicial sale to determine which channels to use pursuant to article 4(4).

¹⁹ *Matters not governed by the Convention*: Article 14, which reproduces article 6(2) of the second revision, remains unchanged from the fourth revision. At the thirty-seventh session of the Working Group, diverging views were expressed as to the placement of this provision, with support expressed for (a) leaving it in article 6, (b) moving it to the provision on scope of application (article 3), or (c) moving it to a new provision that identifies matters that are not governed by the draft convention (A/CN.9/1047/Rev.1, para. 47). The Working Group did not consider the issue at its thirty-eighth or thirty-ninth sessions. The present draft implements option (c). The provision is placed in square brackets to indicate that no decision has been taken on its placement.

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*Article 15. Depositary*²⁰

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 16. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in [city], [on][from] [date/date range], and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatories.
3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 17. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Party to the Convention, to the extent that that organization has competence over matters governed by this Convention. Where the number of States Parties is relevant in this Convention, the regional economic integration organization shall not count as a State Party in addition to its member States that are Parties to the Convention.
2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.
3. Any reference to a "State" or "States" in this Convention applies equally to a regional economic integration organization where the context so requires.

Article 18. Non-unified legal systems

1. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. If a Party to the Convention has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:
 - (a) Any reference to the law or rule of procedure of a State shall be construed as referring, where appropriate, to the law or rule of procedure in force in the relevant territorial unit;

²⁰ *Final clauses:* The final clauses in articles 15 to 21, which have not been considered by the Working Group, remain unchanged from the fourth revision. They are drawn from the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018), the most recent treaty prepared by UNCITRAL.

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(b) Any reference to the place of business in a State shall be construed as referring, where appropriate, to the place of business in the relevant territorial unit;

(c) Any reference to the competent authority of the State shall be construed as referring, where appropriate, to the competent authority in the relevant territorial unit.

4. If a Party to the Convention makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 19. Entry into force

1. This Convention shall enter into force six months after deposit of the [third] instrument of ratification, acceptance, approval or accession.

2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession. The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 18 six months after the notification of the declaration referred to in that article.

Article 20. Amendment

1. Any Party to the Convention may propose an amendment to the present Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of Parties to the Convention for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

2. The conference of Parties to the Convention shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference.

3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.

4. An adopted amendment shall enter into force six months after the date of deposit of the [third] instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties to the Convention that have expressed consent to be bound by it.

5. When a Party to the Convention ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that Party to the Convention six months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 21. Denunciations

1. A Party to the Convention may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.

2. The denunciation shall take effect 12 months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the notification is received by the depositary. [The

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Convention shall continue to apply to judicial sales conducted before the denunciation takes effect.]

DONE in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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Appendix I to the [draft convention on the judicial sale of ships]²¹**Minimum information to be contained in the notice of judicial sale**

1. Statement that the notice of judicial sale is given for the purposes of the [draft convention on the judicial sale of ship]
2. **State of judicial sale**
3. **Judicial sale**
 - 3.1 Court or other public authority conducting the judicial sale
 - 3.2 Reference number or other identifier for the sale procedure
4. **Ship**
 - 4.1 Name
 - 4.2 Register
 - 4.3 IMO number
 - 4.4 *(If IMO number not available)* Other information capable of identifying the ship
5. **Owner(s)**
 - 5.1 Name
 - 5.2 Address or residence or principal place of business
 - 5.3 Telephone/fax/email
6. **Anticipated time and place of judicial sale**
7. Statement as to whether the sale will confer clean title to the ship, including the circumstances under which the sale would not confer clean title
8. Other information required by the law of the State of judicial sale, in particular any information deemed necessary to protect the interests of the person receiving the notice

²¹ *Appendix I*: See paragraph 18 of the cover note.

Appendix II to the [draft convention on the judicial sale of ships]²²**Model certificate of judicial sale**

Issued in accordance with the provisions of article 5 of the [draft convention on the judicial sale of ships]

This is to certify that:

(a) The ship described below was sold by way of judicial sale in accordance with the requirements of the law of the State of judicial sale and the requirements of the [draft convention on the judicial sale of ships]; and

(b) The purchaser acquired clean title to the ship.

- 1. State of judicial sale**
- 2. Authority issuing this certificate**
 - 2.1 Name
 - 2.2 Address
 - 2.3 Telephone/fax/email, if available
- 3. Judicial sale**
 - 3.1 Name of court or other public authority that conducted the sale
 - 3.2 Date of the sale
- 4. Ship**
 - 4.1 Name
 - 4.2 Register
 - 4.3 IMO number
 - 4.4 *(If IMO number not available)* Other information capable of identifying the ship, such as the shipbuilder, time and place of shipbuilding, distinctive number or letters, and recent photographs *(Please attach any photos to the certificate)*
- 5. Owner(s) immediately prior to the judicial sale**
 - 5.1 Name
 - 5.2 Address or residence or principal place of business

²² *Appendix II:* See paragraph 23 of the cover note.

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5.3 Telephone/fax/email

6. Purchaser

6.1 Name

6.2 Address or residence or principal place of business

6.3 Telephone/fax/email

At..... On
(place) (date)

.....
Signature and/or stamp of issuing
authority or other confirmation of
authenticity of the certificate

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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)

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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 Draft³ 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.

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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

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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.

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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.

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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.

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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

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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.

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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)(c)(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

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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.

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**United Nations Commission on
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New York, 27 June–15 July 2022

Draft convention on the international effects of judicial sales of ships

Note by the Secretariat

1. At its fifty-first session (New York, 25 June–13 July 2018), the Commission considered a proposal from the Government of Switzerland on possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/944/Rev.1). In support of the proposal, it was noted that the lack of cross-border recognition of the judicial sale of ships had the potential to affect many areas of international trade and commerce, not simply the shipping industry.¹ The Commission considered the proposal together with other suggestions for future work and agreed that the topic of judicial sale of ships should be added to the work programme.²

2. The topic was referred to Working Group VI, which has considered the topic over six sessions, from its thirty-fifth session (New York, 13–17 May 2019) to its fortieth session (New York, 7–11 February 2022). The progress made by the Working Group at the first four of those sessions has already been considered by the Commission,³ while the progress made by the Working Group at the last two sessions is expected to be considered by the Commission at its fifty-fifth session on the basis of the reports of those sessions (A/CN.9/1089 and A/CN.9/1095, respectively).

3. At its fortieth session, the Working Group completed a further article-by-article review of the substantive provisions of a draft convention and considered the preamble and final clauses of the draft convention on the basis of a fifth revision of the “Beijing Draft” that had been prepared by the secretariat (A/CN.9/WG.VI/WP.94). As noted in A/CN.9/1095 (para. 10), the Working Group requested the secretariat to revise the draft convention to reflect its deliberations and decisions during the session, and to transmit the revised draft to the Commission for consideration and possible

¹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/73/17)*, para. 243.

² *Ibid.*, para. 252.

³ Progress made by the Working Group at its thirty-fifth session was considered by the Commission at its fifty-second session: *ibid.*, *Seventy-fourth Session, Supplement No. 17*.

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approval at its fifty-fifth session. The draft convention, as revised, is contained in the annex to this document.

4. The Working Group also heard an expression of interest from the delegation of China in hosting a ceremony for the signing of the convention, once adopted. As noted in A/CN.9/1095 (para. 77), the Working Group expressed its gratitude for the offer and requested the Commission to consider it favourably. The Commission may wish to consider the offer in its consideration of article 17(1) of the draft convention.

5. The Commission may wish to note that the draft convention contains two new articles that have not been considered by the Working Group, but which flow from the deliberations of the Working Group at its fortieth session.

6. The first is article 20, which responds to a request made by the Working Group concerning the authentication of certificates circulating among States that are party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) (A/CN.9/1095, para. 91). The new article has been drafted to be compatible with article 3 of that Convention.

7. The second is article 21, which follows from the insertion of article 20. Article 21 provides a common clause dealing with how declarations under the convention are made and take effect and is modelled on article 21 of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005) and article 91 of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008). With the insertion of article 20, the draft convention now contemplates three different types of declarations. The Commission may therefore find it convenient to consolidate provisions on the procedure and effect of those declarations in a single clause. If article 21 is retained, consequential amendments will need to be made to several other final clauses to avoid duplication. Specifically, the words in square brackets in articles 18(2), 19(1), 20(1) and 22(2), final sentence, will need to be deleted.

8. At its fifty-fifth session, the Commission will have before it a compilation of comments received from Governments and relevant international organizations, to which the draft convention has been circulated prior to the session. At the request of the Working Group (A/CN.9/1095, para. 10), the Commission will also have before it a draft explanatory note on the convention prepared by the secretariat. The Commission may wish to take note of the draft explanatory note and request the secretariat to publish it as a paper and electronic booklet in the six official languages of the United Nations, within existing resources.

Annex**Draft convention on the international effects of judicial sales of ships**

The States Parties to this Convention,

Reaffirming their belief that international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used both in seagoing and inland navigation, as well as of the function of judicial sales as means to enforce maritime claims,

Considering that adequate legal protection for purchasers may positively impact the price realized at judicial sales of ships, to the benefit of both shipowners and creditors, including lienholders and ship financiers,

Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective sales to interested parties and give international effects to judicial sales of ships sold free and unencumbered of pre-existing liens and charges, including for ship registration purposes,

Have agreed as follows:

Article 1. Purpose

This Convention governs the effects of a judicial sale of a ship that confers clean title on the purchaser.

Article 2. Definitions

For the purposes of this Convention:

- (a) "Judicial sale" of a ship means any sale of a ship:
 - (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and
 - (ii) For which the proceeds of sale are made available to the creditors;
- (b) "Ship" means any ship or other vessel registered in a register that is open to public inspection 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;
- (c) "Clean title" means title free and clear of any mortgage or hypothèque and of any charge;
- (d) "Mortgage or hypothèque" means any mortgage or hypothèque that is effected on a ship and registered in the State in whose register of ships or equivalent register the ship is registered;
- (e) "Charge" means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or hypothèque;
- (f) "Registered charge" means any charge that is registered in the register of ships or equivalent register in which the ship is registered or in any different register in which mortgages or hypothèques are registered;
- (g) "Maritime lien" means any charge that is recognized as a maritime lien or privilege maritime on a ship under applicable law;
- (h) "Owner" of a ship means any person registered as the owner of the ship in the register of ships or equivalent register in which the ship is registered;

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- (i) "Purchaser" means any person to whom the ship is sold in the judicial sale;
- (j) "Subsequent purchaser" means the person who purchases the ship from the purchaser named in the certificate of judicial sale referred to in article 5;
- (k) "State of judicial sale" means the State in which the judicial sale of a ship is conducted.

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:
 - (a) The judicial sale was conducted in a State Party; and
 - (b) The ship was physically within the territory of the State of judicial sale at the time of the sale.
2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

Article 4. Notice of judicial sale

1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, which also determines the time of the sale for the purposes of this Convention.
2. Notwithstanding paragraph 1, a certificate of judicial sale under article 5 shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 to 7.
3. The notice of judicial sale shall be given to:
 - (a) The registry of ships or equivalent register in which the ship is registered;
 - (b) All holders of any mortgage or hypothèque and of any registered charge, provided that the register in which it is registered, and any instrument required to be registered under the law of the State of registration, are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registry;
 - (c) All holders of any maritime lien, provided that they have notified the court or other public authority conducting the judicial sale of the claim secured by the maritime lien in accordance with the regulations and procedures of the State of judicial sale;
 - (d) The owner of the ship for the time being; and
 - (e) If the ship is granted bareboat charter registration:
 - (i) The person registered as the bareboat charterer of the ship in the bareboat charter register; and
 - (ii) The bareboat charter registry.
4. The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in Appendix I to this Convention.
5. The notice of judicial sale shall also be:
 - (a) Published by announcement in the press or other publication available in the State of judicial sale; and
 - (b) Transmitted to the repository referred to in article 11 for publication.
6. If the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation of the information mentioned in Appendix I into any such working language.

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7. In determining the identity or address of any person to whom the notice of judicial sale is to be given, reliance may exclusively be placed on:

- (a) Information set forth in the register of ships or equivalent register in which the ship is registered or in the bareboat charter register;
- (b) Information set forth in the register in which the mortgage or hypothèque or the registered charge is registered, if different to the register of ships or equivalent register; and
- (c) Information notified under paragraph 3, subparagraph (c).

Article 5. Certificate of judicial sale

1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the court or public authority that ordered, approved or confirmed the judicial sale or other competent authority of the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser.

2. The certificate of judicial sale shall be substantially in the form of the model contained in Appendix II and contain:

- (a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of this Convention;
- (b) A statement that the purchaser acquired clean title to the ship;
- (c) The name of the State of judicial sale;
- (d) The name, address and the contact details of the authority issuing the certificate;
- (e) The name of the court or other public authority that conducted the judicial sale and the date of the sale;
- (f) The name of the ship and register of ships or equivalent register in which the ship is registered;
- (g) The IMO number of the ship or, if not available, other information capable of identifying the ship;
- (h) The name, address or residence or principal place of business of the owner(s) of the ship immediately prior to the judicial sale;
- (i) The name, address or residence or principal place of business of the purchaser;
- (j) The place and date of issuance of the certificate; and
- (k) The signature or stamp of the authority issuing the certificate or other confirmation of authenticity of the certificate.

3. The State of judicial sale shall require the certificate of judicial sale to be transmitted promptly to the repository referred to in article 11 for publication.

4. The certificate of judicial sale shall be exempt from legalization or similar formality.

5. Without prejudice to articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

6. The certificate of judicial sale may be in the form of an electronic record provided that:

- (a) The information contained therein is accessible so as to be usable for subsequent reference;

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(b) A reliable method is used to identify the authority issuing the certificate; and

(c) A reliable method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.

7. A certificate of judicial sale shall not be rejected on the sole ground that it is in electronic form.

Article 6. International effects of a judicial sale

A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.

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.

Article 8. No arrest of the ship

1. If an application is brought before a court or other judicial authority in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to an earlier judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.

2. If a ship is arrested or a similar measure is taken against a ship by order of a court or other judicial authority in a State Party for a claim arising prior to an earlier

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judicial sale of the ship, the court or other judicial authority shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.

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

4. Paragraphs 1 and 2 do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be manifestly contrary to the public policy of that State.

Article 9. Jurisdiction to avoid and suspend judicial sale

1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State that confers clean title to the ship or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5.

2. The courts of a State Party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party that confers clean title to the ship or to suspend its effects.

3. The State of judicial sale shall require the decision of a court that avoids or suspends the effects of a judicial sale, for which a certificate has been issued in accordance with article 5, paragraph 1, to be transmitted promptly to the repository referred to in article 11 for publication.

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

A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.

Article 11. Repository

1. The repository shall be the Secretary-General of the International Maritime Organization or an institution named by the United Nations Commission on International Trade Law.

2. Upon receipt of a notice of judicial sale transmitted under article 4, paragraph 5, certificate of judicial sale transmitted under article 5, paragraph 3, or decision transmitted under article 9, paragraph 3, the repository shall make it available to the public in a timely manner, in the form and in the language in which it is received.

3. The repository may also receive a notice of judicial sale emanating from a State that has ratified, accepted, approved or acceded to this Convention and make it available to the public.

Article 12. Communication between authorities of States Parties

1. For the purposes of this Convention, the authorities of a State Party shall be authorized to correspond directly with the authorities of any other State Party.

2. Nothing in this article affects any international convention, treaty or agreement on judicial assistance in respect of civil and commercial matters that may exist between States Parties.

Article 13. Relationship with other international conventions

1. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 Concerning

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Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that Convention or Protocol.

2. Without prejudice to article 4, paragraph 4, as between States Parties to this Convention that are also parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), the notice of judicial sale may be transmitted abroad using channels other than those provided for in that Convention.

Article 14. Other bases for giving international effect

Nothing in this Convention shall preclude any basis for giving effect in one State to a judicial sale of a ship conducted in another State under any other international convention, treaty or agreement or under applicable law.

Article 15. Matters not governed by this Convention

1. Nothing in this Convention shall affect:
 - (a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
 - (b) Any personal claim against a person who owned or had proprietary rights in the ship prior to the judicial sale.
2. Moreover, this Convention shall not govern the effects, under applicable law, of a decision by a court exercising jurisdiction under article 9, paragraph 1.

Article 16. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

Article 17. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States in [...], on [...], and thereafter at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatories as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

Article 18. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a State Party, to the extent that that organization has competence over matters governed by this Convention. For the purposes of articles 19 and 20, an instrument deposited by a regional economic integration organization shall not be counted.
2. The regional economic integration organization shall[, at the time of signature, ratification, acceptance, approval or accession,] make a declaration [to the depositary] specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

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3. Any reference to a “State”, “States”, “State Party” or “States Parties” in this Convention applies equally to a regional economic integration organization where the context so requires.

Article 19. Non-unified legal systems

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may[, at the time of signature, ratification, acceptance, approval or accession,] declare that this Convention shall extend to all its territorial units or only to one or more of them.
2. A State may amend its declaration under paragraph 1 by submitting another declaration at any time.
3. Declarations under this article shall[be notified to the depositary and] state expressly the territorial units to which this Convention extends.
4. If a State makes no declaration under paragraph 1, this Convention shall extend to all territorial units of that State.
5. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention:
 - (a) Any reference to the law, regulations or procedures of the State shall be construed as referring, where appropriate, to the law, regulations or procedures in force in the relevant territorial unit;
 - (b) Any reference to the authority of the State shall be construed as referring, where appropriate, to the authority in the relevant territorial unit.

[Article 20. Authentication of certificate of judicial sale]

1. A State that is party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) may [, at the time of signature, ratification, acceptance, approval or accession,]declare that, notwithstanding article 5, paragraph 4, if a certificate of judicial sale produced under paragraphs 1 or 2 of article 7 emanates from another State that is also party to that Convention, the registrar or other competent authority of the State may request the production of a certificate issued under that Convention. [The declaration shall be notified to the depositary and may be withdrawn at any time.]
2. A declaration under paragraph 1 shall not affect the application of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) as between the States concerned, or any other international convention, treaty, agreement or applicable law that exempts the certificate of judicial sale from legalization or abolishes or simplifies the formality under that Convention.]

[Article 21. Procedure and effects of declarations]

1. Declarations under article 18, paragraph 2, article 19, paragraph 1, and article 20, paragraph 1, shall be made at the time of signature, ratification, acceptance, approval or accession. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declarations and their confirmations shall be in writing and formally notified to the depositary.
3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect [on the first day of the month following the expiration of six months][180 days] after the date of its receipt by the depositary.
4. Any State that makes a declaration under this Convention may modify or withdraw it at any time by a formal notification in writing addressed to the depositary.

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The modification or withdrawal shall take effect [on the first day of the month following the expiration of six months][180 days] after the date of the receipt of the notification by the depositary.]

Article 22. Entry into force

1. This Convention shall enter into force [six months][180 days] after the date of the deposit of the [third] instrument of ratification, acceptance, approval or accession.
2. When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the third instrument of ratification, acceptance, approval or accession, this Convention shall enter into force in respect of that State [six months][180 days] after the date of the deposit of its instrument of ratification, acceptance, approval or accession. [The Convention shall enter into force for a territorial unit to which this Convention has been extended in accordance with article 19 six months after the notification of the declaration referred to in that article.]
3. This Convention shall apply only to judicial sales conducted after its entry into force for the State of judicial sale.

Article 23. Amendment

1. Any State Party may propose an amendment to this Convention by submitting it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within [four months][120 days] from the date of such communication at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. The conference of States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus are exhausted and no consensus is reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the conference. For the purposes of this paragraph, the vote of a regional economic integration organization shall not be counted.
3. An adopted amendment shall be submitted by the depositary to all States Parties for ratification, acceptance or approval.
4. An adopted amendment shall enter into force [six months][180 days] after the date of deposit of the [third] instrument of ratification, acceptance or approval. When an amendment enters into force, it shall be binding on those States Parties to the Convention that have expressed consent to be bound by it.
5. When a State Party ratifies, accepts or approves an amendment following the deposit of the third instrument of ratification, acceptance or approval, the amendment shall enter into force in respect of that State Party [six months][180 days] after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 24. Denunciations

1. A State Party may denounce this Convention by a formal notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which this Convention applies.
2. The denunciation shall take effect [12 months][365 days] after the date of the receipt of the notification by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date of the receipt of the notification by the depositary. The Convention shall continue to apply to a judicial sale for which a certificate of judicial sale referred to in article 5 has been issued before the denunciation takes effect.

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DONE at [...] this [...] day of [...], in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

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Appendix I to the draft convention on the international effects of judicial sales of ships**Minimum information to be contained in the notice of judicial sale**

1. Statement that the notice of judicial sale is given for the purposes of the [Convention on the International Effects of Judicial Sales of Ships]
2. Name of State of judicial sale
3. Court or other public authority ordering, approving or confirming the judicial sale
4. Reference number or other identifier for the sale procedure
5. Name of ship
6. Registry
7. IMO number
8. *(If IMO number not available)* Other information capable of identifying the ship
9. Name of the owner
10. Address or residence or principal place of business of the owner
11. *(If judicial sale by public auction)* Anticipated date, time and place of public auction
12. *(If judicial sale by private treaty)* Any relevant details, including time period, for the sale as ordered by the court or other public authority
13. Statement as to whether the sale will confer clean title to the ship, including the circumstances under which the sale would not confer clean title
14. Other information required by the law of the State of judicial sale, in particular any information deemed necessary to protect the interests of the person receiving the notice

Appendix II to the draft convention on the international effects of judicial sales of ships

Model certificate of judicial sale

Issued in accordance with the provisions of article 5 of the [Convention on the International Effects of Judicial Sales of Ships]

This is to certify that:

(a) The ship described below was sold by way of judicial sale in accordance with the requirements of the law of the State of judicial sale and the requirements of the [Convention on the International Effects of Judicial Sales of Ships]; and

(b) The purchaser acquired clean title to the ship.

1. **State of judicial sale**
2. **Authority issuing this certificate**
 - 2.1 Name
 - 2.2 Address
 - 2.3 Telephone/fax/email, if available
3. **Judicial sale**
 - 3.1 Name of court or other public authority that ordered, approved or confirmed the sale
 - 3.2 Date of the sale
4. **Ship**
 - 4.1 Name
 - 4.2 Registry
 - 4.3 IMO number
 - 4.4 *(If IMO number not available)* Other information capable of identifying the ship *(Please attach any photos to the certificate)*
5. **Owner(s) immediately prior to the judicial sale**
 - 5.1 Name
 - 5.2 Address or residence or principal place of business
6. **Purchaser**
 - 6.1 Name

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6.2 Address or residence or
principal place of business

At.....
(place)

On
(date)

.....
Signature and/or stamp of issuing
authority or other confirmation of
authenticity of the certificate

POLAR SHIPPING 2022

WORKING PAPER ON THE LEGAL FRAMEWORK ON SHIP PASSENGER RIGHTS IN ANTARCTIC WATERS

- I. Introduction
- II. Scope of report: A study of passengers' rights when travelling in the Antarctic for leisure
- III. Definition of the area: Antarctica's geopolitical position
- IV. International. Conventions on safety in polar waters
- V. Description of particularities/special risks in Antarctic waters
- VI. Tourism management in Antarctica; IAATO
- VII. Passenger Rights against the Carrier
- VIII. Ticket Standard Terms and Conditions
- IX. Conclusions

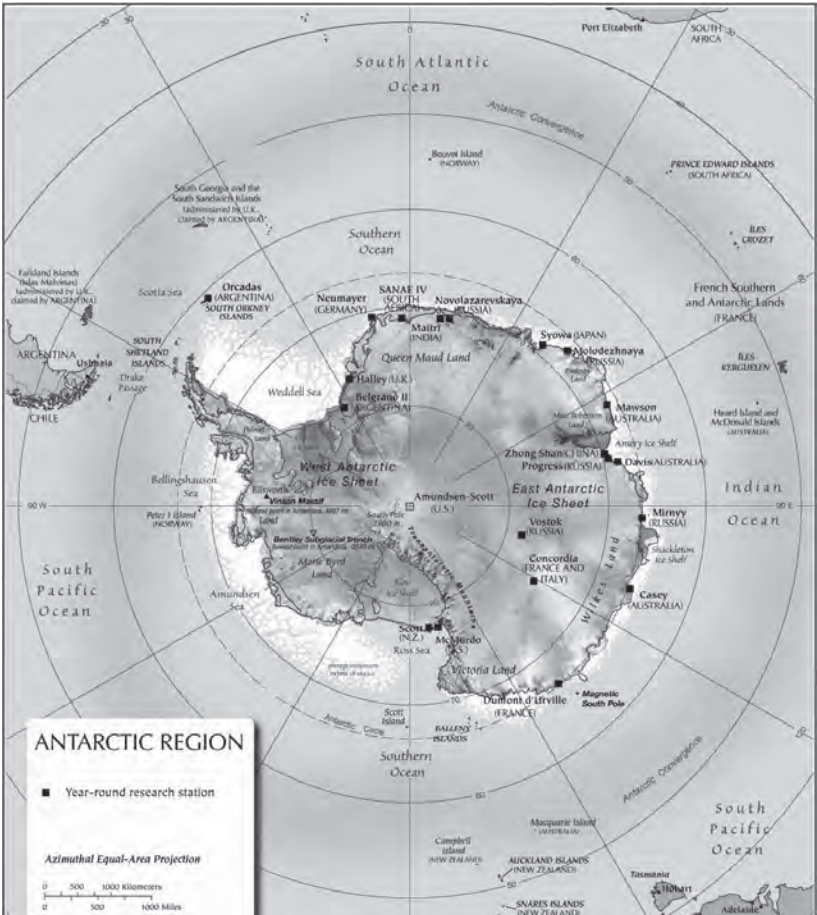
Annex 1: List of shipping accidents in Antarctic waters

Annex 2: IAATO active vessel registry

Annex 3: Samples of standard terms and conditions

The Passenger Rights sub-committee of the CMI International Working Group on Polar Shipping proposed the researching and writing of a preliminary report on the legal position of passengers' rights in Arctic and Antarctic shipping. This report consists of a preliminary study and compilation of materials addressing passenger rights in cruise shipping in Antarctic waters against the backdrop of international treaties and the national laws of states in the southern hemisphere from whose ports cruises are undertaken to Antarctica. The report draws on contributions by legal practitioners in those and other jurisdictions.

Preliminary Report



Source: https://www.nationsonline.org/oneworld/map/antarctica_map.htm

I. Introduction

Ships operating in the Arctic and Antarctic environments are exposed to unique risks. Poor weather conditions and the relative lack of good charts, communication systems and other navigational aids pose challenges for mariners. The remoteness of the areas makes rescue or clean up operations difficult and costly. Cold temperatures may reduce the effectiveness of numerous components of the ship, ranging from deck machinery and emergency equipment to sea suction. When ice is present, it can impose additional loads on the hull, propulsion system and appendages.¹

Sailings to the Antarctic for leisure started in the 1950 with Chile and Argentina carrying a few hundred passengers to the South Shetland Islands. The first expedition to Antarctica with travellers was in 1966 and led by Lars Eric Lindblad. The modern expedition cruise industry started in 1969, when Lindblad built the first expedition ship *MS Explorer*. Since 1970 tourist expeditions have regularly travelled to Antarctica every year.²

These days, Antarctica is successfully advertised throughout the travel industry as one of the last “adventures” people may experience, promising the thrill to enter literally uncharted waters as a member of an “expedition” on board a cruise vessel, (see e.g. Abercrombie & Kent’s “Antarctic Cruise Adventure: A Changing Landscape 2021”³ or Quark Expeditions “the leader in Polar Adventures”⁴). 38,478 tourists visited Antarctica in 2015-2016⁵. More than 56,000 tourists visited Antarctica during the 2018-2019 season. IAATO’s⁷ visitor figures for the 2019/20 season show that this numbers almost doubled to 73,991 between October 2019 and April 2020.⁸ Of these who travelled with IAATO members 18,506 travelled on cruise-only vessels and did not set foot on the continent, while 731 travelled to deepfield destinations by aircraft, 125 by yacht and 4679 by air/cruise - travel programs.

The 2020-21 season of Antarctic tourism was heavily affected by the SARS CoV-2 pandemic. There was effectively nil seaborne tourism and one sailing yacht carrying nine tourists on board.⁹ IAATO’s preliminary estimates, representing the current best-case operating scenario for the

¹ <https://www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx>.

² [https://www.bas.ac.uk/about/antarctica/tourism/antarctic-tourism-frequently-asked-questions/British Antarctic Survey – Natural Environment Research Council](https://www.bas.ac.uk/about/antarctica/tourism/antarctic-tourism-frequently-asked-questions/British%20Antarctic%20Survey%20-%20Natural%20Environment%20Research%20Council).

³ <https://www.abercrombiekent.com/tours/luxury-expedition-cruises/2021/exploring-antarctic-as-changing-landscape-cruise>.

⁴ <https://www.quarkexpeditions.com/antarctic>.

⁵ *Supra* 2.

⁶ The New York Times <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>.

⁷ International Association of Antarctic Tour Operators.

⁸ <https://iaato.org/wp-content/uploads/2020/06/IAATO-on-Antarctic-visitor-figures-2019-20-FINAL.pdf> June 2020 IAATO Antarctic visitor figures.

⁹ IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22 submitted 14 May 2021, Appendix 2.

2021/22 seaborne tourism season are 46 vessels, 342 departures and 48,091 passengers¹⁰.

Updates on the 2021-22 season are planned for October 2021¹¹. The majority of visitors travel by cruise ship from ports like in Argentina (Ushuaia) or Punta Arenas, Chile.¹² A limited number of cruises depart from Hobart, Australia, Lyttelton, or Bluff, New Zealand.¹³

Increasing tourism in this extremely remote area coupled with Antarctica's unique geopolitical position raises the level of passenger safety issues and their legal protection against potential risks associated with ship-based tourism.

II. Scope of report: A study of passengers' rights when travelling in the Antarctic forleisure

In the light of this development, the Passenger Rights sub-committee of the CMI International Working Group on Polar Shipping suggested a report on passengers rights in Arctic and Antarctic shipping.

This report concerns cruise shipping in Antarctica, the specific risks to safety passengers may be exposed to and how these are addressed against the background of the status of Antarctica as a continent without sovereignty and territorial jurisdiction. The report describes the mechanism of the Antarctic Treaty as the internationally governing system of Antarctica and the role of IAATO as the tourist industry's private law self-regulating body. In the absence of a "local law" in Antarctica, safety regulations and passenger rights are addressed by reference to international conventions and EU legislation.

The special status of Antarctica required a deviation in the structure of this report from the Working Paper on the Legal Framework for Ship's Passenger's rights in Arctic Waters. In the absence of an Antarctic national law, passenger rights are governed by the law governing the contract with the respective carriers or tour operators, including international conventions on passenger rights and ship safety, if ratified by the flag state. Consequently, the legal regimes governing passenger rights are as numerous and diverse as there are jurisdictions worldwide and, unlike in the Arctic, these rights cannot be assessed from the perspective of Antarctic coastal states, as there are no such states. This preliminary report, therefore, does not include national policies. Instead, international conventions, insofar as they are relevant to passenger voyages to antarctic waters, are presented without a reference to a specific jurisdiction or, in the case of EU legislation, to a specific EU Member State.

¹⁰ Ibid., jointly for Peninsula and Ross Sea.

¹¹ Ibid., Appendix 2.

¹² Paige McClanahan, *Tourism in Antarctica: Edging Toward the (Risky) Mainstream*, New York Times, Feb. 26, 2020, <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>.

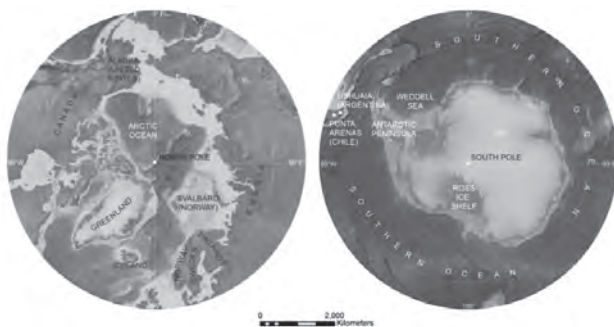
¹³ IAATO Frequently Asked Questions <https://iaato.org/faqs/>.

By way of summary, these are the topics dealt with in the report:

- Antarctica's geopolitical position
- International Conventions on safety in polar waters
- Description of particularities/special risks in Antarctic waters
- Tourism management in Antarctica; IAATO
- Passenger rights against the carrier
- Ticket standard terms and conditions
- Conclusions

III. Definition of the area to be analysed: Antarctica – geopolitical position

Antarctica is a continent surrounded by the Southern Ocean,¹⁴ No sovereign state falls within the Antarctic Circle, a line of latitude around the Earth, at 66°30'S. No single government has the authority to implement rules. It is not a state, it is international territory administered by sovereign states as signatories of the the Antarctic Treaty¹⁵ (AT). The Antarctic Treaty does not cover the surrounding seas (Antctic Treaty, Art. VI). According to UNCLOS¹⁶ Art 2, the sovereignty of a coastal state extends, beyond its land territory to an adjacent belt of sea, described as the territorial sea. In the absence of a coastal state, however, no territorial sovereign exists to exercise legislative or enforcement competence at sea.¹⁷ The high seas begin at the continent's edge¹⁸. Ships sailing on the high seas are subject to the exclusive authority of their flag-state pursuant to UNCLOS Art. 92.



Source: https://www.researchgate.net/figure/Map-of-the-Arctic-and-Antarctic-Regions_fig1_325763631

¹⁴ <https://climate.nasa.gov/blog/2861/arctic-and-antarctic-sea-ice-how-are-they-different/>.

¹⁵ The Antarctic Treaty, 402 U.N.T.S. 71, entered into force June 23, 1961.

¹⁶ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁷ Oxman, Bernard H. (1986) "Antarctica and the New Law of the Sea," *Cornell International Law Journal*: Vol. 19: Iss. 2, Article 4. <http://scholarship.law.cornell.edu/cilj/vol19/iss2/4>, p. 222.

¹⁸ Hoefsmit, Christina A. (2010) "Southern Ocean Shakeup: Establishing Sovereignty in Antarctica and the Consequences for Fishery Management," *Roger Williams University Law Review*: Vol. 15: Iss. 2, Article 5, p. 548; http://docs.rwu.edu/rwu_LR/vol15/iss2/5.

The Antarctic Treaty

The Antarctic Treaty (AT) was adopted in 1959 by twelve countries pursuing scientific activities in and around Antarctica during the International Geophysical Year (IGY) of 1957-58: Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America¹⁹. The Treaty entered into force in 1961 and covers the area south of 60°S latitude (Art.VI). All member states of the United Nations can accede the Antarctic Treaty. The Secretariat supports the Antarctic Treaty Consultative Meetings and the Committee for Environmental Protection, facilitates the exchange of information among the Treaty Parties, and maintains records of Treaty and related meetings.²⁰

Among the original signatories of the AT were seven countries - Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom - with territorial claims, sometimes overlapping. Territorial claims are not enforceable while the AT is in force.²¹

Since 1959, 42 other countries have acceded to the Treaty²². Pursuant to Art. IX.2, they are entitled to participate in the Consultative Meetings during such times as they demonstrate their interest in Antarctica by “*conducting substantial research activity there*”. Currently 54 states are parties to the Treaty, of which 29 are Consultative Parties. The other 25 Non-Consultative Parties are invited to attend the Consultative Meetings but do not participate in the decision-making.²³

The Antarctic Treaty Consultative Meeting ATCM

The original Treaty Parties and Consultative Parties meet annually at the Antarctic Treaty Consultative Meeting (ATCM) “for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering and recommending to their Governments measures in furtherance of the principles and objectives of the Treaty” (AT Art. IX)”²⁴.

The ATCM includes observers and invited experts:

Observers:

Currently the Scientific Committee on Antarctic Research (SCAR), within SCAR, the Standing Committee on the Antarctic Treaty System (SCATS), in charge of developing SCAR’s scientific advice to the ATCM;²⁵ The Committee on Environmental Protection (CEP), the Commission for

¹⁹ <https://www.bas.ac.uk/about/antarctica/the-antarctic-treaty/the-antarctic-treaty-1959/>.

²⁰ <https://www.usap.gov/theantarctic treaty/>.

²¹ <https://www.antarctica.gov.au/about-antarctica/law-and-treaty/history/antarctic-territorial-claims/>.

²² <https://www.ats.aq/devAS/Parties?lang=e>.

²³ Ibid.

²⁴ <https://www.ats.aq/e/atcm.html>.

²⁵ <https://www.scar.org/policy/scats/>.

the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention for the Conservation of Antarctic Seals (CCAS), and the Advisory Committee to the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Council of Managers of National Antarctic Programs (COMNAP);

Invited Experts:

Currently, these are the Antarctic and Southern Ocean Coalition (ASOC) and the International Association of Antarctica Tour Operators (IAATO)²⁶ since 1994²⁷

Measures, Decisions and Resolutions, which are adopted at the ATCM by consensus, give effect to the principles of the Antarctic Treaty and the Environment Protocol and provide regulations and guidelines for the management of the Antarctic Treaty area and the work of the ATCM. Decisions, which address internal organisational matters of the ATCM, and Resolutions, which are hortatory texts, are not legally binding on Contracting Parties.²⁸

Measures are legally binding on the Consultative Parties once they have been approved by all Consultative Parties. However, since the continent has no governing agency, there is no authority who can actually enforce the Treaty. The Measures are implemented through the Consultative Parties' domestic laws and apply to their citizens and corporate entities based within their jurisdiction only when in Antarctica. Only the Consultative Parties take part in decision-making. Other participants in the meeting may contribute to the discussions.²⁹

The ATCM have adopted recommendations and negotiated separate international agreements, of which three are still in use. These, together with the original Treaty provide the rules, which govern activities in Antarctica. Collectively they are known as the Antarctic Treaty System (ATS), namely the Convention for the Conservation of Antarctic Seals (1972), Convention on the Conservation of Antarctic Marine Living Resources (1980), Protocol on Environmental Protection to the Antarctic Treaty (1991)³⁰.

IV. International Conventions on Safety

POLAR CODE

The ATCM supported and advocated the POLAR CODE as per the adopted Antarctic Treaty Resolution 3 (2014):

“Recommending that their Governments:
encourage IMO Member States to continue as a matter of priority the

²⁶ <https://www.ats.aq/e/atcm.html>.

²⁷ <https://iaato.org/about-iaato/the-antarctic-treaty/>.

²⁸ <https://www.ats.aq/e/atcm.html>.

²⁹ Ibid.

³⁰ British Antarctic Survey <https://www.bas.ac.uk/about/antarctica/the-antarctic-treaty/>.

important work of finalising the Polar Code pertaining to ship safety and environmental protection; and further encourage IMO Member States to consider additional safety and environmental protection matters in a second step, as to be determined by the IMO.³¹

The Polar Code applies to ships operating in Arctic and Antarctic waters. It covers the full range of design, construction, equipment, operational, voyage planning, communication, training, search and rescue and environmental protection matters relevant to ships operating in the waters surrounding the two poles. The Polar Code and SOLAS amendments were adopted during the 94th session of IMO's Maritime Safety Committee (MSC), in November 2014.

The individual chapters heading best explain the areas it covers:

Safety Measures

- Chapter 1 - General
- Chapter 2 - Polar Water Operation Manual (PWOM)
- Chapter 3 - Ship Structure
- Chapter 4 - Subdivision and Stability
- Chapter 5 - Watertight and Weathertight Integrity
- Chapter 6 - Machinery Installations
- Chapter 7 - Fire safety/Protection
- Chapter 8 - Life Saving Appliances and Arrangements
- Chapter 9 - Safety of Navigation
- Chapter 10 - Communication
- Chapter 11 - Voyage Planning
- Chapter 12 - Manning and Training

Pollution Prevention Measures

- Chapter 1 - Prevention of Pollution by Oil
- Chapter 2 - Control of Pollution by Noxious Liquid Substances in Bulk
- Chapter 3 - Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form
- Chapter 4 - Prevention of Pollution by Sewage from Ships
- Chapter 5 - Prevention of Pollution by Garbage from Ships

For the purpose of this report, reference is made to Chapter 3 (ice classes), Chapter 1, paragraph 1.2.7. (ETR Expected Time of Rescue) Chapter 8 (Life saving appliances) and Chapter 12 (Training and Manning) para. 12.3.2.

The full text of the Code is available here: <https://www.icetra.is/media/english/POLAR-CODE-TEXT-AS-ADOPTED.pdf>

The Polar Code entered into force on 1 January 2017.³² The Polar Code Part I forms an add-on to the SOLAS requirements. Part II considers the environmental protection of the Polar Regions and is implemented through

³¹ Antarctic Treaty database - Resolution 3 (2014) - ATCM XXXVII - CEP XVII, Brasilia.

³² <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Polar-default.aspx>.

amendments to MARPOL Annexes I, II, IV and V.³³ The Polar Code includes mandatory measures covering safety part (part I-A) and pollution prevention (part II-A) and recommendatory provisions for both (parts I-B and II-B).³⁴

Regardless of flag, the Polar Code applies to all ships carrying SOLAS certification that intend to operate in Polar Regions³⁵

In terms of what is meant by SOLAS Certificates, the interpretation is, if a ship is carrying a SOLAS Passenger Safety Construction Certificate, the Polar Code applies.³⁶

Part I applies to all vessels whose keel was laid on or after 1 January 2017, and to in-service vessels from their first intermediate or renewal survey after 1 January 2018. Part II applies to all vessels operating in Polar waters from 1 January 2017.³⁷

IMO uses “tacit acceptance” as the amendment procedure for most of its conventions. This means amendments to technical annexes of an IMO convention will enter into force after a certain period if a specified number of state parties do not oppose amendments within that period of time³⁸. This shows how IMO is important for Antarctica because the Antarctic Treaty System is not able to regulate all vessels operating in Antarctic waters³⁹

In accordance with its international obligations, member states must implement the provisions of Chapter XIV of SOLAS and the safety provisions in the Polar Code (which is incorporated into SOLAS by reference to it in Chapter XIV) into domestic law.

According to the Polar Code, ‘Antarctic waters’ means those waters which are south of 60° S (see image below).⁴⁰

The applicability is to ships that have SOLAS Certificates and are intending to operate in Polar Regions. In terms of what is meant by SOLAS Certificates, Chapter I of SOLAS includes a number of certificate requirements. Generally the interpretation is, if a ship is carrying a SOLAS Cargo Safety Construction, or Passenger Safety Construction Certificate, the Polar Code applies.⁴¹

³³ Lloyd’s Register <https://www.lr.org/en/resources-polar-code/>.

³⁴ <https://www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx>.

³⁵ SOLAS does not apply to some specific categories of ships, including: cargo ships of less than 500 gross tonnage; pleasure yachts not engaged in trade; ships of war and fishing vessels (sometimes termed “non-SOLAS ships”).

³⁶ [https://www.maritimecyprus.com/wpcontent/uploads/2019/07/](https://www.maritimecyprus.com/wpcontent/uploads/2019/07/the_polar_code_a_regulatory_interpretation_guide.pdf)

[the_polar_code_a_regulatory_interpretation_guide.pdf](https://www.maritimecyprus.com/wpcontent/uploads/2019/07/the_polar_code_a_regulatory_interpretation_guide.pdf), p. 19.

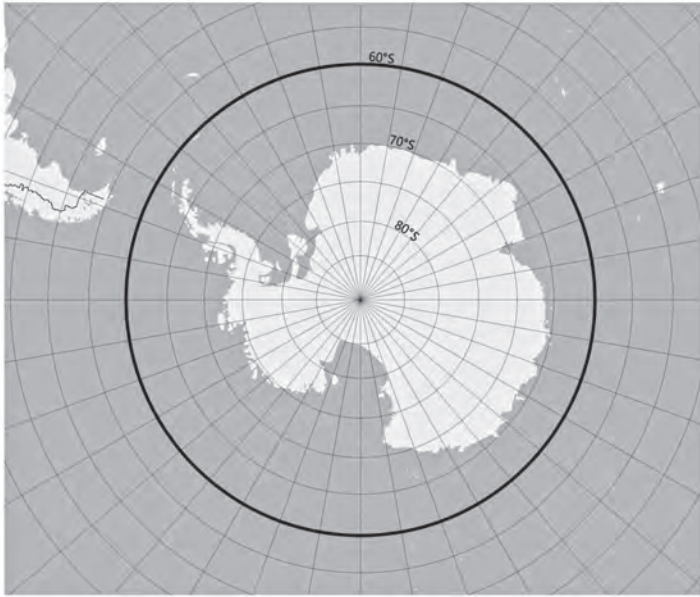
³⁷ <https://www.lr.org/en/resources-polar-code/>.

³⁸ <https://www.lr.org/en/resources-polar-code/o.org/en/About/Conventions/Pages/Default.aspx>.

³⁹ <https://www.asoc.org/advocacy/antarctic-governance/international-maritime-organization>.

⁴⁰ https://puc.overheid.nl/psi/doc/PUC_1503_14/2/.

⁴¹ Lloyd’s Register <https://www.lr.org/en/resources-polar-code/>.



Source: MEPC 68/21/Add 1 Annex 10, p. 8

Polar Ship Certificate

A central safety element of the Polar Code is the Polar Ship Certificate.⁴² It defines the vessel's polar operating capabilities and limitations, and confirms the flag state — or a recognized organization acting on its behalf (e.g., a classification society) — has inspected the vessel and determined its compliance with the relevant requirements of the Polar Code. Polar Ship Certificates classify vessels as one of the following (Part I-A, Definitions 2.1 – 2.4) and Chapter 3 Ship Structure:

- Category A – Capable of operating in at least medium first-year ice, which may include old-ice inclusions
- Category B – Capable of operating in at least thin first-year ice, which may include old-ice inclusions
- Category C – Capable of operating in open water, or ice conditions less severe than those qualified as Category A or B ships

Polar Class (PC) means the ice class assigned to the ship by the Administration or by an organization recognized by the Administration based upon IACS Unified Requirements.⁴³

It is the responsibility of the Owner to select an appropriate Polar Class to match the requirements for the ship with its intended voyage or service.

⁴² <https://oceanconservancy.org/wp-content/uploads/2017/06/Arctic-Vessel-Traffic-Report-WEB-2.pdf>.

⁴³ <https://www.icetra.is/media/english/POLAR-CODE-TEXT-AS-ADOPTED.pdf>.

- PC 1 Year-round operation in all polar waters
- PC 2 Year-round operation in moderate multi-year ice conditions
- PC 3 Year-round operation in second-year ice which may include multi-year ice inclusions.
- PC 4 Year-round operation in thick first-year ice which may include old ice inclusions
- PC 5 Year-round operation in medium first-year ice which may include old ice inclusions
- PC 6 Summer/autumn operation in medium first year ice which may include old ice inclusions
- PC 7 Summer/autumn operation in thin first-year ice which may include old ice inclusions⁴⁴

ETR Expected Time to Rescue

Paragraph 1.2.7 – Maximum expected time to rescue⁴⁵: The IMO, in the 1979 International Convention on Maritime Search and Rescue (the SAR Convention), defines rescue as “An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.

The concept of the maximum Expected Time to Rescue (ETR) is based on an assumption that Polar Regions are more remote than other sea areas, that availability of search and rescue services is more limited and that the environmental conditions mean that deployment of search and rescue services is more difficult. As such the expected time to rescue is intended to be selected by the operator to reflect an increased length of time during which the ship and its crew will have to survive until rescued.

The maximum ETR must be no less than five days. (Part 1-A Safety Measures, Definitions 1.2.7 Maximum expected time of rescue means the time adopted for the design of equipment and system that provide survival support. It shall never be less than 5 days). This timescale was selected based on the length of time that the lifeboat rations currently required to be carried by SOLAS are intended to last.

The maximum ETR affects: – the functionality of any life-saving appliances used for safe evacuation (paragraph 8.2.2 Polar Code) – the provision of survival resources (habitat, protection, communication equipment) (paragraph 8.2.3.3 Polar Code) – the provision of emergency rations (paragraph 8.3.3.4 Polar Code) – the operability of communication on survival craft (paragraph 10.3.2.3 Polar Code). See also the commentary on survival resources in Chapter 8.

The specified ETR will therefore affect equipment and provisions carried on board. The shipowner specifies the maximum ETR at time of build. For voyage-planning purposes the maximum ETR should be considered when planning routes in remote areas. The maximum ETR is included on the PSC and as such, the ship is limited by it.

⁴⁴ <https://balticsearouteing.dk/media/9984/56-equivalence-of-ice-classification-rules.pdf>.

⁴⁵ LLoxd's Register <https://www.lr.org/en/resources-polar-code/>.

It should be taken into account, however, that distances between Antarctica and civilization are vast, which is perhaps the most formidable of all the challenges listed. Travel from McMurdo Station to the nearest city, 2,400 miles away in New Zealand, takes five hours by plane. The bases of the various nations are scattered, rudimentary and separated by thousands of miles of hostile expanse. This degree of isolation is unmatched by any other human settlement and causes inevitable delays and difficulties in mounting a Mass Casualty Incident Response response.⁴⁶

Chapter 8, para. 8.3.3 Survival: no lifeboat shall be of any type other than partially or totally enclosed type

Ice Pilots

Pursuant to paragraph 12.3.3 of Chapter 12 of the Polar Code the (Flag-State) Administration may allow the use of a person(s) other than the master, chief mate or officers of the navigational watch to satisfy the requirements of part I-A, Chapter 12 of the Polar Code, provided that this person(s) shall be qualified and certified in accordance with regulation II/2 of the STCW Convention and section A-II/2 of the S 2.8.3 Polar Code. This does not relieve the vessel's crew of their duties and obligations for the safety of the vessel. This "other person" may be an ice pilot or navigator, as stated in the Flag States Bahamas Maritime Bulletin⁴⁷ at para. 8: "pursuant to the conditions outlined in paragraph 12.3.2 of Part 1-A of the Polar Code, the BMA allows the use of navigational personnel other than the ship's crew, i.e. so-called "Ice Pilots". The use is voluntary.

SOLAS SAFE RETURN TO PORT (SRtP)

In the light of passenger ships carrying ever larger numbers of passengers and voyages to remote areas such as the Antarctic concerns were raised about passenger safety particularly the difficulty of safely evacuating large numbers of passengers, including the elderly and infirm, from ship to lifeboats to rescue vessels in the event of fire or flood emergency and the ensuing Search and Rescue challenges.⁴⁸ At its eighty-second session (29 November to 8 December 2006) the Maritime Safety Committee (MSC) adopted amendments to SOLAS designed to improve passenger ship safety, emphasising prevention of a casualty and that future passenger ships should be designed for improved survivability so that persons can stay safely on board as the ship proceeds to port⁴⁹ Additional information about the intended area of operation, the operating pattern or patterns (which may be used to define any intended speed/maximum distance for safe return to port) should be included in the ship's description⁵⁰.

⁴⁶ Christopher N. Mills, MD, MPH* and Gregory H. Mills, MHS†Mass Casualty Incident Response and Aeromedical Evacuation in Antarctica <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3088372/>.

⁴⁷ Bahamas Maritime Bulletin No. 167 Revision No. 01 Issue Date 06 Oct 2017.

⁴⁸ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf.

⁴⁹ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf.

⁵⁰ MSC.1/Circ.1369 01-07-2010; para. 3.2.

There are two casualty thresholds defined under the SRtP regulations:

1. The fire casualty threshold is defined in SOLAS II-2/21.3 as being the loss of the space of the origin of the fire up to the nearest “A” class boundary if the space is protected by a fixed fire-fighting system or the loss of the space of origin and adjacent spaces up to the nearest A-class boundaries which are not part of the space of origin where no fixed fire-fighting systems are installed.
2. The flooding casualty threshold is the flooding of any single watertight compartment below the bulkhead deck.

If the casualty extends beyond the defined thresholds the ship must be abandoned which poses a severe challenge to passengers and SAR teams.

SOLAS regulations II-2 21, II-2 22, II-2 23 and II-1 8, (‘Safe Return to Port (SRtP) Regulations’) currently apply to passenger ships built on or after 1 July 2010 having a length of 120 m or more or having three or more main vertical zones.⁵¹ Fifteen years after adoption of the SRtP concept, it has become apparent to the co-sponsors that there is a lack of uniform implementation across the passenger ship sector and a need for numerous clarifications or interpretations. Certain key terms (e.g. “remain operational” and “manual actions”) and acceptance criteria are not defined clearly, which has given rise to differing interpretations. On operational aspects, no uniform standard has been established between stakeholders. The co-sponsors are of the view that the verification of compliance and associated documentation of compliance should also be improved⁵². Bahamas, Panama, CLIA and IACS proposed a review of SOLAS provisions related to safe return to port⁵³ on aspects related to a wide range of systems and arrangements, including subdivision and stability but also fire protection systems, falling under the remit of both the Sub-Committee on Ship Systems and Equipment (SSE) and the Sub-Committee on Ship Design and Construction (SDC).⁵⁴

V. Particularities/Special Risks in Antarctic waters

In 2013, the Antarctic Treaty Consultative Meeting (ATCM) formally recognised the Council of Managers of National Antarctic Programs (COMNAP) efforts “... to continue to foster collaborative discussions and vital sharing of information regarding SAR matters including through: holding triennial workshops on search and rescue...” (ATCM XXXVI Resolution 4 (2013)).

Under international maritime and aeronautical agreements, Rescue Coordination Centres (RCCs) of five countries (Argentina, Australia, Chile, New Zealand and South Africa) share responsibility for the coordination of Search and Rescue (SAR) over the Antarctic region.⁵⁵

⁵¹ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf.

⁵² <https://www.iacs.org.uk/media/8110/msc-102-21-12-proposal-for-a-new-output-to-review-guidance-on-the-application-of-solas-provisions-relate-bahamas-panama-clia-and.pdf>.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Antarctic Workshop Valparaiso 2008 https://www.ats.aq/att/Atcm32_att046_e.

The RCC's noted increases in activity related to science, tourism, fisheries and commercial aviation with routing that crosses below 60° south. More people in the Antarctic Treaty area, regardless of purpose of their activity, mean more probability of accident, incident or requirement for emergency response.

Increase in activities in the Antarctic Treaty area is at least partially due to reduction in sea ice in some areas. The perception that reduction in sea ice might be a reduction in risk is not completely true as removal of sea ice often creates increase in icebergs, fog, stronger or more persistent winds, and creates rapidly changing conditions that many are not aware of or prepared for. Ice-breaking capable vessels will still be required in order to respond to Antarctic SAR events.

Each Antarctic SAR region is different and has different characteristics. For example, for the Peninsula, the distances from South America to the Antarctic Treaty area are relatively short. For the three other SAR regions, the distances are larger. However, even in relatively short distances (that are never less than 1000-1200 Kms), the particular circumstances of Antarctica—its hydrometeorological and ice conditions, the scarcity of support points and the limited infrastructure—mean there is a complexity to deployment.

Time of arrival of SAR units is still very high compared to the expected survival time in the Antarctic.

Large distances in the Arctic do not mean having to wait for assistance for one or two days. In some cases, it would take five to six sailing days for a vessel to reach some areas of coastal Antarctica from outside the Antarctic Treaty area and this presumes good weather, and good sea and ice conditions.

Even though there are significant differences between the Polar Regions, there may be lessons Antarctic SAR agencies can learn from Arctic agencies. In some SAR situations, however, it says in the report, that it is simply not possible to provide any assistance.

In the report on the earlier Workshop towards Improved Search and Rescue Coordination and Response in the Antarctic in August 2008 in Valparaíso, Chile⁵⁸, hosted by the Chilean Directorate General of the Maritime Territory and Merchant Marine in collaboration with the Council of Managers of National Antarctic Programs (COMNAP) concern was voiced about incidents involving large passenger vessels:

It was noted that accidents involving a significant number of persons were of extreme concern and as such required special consideration. Depending on the environment, the SRR and the SAR capability available even small numbers of persons can prove extremely challenging. Large passenger vessels and aircraft will pose a very difficult challenge. Experience with MV Explorer has already clearly demonstrated this problem.⁵⁹

⁵⁸ Report of the Workshop Towards Improved Search and Rescue Coordination and Response in the Antarctic, Tuesday 12-Thursday 14 August 2008, Valparaíso, Chile Prepared by workshop convenors Antoine Guichard and Ivan Valenzuela Final version – 26 November 2008.

⁵⁹ Ibid.

The current increase in maritime and air traffic can be of concern in relation both to the capability to respond and to the possible impact on National Antarctic Programs. Of particular concern are very large passenger vessels – their rescue would require considerable assets and resources and could cause major disruptions to nearby stations and vessels and the research programmes they support.

“Accidents are rare, but not unheard-of”⁶⁰

A list of incidents involving passenger vessels sailing in Antarctic waters, based on various sources, including the IAATO reports on the 1991 – 2000 season and the 2011 – 2021 season are attached as Annex 1 to this report.

VI. Tourism

The Antarctic Treaty recognises tourism as a legitimate activity in Antarctica⁶¹, which is governed by a system of non-obligatory self-regulation⁶²

Accidents arising from tourism in the Antarctic raised concern amongst ATCPs. It was agreed, that all operators planning to conduct activities in the Antarctic must recognise and prepare adequately for the inherent dangers associated with operations conducted in this inhospitable and isolated environment, in particular:

- the health and safety of individuals participating in activities;
- the health and safety of rescuers and integrity of equipment used to undertake search and rescue operations in the Antarctic;
- the significant costs associated with the conduct of search and rescue, and medical care and evacuation operations in the Antarctic.⁶³

In 1991, the Antarctic Treaty Consultative Parties adopted the Protocol on Environmental Protection to the Antarctic Treaty, which designates the Antarctic as a natural reserve. The Protocol sets out environmental principles, procedures and obligations for the comprehensive protection of the Antarctic environment, and its dependent and associated ecosystems. The Consultative Parties agreed that, pending its entry into force, as far as possible and in accordance with their legal system, the provisions of the Protocol should be applied as appropriate. The Environmental Protocol applies to tourism and non-governmental activities as well as governmental activities in the Antarctic Treaty Area. It is intended to ensure that these activities do not have adverse impacts on the Antarctic environment, or on its scientific and aesthetic value.⁶⁴

⁶⁰ Paige McClanahan Published Feb. 26, 2020, Updated Feb. 27, 2020 Tourism in Antarctica: Edging Toward the (Risky) Mainstream, The New York Times <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>.

⁶¹ <https://www.bas.ac.uk/about/antarctica/tourism/>.

⁶² Regulation Impact Statement (Australia) Measure 4 (2004). Insurance and Contingency Planning for Tourism and Non-Governmental Activities in the Antarctic Treaty area, 27th Antarctic Treaty Consultative Meeting: Cape Town, 4 June 2004.

⁶³ Ibid.

⁶⁴ Guidance for Visitors to the Antarctic https://documents.ats.aq/recatt/att245_e.pdf.

The Antarctic Treaty Consultative Meeting (ATCM) adopted non-obligatory “Recommendation Tourism and non-governmental activities” at the ATCM XVIII-1 in Kyoto in 1994, recommending in Annex 1⁶⁵ *inter alia* that:

- Operators ensure that activities are self-sufficient and do not require assistance from ATCPs unless such arrangements for assistance have been agreed in advance;
- Provide information to assist in the preparation of contingency plans for emergency situations including search and rescue, medical care and evacuation;
- Consider insurance⁶⁶
- Be safe; be prepared for severe and changeable weather.
- Ensure that your equipment and clothing meet Antarctic standards.
- Remember that the Antarctic environment is inhospitable, unpredictable and potentially dangerous
- Know your capabilities, the dangers posed by the Antarctic environment, and act accordingly. Plan activities with safety in mind at all times
- Key Obligations on Organisers and Operators:
 - Provide prior notification of, and reports on, their activities to the competent authorities of the appropriate Party or Parties
 - Provide for effective response to environmental emergencies, especially with regard to marine pollution
 - Ensure self-sufficiency and safe operations

The Guidelines of 1994 were supplemented in 2004 with guidelines on contingency planning, insurance and other matters as Measure 4 (2004) and adopted in 2014.

However, for the time being, Measure 4 (2004) is not in force, as it requires to be approved by the 27 Consultative Parties present at the time of its adoption.⁶⁷

Measure 4 (2004) provides that ATCPs are to oblige operators under their jurisdiction

to, *inter alia*, develop and put in place appropriate contingency plans and sufficient arrangements for health and safety, search and rescue, medical care and evacuation;

To put adequate insurance or other arrangements in place to cover any costs associated with search and rescue, medical care or evacuation operations, Ensure the contingency plans and arrangements are implemented before the activities commence; and that those plans and arrangements are not reliant upon the support of other operators or national Antarctic programs without prior express written consent.

⁶⁵ Appendix 1 Antarctic Treaty Recommendation XVIII-1; for the purpose of this report recommendations in the Annex to protect the environment are omitted.

⁶⁶ Supra 74.

⁶⁷ Secretariat of the Antarctic Treaty <https://www.ats.aq/devAS/ToolsAndResources/SearchAtd?from=1/1/1958&to=1/1/2158&cat=0&top=0&type=0&stat=4&txt=&curr=0>.

Once in force, Measure 4 (2004) would apply to all parties to the Antarctic Treaty and consequently to their respective operators.⁶⁸

To offset risk to their operations – irrespective of whether they possess adequate insurance coverage – some operators may request individual consumers to sign a liability waiver and obtain individual travel insurance that covers search and rescue and medical care and evacuation in the Antarctic. Measure 4 (2004) does not compel individual consumers to obtain travel insurance that covers search and rescue and medical care and evacuation.⁶⁹

Noting that Measure 4 (2004) had not come into effect by 2017, and “desiring to take certain steps before it enters into effect to promote its objectives” the Representative Parties adopted Resolution 6 (2017) at the ATCM XL - CEP ⁷⁰XX, namely “Guidelines on Contingency Planning, Insurance and Other Matters for Tourist and Other Non-Governmental Activities in the Antarctic Treaty Area”. The adoption occurred against the background of “potential impacts, including the imposition of additional costs, that tourist or other non-governmental activities may have on national programmes, and the risk to the safety of those involved in search and rescue operations”⁷¹. It is recommended that Parties should require those under their jurisdiction organising or conducting tourist or other non-governmental activities in the Antarctic Treaty area, to follow the Guidelines annexed to this Resolution.⁷²

The Guidelines mirror those contained in Measure 4 (2004) and provide in extract as follows:⁷³

1. Those organising or conducting tourist or other non-governmental activities in the Antarctic Treaty area should ensure:
 - a. that appropriate contingency plans and sufficient arrangements for health and safety, search and rescue (“SAR”), and medical care and evacuation have been drawn-up and are in place prior to the start of the activity. Such plans and arrangements should not be reliant on support from other operators or national programmes without their express written agreement; and
 - b. that adequate insurance or other arrangements are in place to cover any costs associated with SAR and medical care and evacuation.
2. Competent authorities may specify the format in which they would prefer to receive information pertaining to paragraph 1a of these guidelines and the equivalent requirement in Measure 4 (2004).

⁶⁸ Supra 74.

⁶⁹ Australia Regulation Impact Statement March 2011 Measure 4 (2004) Insurance and Contingency Planning for Tourism and Non-Governmental Activities in the Antarctic Treaty Area, para. 4.26, p. 8.

⁷⁰ Committee for Environmental Protection.

⁷¹ Resolution 6 (2017) - ATCM XL - CEP XX, Beijing, <https://www.ats.aq/devAS/Meetings/Mmeasure/664>.

⁷² Ibid.

⁷³ Resolution 6 (2017) - ATCM XL - CEP XX, Beijing, <https://www.ats.aq/devAS/Meetings/Mmeasure/664>, Annex.

3. Where a competent authority so decides, a ship-based operator may provide a copy of the Polar Water Operational Manual required under the International Code for Ships Operating in Polar Waters (Polar Code), or relevant parts thereof, as part of demonstrating compliance with the maritime components of the requirements referred to in paragraph 2.
4. The following guidelines should also be observed in particular by those organising or conducting activities without the supervision or support in the field of another operator or a national programme:
 - a. participants have sufficient and demonstrable experience appropriate for the proposed activity operating in polar, or equivalent, environments. Such experience may include survival training in cold or remote areas, flying, sailing or operating other vehicles in conditions and over distances similar to those being proposed in the activity;
 - b. all equipment, including clothing, communication, navigational, emergency and logistic equipment is in sound working order, with sufficient backup spares and suitable for effective operation under Antarctic conditions;
 - c. all participants are proficient in the use of such equipment;
 - d. all participants are medically, physically and psychologically fit to undertake the activity in Antarctica;
 - e. adequate first-aid equipment is available during the activity and that at least one participant is proficient in advanced first-aid.

Adventure Tourism

In the Final Report of the XXVI Antarctic Treaty Consultative Meeting in Madrid, Spain in 2003, the term “Adventure Tourism” in the context of Antarctic Tourism was debated and what kind of activities should fall under any legal framework regulating tourism. A distinction was suggested between commercial tourism and adventure tourism. Some Delegations launched a debate on what should be meant by “adventure tourism”.⁷⁴

Some delegations considered that it was extremely difficult to draw a distinction between what might be considered adventure tourism or tourism in general. Some characteristics ascribed to adventure tourism were its high risk and the autonomy of the participants. Two main implications of adventure tourism were underlined: safety for those practices, which implied risks, and possible rescue operations by national operators and environmental impact.⁷⁵

Several delegations agreed on the need of discouraging and not giving support to these risky activities even in the framework of the ATS. It would be necessary to make the difference between responsible and irresponsible tourist activities, discouraging the latter.⁷⁶

Under the heading “recent trends” IAATO, in a paper called “Adventure Tourism in Antarctica”⁷⁷ produced at the 2003 ATCM, observed that

⁷⁴ XXVI Antarctic Treaty Consultative Meeting Madrid 2003, para. 141, p. 33.

⁷⁵ Ibid., para. 148, p. 35.

⁷⁶ Ibid., para. 149, p. 35.

⁷⁷ IAATO Adventure Tourism in Antarctica ATCM XXVI 2003 Agenda Item 10.

pursuits such as kayaking, camping and climbing may now be available on selected voyages were being branded “Adventure Tourism”. Participation was possible through IAATO member cruise vessels. With regard to ship-based Adventure Tourism, IAATO states that over the last 5 years [i.e. since 1998] activities available aboard and from a cruise vessel had expanded and been developed to accommodate new and active travelers. Of those the majority is said to be small numbers of passengers, traveling with “reputable companies” who have experienced in these activities.⁷⁸

IAATO

The International Association of Antarctica Tour Operators (IAATO) was founded in 1991 by seven Antarctic tour operators: Adventure Network International, Mountain Travel Sobek, Paquet/Ocean Cruise Lines, Salén Lindblad Cruising, Society Expeditions, Travel Dynamics and Zegrahm Expeditions.⁷⁹ These days the membership is more than 100⁸⁰. According to the current IAATO member vessel directory, the passenger capacity range from 8 to 3,000⁸¹. A list incorporating vessels, including motor and sailing yachts currently registered with IAATO and provided courtesy of IAATO is attached to this report as Annex 2.

IAATO participates in the ATCM as an invited expert organisation (see above page 7)

IAATO was established out of the increasing need for standardisations of tourism operations in the light of rising tourism levels in Antarctica and applying the recommendations issued by the ATCM. The solution chosen was a self-regulatory organisation and operating through Bylaws⁸² and a Code of Conduct⁸³. IAATO promulgates regular Guidelines on land- and sea-based Antarctic tourism operations⁸⁴. However, IAATO cannot enforce rules vis a vis third parties, they “are not the police” as specifically stated in their Code of Conduct:

IAATO is not the “police”, nor do we regulate tourism in the Antarctic; rather, we manage tourism within the parameters of international and national legal and policy requirements, including those of the Antarctic Treaty System. IAATO Operators also follow guidelines found in the IAATO Field Operations Manual, which often exceed the national or international required standards.⁸⁵

⁷⁸ Ibid.

⁷⁹ IAATO Bylaws Apr 2021 <https://iaato.org/about-iaato/our-mission/bylaws/>.

⁸⁰ <https://iaato.org/who-we-are/vessel-directory/>; <https://iaato.org/who-we-are/member-directory/>.

⁸¹ Ibid.

⁸² Supra 80.

⁸³ <https://iaato.org/agenda-item-10a-code-of-conduct>.

⁸⁴ IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22 iaato.org/wp-content/uploads/2021/07/ATCM43_ip110_e.

⁸⁵ Supra 85.

Non-IAATO tourist vessels operating in Antarctica, if flagged to non-Parties to the Treaty do not fall under IAATO's self-regulation measures.⁸⁶

IAATO Bylaws

Members can be expelled. Section III of the IAATO Bylaws allow for reprimand or change in membership status (e.g. probation or expulsion) after review by the Compliance and Dispute Resolution and Executive Committees and a vote by the members in good standing.⁸⁷

According to an IAATO paper on tourism growth, apart from small yachts (vessels carrying 12 or less), none of the passenger vessels operating in the Antarctic operated outside of IAATO in the 2019/2020 season⁸⁸.

There are three types of membership according to the IAATO Bylaws:⁸⁹

Operators: organisers that operate travel programs to the Antarctic and/or sub-Antarctic, have been Provisional Operator members for at least one year and have fulfilled the Bylaw requirements in Article III, Sections B and C, and Article X, as applicable.

Organisers: operate travel programs to Antarctica and/or sub-Antarctic and are expected to request Operator status in IAATO. These organisers are Provisional Operator members. Once the conditions in Article III, Sections B and C, and Article X are met, as applicable, these organisers can become Members. Applications for Provisional Operator membership will only be voted upon once per year at the IAATO Annual Meeting. To have their application voted upon, applicants must be present at the meeting.

Associate members: are defined as one of the following:

Tour operators, travel agents or organisers that do not operate Antarctic and/or sub-Antarctic tour programs themselves, but book into other Operators or Provisional Operators' programs and/or companies, organizations or individuals with an interest in supporting Antarctic tourism and the IAATO objectives. These companies, individuals, operators, agents or organisers are Associate members.

As set out in the membership application, all Members, as a condition of Membership, are to participate in and be bound by the IAATO Rules of Procedure for Enforcing Compliance the IAATO Codes of Conduct relevant to their Activities, as adopted.⁹⁰

The membership application is detailed and includes comprehensive questionnaires for each category of members aimed at disclosing the applicant's company's details, the vessel details, previous experience in the Antarctic, previous incidents, if any, e.g.:

As applicable, please include examples of all relevant pre-departure materials your company provides to clients with this application and be sure to list them to the right.

⁸⁶ Chairman's Report from the Miami Meeting (March 17-19, 2008) on Antarctic Tourism, [iaato.org > uploads > 2020/03 > Atcm31_ip019_eiaatochairmans1](https://iaato.org/uploads/2020/03/Atcm31_ip019_eiaatochairmans1), para. 2.2.2, p. 6.

⁸⁷ IAATO frequently asked questions <https://iaato.org/faqs/>.

⁸⁸ IAATO and Tourism Growth [https://iaato.org > wp-content > uploads > 2020/05](https://iaato.org/wp-content/uploads/2020/05).

⁸⁹ Application for IAATO Membership updated 2020, p. 2; [https://iaato.org > wp-content > uploads > 2020/12](https://iaato.org/wp-content/uploads/2020/12).

⁹⁰ Application for IAATO Membership updated 2020, Art. III, Section L, p. 18.

As applicable, please describe what other methods you use to prepare/educate your clients in terms of their behavior, safety and well-being prior to departure.⁹¹

According to Bylaws article X⁹²: Operational Procedures Section A, operators and their activities are grouped into the following categories:

1. Organisers of vessels carrying 13-200 passengers and making landings.
2. Organisers of vessels carrying 201-500 passengers and making landings.
3. Organisers of vessels making no landings (cruise only). This includes all vessels carrying more than 500 passengers.
4. Organisers of land operations.
5. Organisers of air operations with over-flights only.
6. Organisers of air/cruise operations.
7. Organisers of sailing or motor vessels that carry 12 or fewer passengers.

Section B provides that all Operators and Provisional Operators are to comply with the following operational conditions pursuant to the Antarctic Treaty System, including the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty, along with IMO Conventions and similar international and national laws and agreements:

Organisers are expected to maintain their vessels, aircraft, and equipment in suitable condition for safe and effective operation under Antarctic conditions.

Organisers are expected to have appropriate contingency plans for all aspects of their operations.

Organisers are expected to hire a sufficient number of expedition staff, at least 75% of whom have previous Antarctic experience, and to recommend strongly that all field staff in their employ take and pass the relevant IAATO online assessment module.

Organisers are to complete a Post-Visit Site Report upon the completion of each program and submit it to the IAATO Secretariat and the Organiser's National Authority, if applicable.

Organisers are to submit an End of Season Report to the IAATO Secretariat on completion of their Antarctic season.

Organisers are to adhere to other obligations as enacted by the Antarctic Treaty System and/or governments of sub-Antarctic islands.

⁹¹ IAATO Membership Application 2020 p. 7 et seq. <https://iaato.org/wp-content/uploads/2020/12>.

⁹² IAATO Bylaws <https://iaato.org/about-iaato/our-mission/bylaws/>.

Section C deals with additional conditions for vessel operations:

Operators and Provisional Operators who organise tourism activities using vessels are to comply with the following additional operational conditions pursuant to the Antarctic Treaty System, including the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty, along with IMO Conventions and similar international and national laws and agreements:

Organisers of vessels that carry more than 500 passengers are not permitted to make landings.

Organisers of vessels that make landings are not to have more than 100 visitors ashore at any one site at the same time. Visitors are defined as passengers and crew not assisting with the landing; this excludes expedition guides, leaders, and crew assisting with the landing.

Organisers of vessels carrying 201-500 passengers are to abide by stringent restrictions on time and place of landing activities.

Organisers of vessels of any size must coordinate site visits via the IAATO Ship Scheduler and the agreed ship-to-ship communication procedures so that not more than one vessel is at any one site at the same time.

Organisers who land visitors are to maintain a minimum expedition staff-to-visitor ratio of 1:20 while ashore.

Organisers operating vessels that will travel south of 60°S latitude are to have a Captain or appointed Ice Pilot with Antarctic experience suitable for the intended operation.

Depending on the intended operation, it may be necessary to have additional relevant Antarctic experience among the bridge officers.

Organisers are to update the IAATO Vessel Database on a regular basis.

Organisers are to incorporate into their own operating procedures the IAATO guidelines and operational procedures while operating in the Antarctic and, where appropriate, in the sub-Antarctic islands.

IAATO Code of Conduct⁹³

The Code consists of two parts: part one sets out the purpose and the scope:

Purpose

The purpose of this Code of Conduct is to support important principles and expectations for professional conduct and best practices by all the Onboard Teams of IAATO Operators. While non-exhaustive, this Code is a shared statement of commitment to uphold the ethical and professional standards required to fulfill these principles and objectives.

⁹³ IAATO Code of Conduct <https://iaato.org/agenda-item-10a-code-of-conduct>.

This Code of Conduct is meant for and to be followed by all staff onboard vessels. It is the responsibility of the Captain and Expedition Leader to ensure this document is shared in pre-season briefings and is reviewed before the start of every voyage.

Where possible, those vessels who comply with SOLAS Chapter IX – Management for the Safe Operations of ships – should use and incorporate the IAATO Guidelines and Practices in their Safety Management Systems.

Scope:

This Code sets minimum expectations for personal and professional behaviour. More stringent requirements imposed by third parties (e.g. employing organizations, vessel or camp management) remain fully in effect.

This Code applies to all IAATO Operators and Associates, whether working on vessels or in the home office. We are ALL IAATO

Part two addresses guiding principles, including Specific Practises:

If a vessel is involved in activities in a narrow channel, upon hearing the “Securite” call, the vessel engaged in the activities should immediately respond over Channel 16 and notify the incoming vessel of any potential hazards/risks to navigation.

Be conscious of the ship wake when other vessels are around and offering activities. When sailing past a vessel engaged in activities, be sure to communicate your vessel’s intentions, and inquire what activities are in progress.

Avoid disturbances such as waking, buzzing, bumping, or crowding other vessels. This is particularly important when Zodiacs/small boats and kayakers are on the water, as not only could a ship wake make kayaking less enjoyable, it could potentially cause an emergency.

Adhere to all applicable international and national legal and policy requirements, including those of the Antarctic Treaty System. 2. Support the mission of IAATO: advocate and promote the practice of safe and environmentally responsible private-sector travel to the Antarctic

Vessel Emergency Contingency Plan

The IAATO-Wide-Emergency Contingency, Search, and Rescue Plan, “A Brief Summary of the Work in Progress”, is published on the current IAATO website⁹⁴, a paper produced in 2002 at the XXV ATCM.

In 2006-2007, the plan was reviewed first by IAATO’s Marine Committee and then presented to all ship operators for discussion and adoption. It was agreed by the membership that the plan was effective and only required additional supplemental text.⁹⁵

⁹⁴ <https://iaato.org/information-resources/data-statistics/download-iaato-information-papers/>.

⁹⁵ IAATO Vessel Emergency Contingency Plan 2006-2007 IAATO Operational Document <https://iaato.org/download/ip091-iaato-contingency>.

The IAATO Emergency Contingency Plan is presented as only giving a description of how to produce an Emergency Contingency Plan to be used for operations in Antarctica. It is referred to as a framework, on which to hang a specifically tailored emergency contingency plan peculiar to each vessel/operation.⁹⁶

Emergencies considered - apart from environmental pollution - were:

- Ice damage to the hull, propeller and rudder
- Heavy weather damage
- Medical emergencies
- Man overboard from the ship, Zodiacs, kayaks, etc.
- Grounding and stranding
- Mechanical and/or steering failure
- Power outage/blackout
- Fire
- Collision
- Security threat
- Explosion

At the time (2006-2007) in place were the following according to the paper:⁹⁷

- A well-established spreadsheet of vessel itineraries in the Antarctic and Sub-Antarctic
- Proven and effective communication between vessels
- An established medical evacuation plan
- A database detailing emergency equipment available on board all IAATO ships
- All ships are in compliance with ISM, MARPOL, SOLAS, etc.
- Agreement to assist each vessel in any emergency
- Adequate insurance coverage
- Engagement of only experienced and properly trained officers and crew, Ice Masters in compliance with Standards for Training, Certification and Watchkeeping (STCW)

In terms of “Future Work” item 6 in the paper amongst other items includes

- Increased medical emergency response capabilities in remote areas.⁹⁸

IAATO Member Emergency Medical Evacuation Response (EMER) action plan

IAATO Emergency and Medical Evacuation Response (EMER) was established in 1998⁹⁹ together with IAATO founding member Adventure Network International in Punta Arenas, Chile (EMER)¹⁰⁰ is a key component

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Report of the International Association of Antarctica Tour Operators 2008-2009 <https://iaato.org/wp-content/uploads/2020/03>.

¹⁰⁰ Report of the International Association of Antarctica Tour Operators (IAATO) XXII ATCM 1998.

of emergency response. It is contained in the IAATO Field Operations Manual (FOM¹⁰¹) and is posted on the “members only” page of the IAATO website (¹⁰²www.iaato.org).¹⁰³ The FOM is updated and circulated annually to IAATO operators, and contains all relevant international governance, including ATCM instruments as well as IAATO requirements, guidelines, standard operating procedures and other industry best practice.¹⁰⁴

IAATO Passenger Medical Questionnaire

The IAATO Passenger Medical Questionnaire is referred to as “Standard Operating Document”¹⁰⁵. Samples of the questionnaire published e.g. by Hurtigruten¹⁰⁶

IAATO Observer Programme¹⁰⁷

At its 2019 Annual Meeting in Cape Town, South Africa, IAATO Operators voted unanimously to implement a scheme of periodic mandatory observations of all member operations to ensure Operators’ and other stakeholders’ compliance with all IAATO and Treaty policies and procedures¹⁰⁸. Under the Programme, all IAATO Operator companies are required to carry an IAATO-approved observer during the first Antarctic season of a new-build/newly converted vessel or during the first year of operation of a new deep field camp, unless exempted by the Executive Committee on the advice of the Membership Committee. The Programme includes an Annual Internal Review Checklist¹⁰⁹ to be completed once per season per operator and filed internally within each Member company on an annual basis. This checklist for vessel operators covers, *inter-alia*,

To ensure that passengers – whether booked through charterers, wholesalers, sponsoring organisations, or directly are requested to supply relevant medical information (as appropriate);

Passengers have adequate insurance cover (as appropriate);

Prior to arrival in Antarctica, passengers will receive a copy of Recommendation XVIII-1 Guidance for Visitors to the Antarctic and the IAATO safety and conservation briefing or company equivalent.

¹⁰¹ The FOM is updated and circulated annually to IAATO operators, and contained all relevant international governance, including ATCM instruments as well as IAATO requirements, guidelines, standard operating procedures and other industry best practice.

¹⁰² Supra 101.

¹⁰³ Supra 101.

¹⁰⁴ IAATO Field Operations Manual (FOM) XLII ATCM Prague, 2019.

¹⁰⁵ Regulation of Antarctic Tourism--A Marine Perspective, Information Paper Submitted by IAATO at the ATCM 2008, Appendix 3, Index of IAATO Guidelines and Adopted Procedures

¹⁰⁶ 4b-IAATO Sample Medical questionnaire (revised 2015) <https://www.singlestravelintl.com › 2017/11 › FO...>

¹⁰⁷ IAATO 2019 Annual Meeting Cape Town, South Africa April 30 – May 3, 2019.

¹⁰⁸ IAATO Mandatory Observer Scheme Information Paper Submitted by IAATO 2019.

¹⁰⁹ IAATO Enhanced Review/Observer Scheme Annual Internal Review Checklist <https://iaato.org › download › ip107-appendix-1-...>

If operating a SOLAS Passenger vessel, ensure vessel tracking system operation planned and prepared to start tracking hourly while in Antarctic waters;

Ensure Master or Ice Pilot have appropriate Antarctic experience. Consider additional relevant Antarctic experience among the bridge officers, as appropriate.

Additionally, each IAATO vessel or deep field camp is required to be observed once every 5 years of Antarctic operation.¹¹⁰

The Operator's responsibilities include:

No less than three months prior to departure, the operator should send to the observer (a) all pre-trip information provided to passengers and (b) all forms, especially medical forms, required to be completed and returned by passengers.

No less than one month prior to departure, the Operator should send to the Observer and copy to IAATO's Director of Governance and Administration A complete list of expedition staff and their specific Antarctic experience.

The Observer's obligations include to provide the company with necessary documents consistent with all passengers' requirements, such as medical certificate, proof of emergency medical/evacuation/repatriation insurance coverage, etc.; submission of a report to the IAATO Secretariat and Operator member company within two-weeks of the conclusion of the expedition.¹¹¹

Observer Checklist

IAATO provides the Observer with the IAATO Observer Report Checklist with questions covering:

Voyage Preparation and Documentation

Did the pre-departure material explain that conditions can be severe and inhospitable and point out the necessity for suitable clothing?

Were clients advised that sophisticated medical care is unavailable in the Antarctic, and encouraged to take out medical and evacuation insurance prior to their trip?

Did they have to provide a medical questionnaire prior to their voyage?

– Antarctic Treaty and Domestic Legislation

Did the operator receive all permits from government authorities required under domestic legislation in time of departure?

¹¹⁰ Supra 108.

¹¹¹ Supra 109.

– Vessel Operation

Did the Captain or an appointed ice pilot have Antarctic experience suitable for the intended operation? Was there additional relevant Antarctic experience among the bridge officers?

Did the vessel, as far as reasonable and practical, comply with the Guidelines for Ships Operating in Polar Waters?

Did the vessel participate in the IAATO vessel tracking scheme and report hourly?

Were current hydrographic charts for the area of operation available on the bridge at all times? Please indicate which charting authority charts were being used (e.g. UKHO, Chile HO, etc.).

Which Search and Rescue (SAR) measures were put in place for self-sufficient operations?

Were there onboard drill schedules, which included regular damage control scenarios related to ice damage with control measures that considered the implications of cold weather environments?

Was there a comprehensive briefing on safety issues, including the mandatory lifeboat/safety drill, conducted in a timely manner, with all passengers in attendance, and translated for non-English speaking passengers?

Were passengers' and crew's attention drawn to the necessity for suitable clothing in conditions that can be severe and inhospitable? Were passengers strongly encouraged to observe the weekly crew abandon ship drill and fire drill?

Were the relevant officers and the expedition leader familiar with IAATO's Emergency Contingency Plan?

Please describe the medical facilities and list the number and qualifications of all medical personnel onboard.

Were the relevant officers and the expedition leader familiar with IAATO's Medical Evacuation Response Plan (EMER), and was there a copy on board? If not, please describe the Emergency Medical Evacuation Response that was in place.

Were passengers and crew advised to take precautionary measures to prevent accidents during particularly difficult weather conditions?

VII. Passenger Rights against the Carrier

Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (PAL) and the 2002 Protocol

PAL was adopted within the IMO framework in 1974 and entered into force on 28 April 1987¹¹². The intention was to harmonise two earlier Brussels conventions dealing with passengers and luggage and adopted in 1961 and 1967.¹¹³

The text of PAL can be found here¹¹⁴. Signatory states to PAL, including the EU, are listed in the UN Treaties list.¹¹⁵

Scope of application

PAL Art. 2 defines the scope of application. It applies to international carriage only, i.e. not domestic cruises as defined in Art. 1 (9). First, there has to be an international carriage:

international carriage” means any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State.

Considering that Antarctica is not a “State”, cruises that sail from ports in states to Antarctica, calling at an Antarctic port and returning to the port of embarkation do not qualify as “international carriage” as defined in PAL. PAL might apply if incorporated into the contract of carriage but it is a matter of construction under the law applicable to the contract if the missing element of the internationality of the carriage can be ignored when PAL is incorporated unamended.

If there is a call at an intermediate port in another “State”, making the voyage an “international carriage”, PAL applies by force of law without the need to be included in the contract¹¹⁶, if, as set out in PAL Art. 2 (1):

- the ship is flying the flag of or is registered in a State Party to this Convention,
- or
- the contract of carriage has been made in a State Party to this Convention,
- or

¹¹² [https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx).

¹¹³ Ibid.

¹¹⁴ <http://www.admiraltylawguide.com/conven/passengers1974.html>.

¹¹⁵ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800edbb3>.

¹¹⁶ Rosemary Gibson CRUISE SHIP PASSENGER CONTRACTS: THE TRIP OF A LIFETIME OR A VOYAGE THROUGH CLAUSES, CONVENTIONS AND CONFUSION? p. 31; <http://138.25.65.17> › journals › ANZMarLawJl › 8.pdf.

- the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

The Convention does not concern itself with claims for damages by passengers for lost holiday enjoyment due to quality complaints.¹¹⁷ It applies automatically, regardless of whether its terms are incorporated in the contract of carriage/the ticket.

Passenger

The party entitled to sue is the passenger who becomes a passenger under a contract of carriage (PAL Art. 1 (2) Definitions).

Carriage

Carriage covers the time from embarkation to disembarkation (PAL Art. 1 (8) Definitions). It does not cover shore excursions.

Contractual and Performing Carrier

The party liable is the actual and/or the performing carrier.

Pursuant to PAL Art. 1 (1) (a),(b) a “carrier” is a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier (contractual carrier). A “performing carrier” means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage. In the premises, “carrier” may include a non-vessel owning tour operator¹¹⁸

PAL Art. 4 (1) provides that both are liable jointly and severally.

Fault

The liability regime is fault-based: the burden is on the claimant to prove fault or neglect by the carrier, or his servants or agents (PAL Art 3(2)) Fault is presumed unless the carrier is able to prove otherwise. The presumption arises when death, personal injury or loss of luggage occurred from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship itself (PAL Art 3(3)).

Limitation of Liability

The carrier is entitled to limit liability expressed in Special Drawing Rights (SDR's). (PAL Arts 711). The carrier and the passenger may agree, expressly and in writing, to higher limits (PAL Art 10(1)). As to the actual limits applicable under the 2002 Protocol please see below, page 36. The limitation of liability applies per passenger

No limitation applies if the carrier acted with intent to cause damage, or recklessly and with knowledge, that such damage would probably result (PAL Art. 13).

¹¹⁷ Sarah Prager, Jack Harding; “It’s all Greek to me: the importance of pleading the Athens Convention in Cruise cases”, [2010] Travel Law Quarterly, p. 24.

¹¹⁸ Ibid.

Exclusive legal framework

PAL Art 14 states the exclusivity of the Convention as a basis for a Convention claim, providing that “no action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention”.

Time-bar for actions

PAL Art. 16 provides:

1. Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.
2. The limitation period shall be calculated as follows:
 - a) in the case of personal injury, from the date of disembarkation of the passenger;
 - b) in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, from the date of death, provided that this period shall not exceed three years from the date of disembarkation;
 - c) in the case of loss of or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.
3. The law of the court seised of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later. (The expiration period was extended to five years under the 2002 Protocol, to which below on page 36).
4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

Competent jurisdiction

According to PAL Art. 17 a claimant has various options where to sue the carrier, always provided the court is located in a State Party to this Convention:

- The court of the place of permanent residence or principal place of business of the defendant, or
- The court of the place of departure or that of the destination according to the contract of carriage, or
- The court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or

- court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

The parties may agree to a different forum after the occurrence of the incident, which has caused the damage.

No contracting out

PAL Art. 18 stipulates that the Convention rules are mandatory:

Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention.

1976 Protocol

Art. 9 of the Protocol of 19 November 1976, the Special Drawing Right (SDR) was introduced as unit of account, replacing the Poincaré franc¹¹⁹. Under art. 7 and 8 of the 1976 Protocol, the liability of the carrier for the death of or personal injury to a passenger was limited to 46,666 SDR's, the limit for loss of or damage to cabin luggage was limited to 833 SDRs, the limit for loss of or damage to vehicles to 3,333 SDRs and the limit for loss of or damage to luggage other than cabin luggage was 1,200 SDRs.

2002 Protocol - The Athens Convention 2002

The latest revision of the Athens Convention took place through the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (2002 Protocol) adopted under the auspices of IMO. It was adopted 1 November 2002 and entered into force on 23 April 2014. The 2002 Protocol and PAL are to be read together as one single instrument (Art. 15 (1) of the Protocol)¹²⁰

Liability regimes – strict and fault based

The Athens Convention 2002 substantially increased liability levels and sets out two liability regimes for shipping incidents, namely shipwreck,

¹¹⁹ <https://www.i-law.com/ilaw/doc/view.htm?id=346789>.

¹²⁰ Consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and the Protocol of 2002 to the Convention <https://www.travellawquarterly.co.uk/resources/other-legislation-and-treaties/athens-convention-relating-to-the-carriage-of-passengers-and-their-luggage-by-sea-2002/attachment/consolidated-text-of-the-athens-convention-1974-and-the-2002-protocol/>.

capsising, collision, stranding, explosion or fire in the ship, defect in the ship PAL 2002 Art. 3 (5)(a)). A strict liability regime is introduced up to a certain limitation beyond which the fault-based regime applies. Pursuant to PAL 2002 Art. 3 (1):

For the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the carrier shall be liable to the extent that such loss in respect of that passenger on each distinct occasion does not exceed 250,000 units of account, unless the carrier proves that the incident: a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

PAL Art. 3 (2) provides:

For the loss suffered because of the death of or personal injury to a passenger not caused by a shipping incident, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect shall lie with the claimant.

PAL 2002 Art. 7 sets the limit for fault based liability for death and personal injury at SDR 400,000:

1. The liability of the carrier for the death of or personal injury to a passenger under Article 3 shall in no case exceed 400,000 units of account per passenger on each distinct occasion. Where, in accordance with the law of the court seized of the case, damages are awarded in the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit.

Article 13 of the Athens Convention 2002 provides

“The carrier shall not be entitled to the benefit of [those] limits of liability (...), if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”. The revision included the following amendments of PAL 1974.

Compulsory insurance

The Protocol introduced new liability and limitation regime as well as compulsory insurance to cover passengers.¹²¹ All ships registered in a State

¹²¹ [https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx).

or injury to passengers, or loss or damage to their luggage.¹²³

Under PAL 2002 limitation applies per injured passenger actually on board. The differences between the global limitation and PAL 2002 may be illustrated as follows:¹²⁴

If 10 passengers are injured on board a passenger ship certified to carry 3,000 passengers, due to a shipping incident, under PAL 2002 the total maximum liability of the carrier would be SDR 4,000,000. If all passengers perish or are injured, the overall liability of the carrier under PAL 2002 would be SDR 400,000 multiplied by 3,000 passenger, i.e. SDR 1.2 billion. By contrast, under the LLMC, the global limit in this scenario would be SDR 525 million so there would be up to SDR 675 million uncovered losses.

The Governments of Sweden and Finland have made use of the option in LLMC 1996 Protocol Art. 15 (3bis) and increased the LLMC limitation limit to align with PAL 2002.¹²⁵

The European Union and the 2002 Protocol

The European Union adopted the Convention and the 2002 Protocol¹²⁶ (Regulation No 392/2009 –Passenger Liability Regulation or PLR) on 23 April 2009. According to Art. 12 of the Regulation,

it shall apply from the date of the entry into force of the Athens Convention for the Community and in any case from no later than 31 December 2012.

The PLR adopts most provisions of PAL as amended by the 2002 Protocol. The rules on jurisdiction as well as on recognition and enforcement a (Protocol Art. 10 and 11) which are regulated in the Brussels Regulation (recast) are not included.¹²⁷

The Scope of application is extended from international carriage as defined in PAL to cover domestic carriage (PLR Art. 2) by Class A ships and as of 31 December 2018 to Class B ships (PLR Art. 11).¹²⁸ Member States that

¹²³ Andrew Kelly, Department for Transport, consultation on changes to domestic legislation implementing certain international maritime liability conventions, 22.12.2025, para. 1.3; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488012/maritime-legislation-consultation.pdf.

¹²⁴ MM Slinde, “Carriers Liability for Death or Personal Injury under the International Maritime Convention”, Diss. Faculty of Law, Oslo, 2016, p. 17; Dr. Simone Lamont-Black, “Sea Passenger Rights and the Implementation of the Athens Convention in the EU”, University of Edinburgh, School of Law, Research Paper Series No 2018/35., p. 19.

¹²⁵ STATUS OF IMO TREATIES, 2009 LLMC Protocol, Declarations, Reservations and Statements; pp. 297, 402. <https://wwwcdn.imo.org/StatusOfConventions>.

¹²⁶ Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L 131, 28.5.2009, pp. 24-46 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:131:0024:0046:EN:PDF>.

¹²⁷ Regulation (EU) No 1215/2012.

¹²⁸ As to classes of ships and the sea areas they are allowed to sail, see Directive (EU) 2017/2108 of the European Parliament and of the Council of 15 November 2017 amending Directive 2009/45/EC on safety rules and standards for passenger ships [2017]; OJ L 315, 30.11.2017 pp. 40-51.

have made the Regulation applicable to Class C and D ships (e.g. Denmark, Sweden and the Netherlands) created exemptions to adopt certain provisions of the Regulation, as in the case of Denmark.¹²⁹

While PAL 2002 does not affect the availability of any applicable global limitation regimes (PAL Art. 19), under PLR Art. 5 only national law implementing global limitation in form of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 as amended by the Protocol of 1996, including any further amendments thereof are allowed. In the absence of any such applicable national legislation, only PLR Art 3 shall govern the liability of the carrier or performing carrier.¹³⁰

Application of PAL to currently IAATO registered vessels

Of the flag state jurisdictions set out in Annex 2, all European countries apply PAL 1974 and the 2002 Protocol through Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

The United Kingdom retained Regulation (EU) No 392/2009, as amended by Regulation 6 of the Merchant Shipping (Passenger Rights) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/649) after Brexit. The amended version came into force on 31 December 2019. The Regulations implement the Athens Convention 1974 relating to the Carriage of Passengers and their Luggage by Sea (as amended by the Protocol of 2002)¹³¹.

The Cayman Islands apply PAL 1974 and the 1976 Protocol¹³², as has Liberia¹³³.

The Marshall Islands acceded to the 1974 Convention and the 2002 Protocol¹³⁴.

Brazil has not signed PAL 1974 but the 1976 Protocol¹³⁵.

Saint Vincent & the Grenadines have not signed PAL 1974 or any Protocol thereto¹³⁶.

Liberia acceded to PAL 1974 and to the 1976 Protocol¹³⁷.

¹²⁹ Support study to the Evaluation of Regulation (EC) 392/2009 Final Report 2017, ii, vii (<https://transport.ec.europa.eu/system/files/2017-10/2017-ex-post-evaluation-regulation-2009-0392-final-report.pdf>).

¹³⁰ Dr Simone Lamont- Black, Sea Passenger Rights and the Implementation of the Athens Convention in the EU, pp.42,43, <http://www.austlii.edu.au/au/journals/ANZMarLawJl/2018/9.pdf>.

¹³¹ <https://www.gov.uk/government/publications/rights-of-passengers-travelling-by-sea-in-the-event-of-an-accident>.

¹³² <https://www.cishipping.com/system/files/notices/documents/CIGN%202020%2003%20Rev%202%20-%20Conventions%20Extended.pdf?download=1>.

¹³³ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁴ <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028053bf55>.

¹³⁵ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁶ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>; https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁷ https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002800cdc55&clang=_en; https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

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¹²⁹ Support study to the Evaluation of Regulation (EC) 392/2009 Final Report 2017, ii, vii (<https://transport.ec.europa.eu/system/files/2017-10/2017-ex-post-evaluation-regulation-2009-0392-final-report.pdf>).

¹³⁰ Dr Simone Lamont- Black, Sea Passenger Rights and the Implementation of the Athens Convention in the EU, pp.42,43, <http://www.austlii.edu.au/au/journals/ANZMarLawJl/2018/9.pdf>.

¹³¹ <https://www.gov.uk/government/publications/rights-of-passengers-travelling-by-sea-in-the-event-of-an-accident>.

¹³² <https://www.cishipping.com/system/files/notices/documents/CIGN%202020%2003%20Rev%202%20-%20Conventions%20Extended.pdf?download=1>.

¹³³ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁴ <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028053bf55>.

¹³⁵ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁶ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cdcb3>; https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁷ https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002800cdc55&clang=_en; https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

The Bahamas acceded to PAL 1974 and the 1976 Protocol¹³⁸.

Norway acceded to the 2002 Athens Convention and the 2002 Protocol¹³⁹

Antigua & Barbuda has not signed PAL 1974 or any Protocol thereto¹⁴⁰.
The same applies to Togo¹⁴¹

DIRECTIVE (EU) 2015/2302 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2015 on package travel and linked travel arrangements¹⁴²

Directive (EU) 2015/2302 on package travel and linked travel arrangements ('the PTD' or 'the Directive') was adopted 25 November 2015. It replaced Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

EU countries had to incorporate it into national law by 1 January 2018. It became applicable from 1 July 2018. The PTD sets out consumer rights in relation to package travel, in particular with regard to information requirements, the liability of traders in relation to the performance of a package, and protection against the insolvency of an organiser or a retailer.

The parties subject to the Directive are defined in PTD Art. 3:

- Traders as persons acting in relation to packages and linked travel arrangements for commercial purposes (and other purposes relating to their trade)
- Organisers as traders who combine and sell/offer packages directly or through another trader
- Retailers as traders other than organisers, who sell/offer packages combined by an organiser
- Travellers as persons seeking to conclude a contract or entitled to travel on the basis of a contract concluded.

The PTD applies to all sales, which include two or more different types of travel services for the same holiday, booked under a single contract with one supplier. Package travel also includes sales where services are booked with different suppliers under separate contracts, as long as one of the following conditions is met:

- The travel services are bought at a single point of sale (shop, call centre or website) where the customer selects the services before agreeing to pay, i.e. before he/she concludes the first contract.
- The services were sold at an inclusive price.
- The services were advertised/sold as a "package" or under a similar term.

¹³⁸ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>; https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en.

¹³⁹ https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028053c08a&clang=_en.

¹⁴⁰ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>.

¹⁴¹ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>.

¹⁴² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326, 11-12-2015; pp. 1-33.

- Customers are entitled to choose from a selection of travel services, for example a travel gift-box.¹⁴³

The PTD generally applies to cruises, as they are a combination of carriage of passengers and accommodation and sometimes additional travel services, unless they are shorter than 24 hours and do not include overnight accommodation.¹⁴⁴

Mandatory scope of application

Under the PTD, the organiser of a package is responsible for the performance of all services forming part of the package, irrespective of whether those services are performed by the organiser itself or by other service providers.¹⁴⁵

It applies to both European tour operators and foreign parties selling travel products to European travellers, be it directly or via a retailer.¹⁴⁶

PTD Art.23 (“Imperative nature of the Directive”) provides:

1. A declaration by an organiser of a package or a trader facilitating a linked travel arrangement that he is acting exclusively as a travel service provider, as an intermediary or in any other capacity, or that a package or a linked travel arrangement does not constitute a package or a linked travel arrangement, shall not absolve that organiser or trader from the obligations imposed on them under this Directive.
2. Travellers may not waive the rights conferred on them by the national measures transposing this Directive.
3. Any contractual arrangement or any statement by the traveller, which directly or indirectly waives or restricts the rights conferred on travellers pursuant to this Directive or aims to circumvent the application of this Directive shall not be binding on the traveller.

This means the Directive applies to all booking contacts, including those that select a non-EU law.¹⁴⁷ A contracting-out clause in ticket terms and conditions is invalid.

Pre-contractual information requirements by organiser and/or retailer

According to PTD Art. 5, Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the standard information by

¹⁴³ https://europa.eu/youreurope/business/selling-in-eu/selling-goods-services/package-travel/index_en.htm.

¹⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/967428/package-travel-and-linked-travel-arrangements-regulations-2018.pdf.

¹⁴⁵ The EU Commission, Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM (2021) 90 final, 26.2.2021); para. 1.1. p. 1; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0090&from=EN>.

¹⁴⁶ <https://www.cbi.eu/market-information/tourism/how-work-new-2018-european-package-travel-directive>.

¹⁴⁷ Ibid.

means of the relevant form as set out in PTD Part A or Part B of Annex I. This information is binding, unless the organiser reserves the right to make changes to those elements and unless such changes are clearly, comprehensibly and prominently communicated to the traveller before the conclusion of the package travel contract.¹⁴⁸ The Annex lists the so-called “key rights” under the PTA, which include:

- Travellers will receive all essential information about the package before concluding the package travel contract.
- There is always at least one trader who is liable for the proper performance of all the travel services included in the contract.
- Travellers are given an emergency telephone number or details of a contact point where they can get in touch with the organiser or the travel agent.
- Re-funds, termination and price reductions rights in the event of quality complaints
- The organiser has to provide assistance if the traveller is in difficulty.
- If the organiser or the retailer becomes insolvent, payments will be refunded.
- If the organiser or, where applicable, the retailer becomes insolvent after the start of the package and if transport is included in the package, repatriation of the travellers is secured.
- Information on the entity in charge of the insolvency protection, e.g. a guarantee fund or an insurance company. Travellers may contact this entity or, where applicable, the competent authority (contact details, including name, geographical address, email and telephone number) if services are denied because the operator’s or the retailer’s insolvency.

Content of the package travel contract and documents to be supplied before the start of the package

The contents of the package travel contract is regulated in PTD Art. 7 including, inter-alia:

- It shall set out the full content of the agreement
- information that the organiser is responsible for the proper performance of all travel services included in the contract in accordance with Article 13; and obliged to provide assistance if the traveller is in difficulty, in accordance with Article 16
- the name of the entity in charge of the insolvency protection
- the name, address, telephone number, e-mail address and, where applicable, the fax number of the organiser’s local representative, of a contact point or of another service which enables the traveller to contact the organiser quickly and communicate with him efficiently, to request assistance when the traveller is in difficulty or to complain about any lack of conformity perceived during the performance of the package

¹⁴⁸ Full text of Annex I of Part A and B of the PTA: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2302&from=EN>.

Responsibility for the performance of the package

Recital (22) summarises the responsibilities set out in PTD Art. 13:

The main characteristic of a package is that there is one trader responsible as an organiser for the proper performance of the package as a whole..... Whether a trader is acting as an organiser for a given package should depend on that trader's involvement in the creation of the package, and not on how the trader describes his business. When considering whether a trader is an organiser or retailer, it should make no difference whether that trader is acting on the supply side or presents himself as an agent acting for the traveller.

Under Art. 13, the organiser is responsible for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers. Under Article 13(3), if any of the travel services are not performed in accordance with the package travel contract, the organiser shall remedy the lack of conformity, unless it is impossible; or entails disproportionate costs, taking into account the extent of the lack of conformity and the value of the travel services affected, Article 14 shall apply.

As long as it is impossible to ensure the traveller's return as agreed in the package travel contract because of unavoidable and extraordinary circumstances, the organiser shall bear the cost of necessary accommodation, if possible of equivalent category, for a period not exceeding three nights per traveller. This limit does not apply to travellers with reduced mobility, as defined in lit. (a) of Article 2 of Regulation (EC) No 1107/2006, and any person accompanying them; pregnant women and unaccompanied minors, as well as persons in need of specific medical assistance, provided that the organiser has been notified of their particular needs at least 48 hours before the start of the package.

Termination

According to Art. 12, both the traveller and the tour operator can cancel the trip without penalty in the event of "unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination."

"Unavoidable and extraordinary circumstances" mean a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken (PTD Art. 3 (12)). It includes, for example, wars, natural disasters, other serious security problems such as terrorism, significant risks to human health, such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract ¹⁴⁹

¹⁴⁹ Dir. (EU) 2015/2302, Recital (31).

Pricereduction and compensation for damage; exclusion of compensation

PTD Art. 14 stipulates that the traveller is entitled to an appropriate price reduction for any period during which there was lack of conformity, unless the organiser proves that the lack of conformity is attributable to the traveller. The traveller shall be entitled to receive appropriate compensation from the organiser for any damage, which the traveller sustains because of any lack of conformity. Compensation should also cover non-material damage, such as compensation for loss of enjoyment of the holiday because of substantial problems in the performance of the relevant travel services.¹⁵⁰

PTD Art 14 (3):the traveller shall not be entitled to compensation for damage if the organiser proves that the lack of conformity is attributable to the traveller or attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or due to unavoidable and extraordinary circumstances.

Limitation of Liability

The PTD does not affect the rights of travellers to claim both under the PTD and under other relevant EU legislation or international conventions, notably PAL (EC 392/2009) (PTD Art. 14 (5)).

To avoid overcompensation, compensation or price reduction granted under PTD and the compensation or price reduction granted under other relevant Union legislation or international conventions should be set off against each other.

Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is payable by a provider carrying out a travel service, which is part of a package, the same limitations shall apply to the organiser. Insofar as international conventions not binding the Union limit compensation to payable by a service provider, Member States may limit compensation payable by the organiser accordingly. Recital (35) states in this context.

In order to ensure consistency, it is appropriate to align the provisions of this Directive with international conventions regulating travel services and with the Union passenger rights legislation. Where the organiser is liable for failure to perform or improper performance of the travel services included in the package travel contract, the organiser should be able to invoke the limitations of the liability of service providers set out in such international conventions as the Montreal Convention of 1999 for the Unification of certain Rules for International Carriage by Air, the Convention of 1980 concerning International Carriage by Rail (COTIF) and the Athens Convention of 1974 on the Carriage of Passengers and their Luggage by Sea.

¹⁵⁰ Ibid, Recital (34).

PTD Art. 14 (4) provides on limitation (emphasis added):

Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is payable by a provider carrying out a travel service, which is part of a package, the same limitations shall apply to the organiser. Insofar as **international conventions not binding the Union** limit compensation payable by a service provider, Member States may limit compensation payable by the organiser accordingly. In other cases, the package travel contract **may limit compensation payable by the organiser** as long as **that limitation does not apply to personal injury** or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.

Insolvency protection

Organisers established in a Member State territory or offering or selling package travels in the Member State from a Third Country, must arrange for effective security for the refund of all payments made by or on behalf of travellers or, if the carriage of passengers is involved, for their repatriation, if the relevant services are not performed because of the organiser's insolvency (PTD Art. 17). The solvency of an organiser is of significant importance in relation to the costs of re-patriation in the event of adverse circumstances (see e.g. ATP Measure 4 (2004) above). Antarctic cruise tourism may not reach the dimensions of land-based package travelling as became manifest when Thomas Cook became insolvent in September 2019. The insolvency affected around 600 000 holidaymakers¹⁵¹, who either had to be repatriated or reimbursed the money they had paid in advance. To the extent that travellers had bought a package tour, they were covered by the relevant national insolvency protection schemes.¹⁵² The insolvency of Thomas Cook's German subsidiaries left around 140 000 travellers stranded abroad, who were repatriated with the help of the insolvency protection provider Zurich Versicherungen. However, insolvency protection, proved insufficient to fully cover the refunds of travellers not yet at their destination (estimated € 287.4 million), because the liability of the insurance provider was capped.¹⁵³ The German government committed to compensate all affected travellers.¹⁵⁴

A further aspect in the context of insolvency insurance was raised in the EU Commission Report on the PTD (see fn. 136). Business stakeholders represented in the PTD expert group and authorities expressed concerns that it may be increasingly difficult to find appropriate insolvency protection providers prepared and capable to cover the risks related to the insolvency of a large organiser. Travel guarantee funds and insurance companies providing insolvency protection are rare and are reportedly pulling out of

¹⁵¹ *supra* 133; para. 4.1, p. 10.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

the market, which increases the pressure to find a solid protection system, especially, since insolvency protection is mandatory for an operator under the PTA.

International Convention on Travel Contracts (CCV) (Brussels, April 23, 1970)

The CCV, a UNIDROIT document, was adopted in Brussels on 23.04.1970 and entered into force on 21.03.1976 with only six signatory states, including Italy.¹⁵⁵

According to the Acts of the Diplomatic Conference on the Travel Contract in Brussels, April 1970, published by J. Goemaere, Brussels, for the Belgian Ministry of Foreign Affairs and Foreign Trade,

it was during the work of preparation of the draft Convention on the contract for the international carriage of passengers and luggage by road (C.V.R.), in 1958, that the attention of UNIDROIT was...drawn to elaborating uniform rules of private law concerning the legal relationships between travel agents and their clients.¹⁵⁶

The CCV influenced later EU legislation: the first Package Travel Directive Directive 90/314/EEC, refers to the same classifications as contained in the CCV, e.g. the definition of “package” in Directive No. 90/314 corresponds to “the organised travel contract” as defined in the CCV¹⁵⁷as

Any contract whereby a person undertakes in his own name to provide for another, for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto.¹⁵⁸

The performing person in the CCV is the “travel organiser”, meaning

Any person who habitually or regularly undertakes to perform the contract..., whether or not such activity is his main business and whether or not he exercises such activity on a professional basis.¹⁵⁹

In view of the low number of signatories the contribution of this convention to the protection of international tourists is considered limited.¹⁶⁰ However, Italy also ratified the CCV. It still is part of Italian law and exists

¹⁵⁵ <https://www.unidroit.org/instruments/transport/ccv/status/>.

¹⁵⁶ <https://www.unidroit.org/instruments/transport/ccv/overview/>.

¹⁵⁷ Stefano Zunarelli, *Fordham International Law Journal*, Volume 17, Issue 3 1993 Article 2, *Package Travel Contracts: Remarks on the European Community Legislation*, pp. 492,492.

¹⁵⁸ CCV Art.1 (2).

¹⁵⁹ CCV Art.1 (5).

¹⁶⁰ Hague Conference on Private International Law – Conférence de La Haye de droit international privé, www.hcch.net Council on General Affairs and Policy – March 2020, Report of the Experts’ Group on the Cooperation and Access to Justice for International Tourists (Tourism and Visitors Project), pp. 31,32.

alongside the PTD, which applies compulsorily in Italy as an EU Member State. It also forms part of ticket terms and conditions in passenger shipping (see below “Ticket Terms & Conditions”). As stated by professor Michele Comenale Pinto, this poses “the problem of coordination between EU law and international uniform law, with consequent problems of identification of appropriate norms to apply in a given situation.”¹⁶¹

The conflict concerns, in particular, the travel organiser’s limitation of liability under the CCV limitation regime set out in CCV Art. 13:

1. The travel organiser shall be liable for any loss or damage caused to the traveller as a result of non-performance, in whole or in part, of his obligations to organise as resulting from the contract or this Convention, unless he proves that he acted as a diligent travel organiser.
2. Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited for each traveller to:
 - 50.000 francs for personal injury,
 - 2.000 francs for damage to property,
 - 5.000 francs for any other damage.

However, a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

The “franc” referred to is the gold franc weighing 10/31 of a gramme and of a millesimal fineness of 0.900. (CCV Art. 24), also known as *Germinal franc*¹⁶² with a gold content of 0.29032 gram¹⁶³. The conversion into currencies to calculate the respective limitations depends on the gold price.

The organiser shall be liable for any loss or damage caused to the traveller because of non-performance, in whole or in part, of his obligations resulting from the contract or the CCV, unless he proves that he acted as a diligent travel organiser. This is considered a liability of presumed fault¹⁶⁴

Overlap and Conflict

CCV Art. 13 conflicts with PTD Art. 14 (4) in that as a convention non-binding on the EU it allows limitation for personal injury.

The CCV also overlaps and conflicts with Athens Convention as implemented in EU Law (PAL) as well as the Convention and the 2002 Protocol regarding death and personal injury. The CCV does not contain strict liability elements.

On overlap and conflict with EU law under EU law the position is that

¹⁶¹ Michele M. Comenale Pinto, “Legal Profiles of Travel Packages and the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015; para. 3 “The CCV” <https://www.dirittoestoria.it/16/contributi/Comenale-Pinto-Legal-Profiles-Travel-Packages.htm>.

¹⁶² UN Commission on International Trade Law, yearbook. Vol. XV, 1984, p. 297; *uncitral.org > files > media-documents > uncitral > yb_1984_e*.

¹⁶³ <https://www.bis.org/press/p960610a.htm>.

¹⁶⁴ Stefano Zunarelli “Package Travel Contracts: Remarks on the European Community Legislation” *Fordham International Law Journal* Volume 17, Issue 3 1993, p. 497.

the principle of the primacy of EU law as developed over time by the CJEU¹⁶⁵ Member State obligations on the international level cannot affect or suspend the validity of EU legislation. If an international treaty, entered into by one or more Member States after 1958, the year the Treaty of Rome came into force, collides with a Community measure, that treaty is considered national law and, because of the supremacy rule, will not apply¹⁶⁶. The precedence principle governs to all European acts, such as directives and regulations, with a binding force. Therefore, Member States may not apply a national rule, which contradict European law.¹⁶⁷

VIII. Standard Terms and Conditions

The contractual relationship between the passenger and the cruise line as the carrier is governed by the contract of carriage, conventionally referred to as “the ticket”¹⁶⁸ or “passage contract”. Travel documents are also referred to as “cruise contract”, “holiday contract” or “booking terms and conditions”, if the cruise is booked through a party other than the line or with an organiser as opposed to the actual carrier. Standard terms and conditions invariably contains terms set by the carrier/then organiser as standard non-negotiated terms and conditions to be used for a multitude of similar contracts. The terms individually agreed are commonly limited to the price of the cruise and the cabin category.

Whether the terms and conditions are valid as such, respectively to what extent validly incorporated into the contract is a question of the (consumer protection) law applicable to the individual contract and is beyond the remit of this report. Indeed, documents issued by a cruise line referred to as “terms and conditions” may expressly state that they do not form part of any offer or contract (e.g. “Silversea Cruises”, below), yet they contain terms worded as obligations (“...must take out travel insurance...”) or exclusion rights (“...Silversea will not pay for claims...”). “Binding” terms are contained in the “Holiday Contract”.

Standard terms usually cover contract formation, rates, itineraries, deviations, cancellation policies, performance, obligations and liabilities, exclusion and limitations of liability pursuant to PAL, LLMC and EU legislation, force majeure, termination and law and jurisdiction. In the context of the carriage of passengers by sea the clauses concerning the passenger’s fitness to travel and disclosure of medical conditions and medical treatment

¹⁶⁵ E.g. Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.

¹⁶⁶ Jan Willem van Rossem “Interaction between EU law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Member States but not the Community, Centre for the law of EU external relations; Cleer working papers 2009/4; p. 17.

¹⁶⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114548>.

¹⁶⁸ Rosemary Gibson, “Cruise Ship Passenger Contracts: the trip of a lifetime or a voyage through clauses, conventions and confusion?” Global Shipping Law Forum, Brisbane, 4 July 2018 <http://138.25.65.17/au/journals/ANZMarLawJI/2018/8.pdf>, para. 3.4, p. 24.

on board, which are the responsibility at his risk and cost. In the context of Antarctic expeditions or adventure cruises some cruise line terms require or recommend that passengers take out evacuation insurance. Specific reference to the remoteness and associated risks to life or health feature in the tour operator's terms (Polar Latitudes, Quark expedition). Liability for emotional distress claims are excluded as is the right to arrest the ship or to join a class action.

Cruise lines who are members of CLIA may also refer in their ticket conditions to the Passenger Bill of Rights. In 2013, apparently in the wake of an engine fire on board a cruise vessel, leaving passengers stranded at sea for various days¹⁶⁹ Cruise Lines International Association (CLIA), announced the adoption of a "Cruise Passenger Bill of Rights"¹⁷⁰ for its members addressing safety, medical and refund issues resulting from mechanical failures in board. Please see Fn. ¹⁷¹ for the text of the Bill of Rights.

If the cruise is booked through a tour operator passengers will be issued with the tour operator's standard terms and conditions as additional travel documents to be distinguished from the contract of carriage as evidenced in the ticket. As set out above, at least under PAL, the tour operator may still be liable as the contractual carrier (alongside the cruise line as the actual carrier).

A selection of extract standard terms and conditions from cruise lines/tour operators/organisers whose operations include Antarctic cruises and different passenger source countries is attached as Annex 3 to this report. The terms address the identity of the parties, limitation and exclusion of liability, time for suit, clauses highlighting the specific challenges of Antarctic expedition cruises, medical information and law and jurisdiction clauses. The lines /tour operators are:

- Crystal Cruises
- Silversea Cruises
- Hurtigruten Antarctica Cruises
- Princess Cruises
- Costa Cruises
- Polar Latitudes
- Quark Expedition

¹⁶⁹ <https://www.cruise critic.co.uk/articles.cfm?ID=3148&stay=1&posfrom=1>.

¹⁷⁰ <https://abcnews.go.com/Travel/cruise-passenger-bill-rights-introduced/story?id=19250587>.

¹⁷¹ <https://cruising.org/about-the-industry/policy-priorities/cruise-industry-policies/Other>.

IX. Conclusions

1. Antarctica is not a sovereign state exercising authority within its territory. Rights and obligations of passengers, owners and operators are governed by the law of the flag of the vessel and the law governing the passenger ticket.
2. On the regulatory level, the implementation of the Polar Code has advanced (passenger) safety and security in Antarctic waters. This should prevent incidents like the grounding of the sub-standard equipped MV ENDEAVOUR in 2007.
3. The cooperation of stakeholders in the tourism business under the roof of the ATCM and IAATO, although voluntary and in the absence of enforcement options due to the Antarctic geo-political position, successfully manages cruise lines' and tour operators' safety standards for the benefit of passengers. Although the risk of serious shipping incidents remains, it can be reduced by best practices, as promulgated by IAATO. Obviously, IAATO has no control over operations by cruise lines that are not IAATO members. Currently, however, all commercial SOLAS passenger ship operators conducting tourism activities in the Antarctic Treaty Area are members of IAATO.¹⁷²
4. The ticket terms and conditions reviewed for the purpose of this report contain warnings that "each Passenger acknowledges and voluntarily accepts and assumes the risks inherent in travel by sea," They do emphasize the requirement of medical/physical fitness and the duty to disclose medical information prior to boarding. Some tour operators' terms refer specifically to the physical challenges ("You understand and acknowledge that due to the remoteness of where we travel, emergency evacuation and/or search and rescue may be delayed or unavailable and that medical facilities and supplies may be limited and you acknowledge that it is your responsibility to assess the impact such limitations may have on any existing medical condition(s))".¹⁷³
5. In the absence of Antarctic local law, passengers' rights are determined by the law applicable to their contract of carriage and the conventions referred to in this report, as implemented under the respective legal regime of the flag state.

In summary, the IAATO system of self-governance of the cruise industry, the improvement of regulatory safety measures on an international level and international conventions promoting the passengers' rights against the carrier or tour operator provide an adequate level of legal protection. Antarctica will remain a challenging environment. Excluding all risks would mean not to travel there at all, which appears an unrealistic option.

¹⁷² IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22, p. 6.

¹⁷³ Annex 3, Standard Terms and Conditions, Polar Latitudes Inc, p. 25; Quark Expeditions, p. 26.

Antarctic Passenger Rights ANNEX I Shipping Accidents

Annex 1

“Accidents are rare, but not unheard-of”¹

The following are incidents involving passenger vessels sailing in Antarctic waters, based on various sources, including the IAATO reports on the 1991 – 2000 season² and the 2011 – 2021 season. Accidents are referred to therein as “tourism incidents”

1989 - MV BAHÍA PARAISO.

Date: 28 January 1989: the Argentine Polar Transporter and Tourism Vessel BAHÍA PARAISO ran aground two miles from Palmer Station due to human error. The vessel was used for tourism and research purposes.

Built: Argentina, July 1980; length 132.70 meters, breadth of 19.60 meters, draught 9.70 meters; 124 crew members, 82 berhs.

The grounding resulted in the spill of 510 tons of diesel oil affecting the birds and marine ecosystem in the area, being one of the worst environmental disaster that occurred in Antarctica³

1991 - MV World Discoverer

Built 1974, 138 berths.

Date: 21 January 1991, 18.30 hrs UTC.

Operators/Charterer: Society Expeditions

Location: At sea/Adjacent to Cape Evans/Ross Island, uncharted rock. The Distance to Cape Evans Hut was 064°, and 0.6.NM.Latitude/Longitude 77 ° 38.5’S, 166 ° 21.9’E. While approaching Cape Evans/Ross Island the vessel grounded on an uncharted rock.

No injuries or fatalities were reported.

1995 - M.V. Explorer

Date: February 1995

Vessel: tourist Ship Explorer

Operators/Charterer: Abercrombie & Kent/Explorer Shipping

¹ Paige McClanahan Published Feb. 26, 2020, Updated Feb. 27, 2020 Tourism in Antarctica: Edging Toward the (Risky) Mainstream, The New York Times <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>.

² IAATO An Assessment of Environmental Emergencies Arising from Activities in Antarctica https://iaato.org/wp-content/uploads/2020/03/xii_enviro_assessment.pdf.

³ Cavallo, Emiliano Miguel, “An assessment of the environmental regulatory framework regarding increasing tourism activity in Antarctica” (2019). World Maritime University Dissertations. 1235. https://commons.wmu.se/all_dissertations/1235; page 8.

Antarctic Passenger Rights ANNEX 1 Shipping Accidents

Location: At sea/near Rothera

Latitude/Longitude: N/A

Type of Incident: Medical Emergency- Female tourist/passenger fell and broke her hip.

Response action taken: personnel from British Antarctic Survey made the arrangements for the flight and brought an aircraft from Stanley. The passenger overnighted at Rothera Base for one night while the vessel remained in the vicinity.

1996 - MV Professor Multanovskiy

Date: 4 January 1996

Operators/Charterer: Marine Expeditions Inc

Location: at sea-6 cables WNW from Penguin Island

Latitude/Longitude: unknown

Type of Incident: Transport Incident/Vessel was grounded on rocks

Response Action Taken: adjusted Ballast to float vessel, holes repaired with concrete

Other Measures Taken Returned to Port of Ushuaia for a full inspection with divers.

The vessel has a double hull and only the outer layer was affected.

No injuries or fatalities

1997 - MV Professor Khromov

Date: 4 January 1997

Vessel: tourist Ship Professor Khromov

Operators/Charterer: Quark Expedition/Supernova Expeditions

Location: Neumayer Channel

Latitude/Longitude 64° 47.5259' S, 63° 10.0438' W.

Type of Incident: Transport Incident/Vessel grounded on shoal, uncharted rock

Response action taken: Vessel was pulled off the shoal by Chilean tugboat

Passengers were transferred to another Quark Expeditions operated vessel the "Alla Tarasova" (now Clipper Adventurer). Vessel then returned to Ushuaia under her own steam and was inspected for extent of damage. No injuries or fatalities.

1998 - MV Kapitan Khlebnikov

Date: 2 February 1998

Vessel: tourist Ship Kapitan Khlebnikov

Operators/Charterer: Supernova Expeditions/Quark Expeditions

Location: McMurdo Station/Ross Island-Outside Fire Station

Latitude/Longitude: at McMurdo Station

Type of Incident Medical Emergency: Passenger collapsed after a 10-15 minute walk up hill on the road from the ice pier. Outside temperature was -9°Celsius. Upon returning home the family doctor believed the problem was heart arrhythmia that could have been exacerbated by physical stress. The passenger was not aware of this condition prior to departure. Passenger recovered from this incident but several months later he passed away.

1999 - MV Hanseatic

Date: 3 February 1999

Vessel: tourist Ship Hanseatic

Operators/Charterer: Hapag Lloyd

Location- At sea/Paradise Bay

Latitude/Longitude N/A

Damage to vessel. Starboard propeller sustained damage

Vessel sailed to Ushuaia at a speed of 11 knots. The second propeller was fully functional.

1999 - MV Marco Polo

Date: February 1999

Vessel: tourist Ship Marco Polo

Operators/Charterer: Orient Lines

Location: McMurdo station

Latitude/Longitude N/A

Type of incident: medical. The passenger was suffering from lung cancer and his condition had worsened to the extent that he needed to be permanently on oxygen. The supply of oxygen on board was deemed insufficient for him to remain on board all the way to New Zealand.

The passengers' insurance company paid for cost

1999 - MV Clipper Adventurer

Date: 31 December 1999

Vessel: tourist ship Clipper Adventurer

Operators/Charterer: New World Ship Management Co LLC/Clipper

Cruise Line/Charterer: Zegrahm Expeditions

Location: at Anchor, approximately 2 nm NW of Cape Winman near Seymour Island.

Latitude/Longitude 64°11.3'S and 56°40.2'W

While at anchor, the vessel was contacted by ice damaging two of the five blades on the port propeller. The vessel continued her voyage on one propeller and safely returned to Ushuaia. After disembarking the passengers, the ship then proceeded under her own power to Bahia Blanca, Argentina for repairs.

2000 - MV Clipper Adventurer

Date: 1 February 2000

Vessel: tourist ship Clipper Adventurer

Operators/Charterer: New World Ship Management Co LLC/Clipper Cruise Line

Location: Pack ice/Martha Strait

Latitude/Longitude: 66°43.1'S and 67°31.3'W

The vessel was beset in pack ice while navigating in Martha Strait.

The vessel was contacted by radio and assisted by the Argentinean icebreaker ALMIRANTE IRIZAR.

The CLIPPER ADVENTURER was free and clear on the morning of 1 February 2000 and proceeded on her voyage.

2000 - MV Akademik Sergei Vavilov

Date: 1 February 2000

Vessel: tourist Ship Akademik Sergei Vavilov

Operators/Charterer: Quark/Supernova Expeditions

Location: Approaching Dallmann Bay enroute to Melchoir Islands

Latitude/Longitude 64°10'S and 63°03'1"W

Type of Incident: Transport Incident/Collision with humpback whale. Ship's officers had spotted two whales in front of the ship approximately 2 miles at the 1200 position. The whales resurfaced at approximately the 1130 position, one mile ahead of the vessel and then again resurfaced 15 yards in front of the vessel to the port side. They altered course and one whale came up directly in front of the bow and collided with the vessel. Passengers on the stern deck then noted that two whales resurfaced about 200 yards off the stern. Both were still breathing on the surface but the whale, which had been hit, was seen to be bleeding. The incident was reported to Quark Expeditions, IAATO, the Marine Mammal Commission, NSF and EPA. A directive was subsequently sent to all expedition leaders and Captains to ensure when any vessel comes into proximity of whales, the vessel must reduce speed and all care taken to change course to avoid any disturbance or collision with whales or in fact any other wildlife present in the water.

2006 - M/V LYUBOV ORLOVA

Date: 27 November 2006

Vessel: Russian Antarctic cruise vessel built in 1975, length of 90 meters, gross tons 4,251, beam 16 meters, draught of 4.6 meters; built to ice class 1A to resist impacts with ice.

Type of incident: the vessel ran aground on 27 November 2006 at Deception Island, South Shetlands Islands. The Master called for help and the Spanish R/V "LAS PALMAS" assisted. No hull damage was detected. The R/V "Las Palmas" towed the M/V "Lyubov Orlova" to deeper waters and the cruise vessel returned to navigate under its own propulsion to Argentina. No casualties or environmental damage was reported⁴.

2007- M/V NORDKAPP

Date: 29 January 2007

Vessel: Norwegian cruise ship built in 1997 and operated by the Hurtigruten Group. Gross tons 11,386 GT, length 123.30 meters, beam 19.50 meters, draught 4.90 meters; 460 berths. The vessel was classified for light ice conditions.

Type of incident: grounding on 29 January 2007 at Port Foster, Deception Island, South Shetland Islands in severe weather conditions. No casualties and minor hull damage were reported; however, scientists from the Spanish base Gabriel de Castilla in Deception Island reported traces of oil detected

⁴ Cavallo, Emiliano Miguel, "An assessment of the environmental regulatory framework regarding increasing tourism activity in Antarctica" (2019). World Maritime University Dissertations. 1235. https://commons.wmu.se/all_dissertations/1235, page 27.

after the because the double hull was not broken⁵. 294 passengers from the cruise MV Nordkapp were transferred to another IAATO Member vessel as a precautionary measure after the grounding⁶.

2007 – MV EXPLORER

Date: 23 November 2007

Vessel: cruise vessel operated by a Toronto company. Built in Finland in 1969, registered in Monrovia. Classed by DNV as 1A1 to operate in polar waters. Length 76.2 meters, beam 14 meters, draught 5.6 meters, 100 berths. Operator/Charterer: Great Adventure People (GAP), Toronto, Canada.

Type of incident: on 23 November 2007 the vessel's hull was damaged while sailing in an ice field. The Master decided to enter the ice field because he believed that the vessel would not suffer any damage; however, the ice pilot who made the assessment of the passenger video during the investigation stated that the ice was thicker and harder than the Master's evaluation. Human error generated that the Explorer sunk in a position 25 NM southeast of Penguin Island, Bransfield Strait near South Shetland Islands⁷. After the accident, 154 passengers and crew abandoned ship into open lifeboats and zodiacs in the middle of the night and waited more than three hours before they were rescued by another cruise ship, the NORDNORGE in an operation coordinated by the Chilean and Argentine MRCC's⁸.

2007 - MV FRAM

Date: 28 December 2007

Vessel: Norwegian flagged Hurtigruten vessel, built in 2007, gross tonnage 12,700, length 114 meters, beam 20 meters, 318 berths and capacity for 25 vehicles. According to its promoters she was specially designed for cruising arctic waters⁹.

Type of incident: lost power for about 50 minutes and drifted into an iceberg near Browns Bluff, sustaining damage to a lifeboat¹⁰. After the incident she sailed to the Chilean airbase Frei for damage investigations and the reason for the engine problems.

2008 - MV USHUAIA

Date: 4 December 2008

Vessel: asteel hulled and ice-strengthened vessel built in 1970

Operator/Charterer: Antapply Expeditions. Length of 85 meters, beam 15.5 meters, draught 5.5 meters, 84 berths, 38 crew.

⁵ Ibid.

⁶ Regulation of Antarctic Tourism – A Marine Perspective ATCM 2008 https://iaato.org/wp-content/uploads/2020/03/Atcm31_ip083_eIAATOMarineRegulatoryMechanisms1.pdf.

⁷ Supra Fn. 50.

⁸ <https://en.mercopress.com/2007/12/29/damaged-antarctic-cruise-takes-refuge-in-chilean-base>.

⁹ Supra Fn. 54.

¹⁰ <https://www.travelweekly.com/Cruise-Travel/Ship-accidents-in-Antarctica-raise-ecological-and-safety-concerns>.

Antarctic Passenger Rights ANNEX 1 Shipping Accidents

Type of incident: on 4 December of 2008 the vessel ran aground at Wilhelmina Bay, Gerlache Strait due to severe weather conditions. The M/V “Ushuaia” reported serious hull damage and diesel oil leak from the breached tanks, and was assisted by a United Kingdom Coast Guard vessel, the Russian icebreaker Grigoriy Mikheev, and the Chilean Navy vessels “Achiles” and “Lautaro”. On 8 December the vessel was refloated and continued sailing under its own propulsion. No casualties were reported¹¹.

2009 - M/V OCEAN NOVA

Date: 27 February 2009

Vessel: passenger vessel built 1992 with ice-strengthened hull. Length 72.8 meters, beam 10.99 meters, draft 3.40 meters, 98 berths and 34 crew.

Operator/Charterer: Quark Expeditions

Type of incident: the vessel ran aground on 17 February 2009 in Marguerite Bay research station San Martin, due to adverse weather conditions. The MV CLIPPER ADVENTURE assisted the OCEAN NOVA during passenger evacuation. No casualties or hull damage were registered. Several hours later the vessel started the return sailing escorted by the M/V CLIPPER ADVENTURE.

2010 - Clelia II¹²

(Travel Dynamics International)

Date: 08 December 2010

Quoted from the hearing before the Committee on Commerce, Science and Transportation of the US Senate, 1 March 2012: “A large wave slammed into the ship with 88 passengers and 77 crew members aboard, but the ship’s crew overcame minor damage and is heading safely back to its scheduled port (Ushuaia). The ship declared an emergency yesterday, reporting it had suffered engine damage amid heavy seas and 90 kph winds when it was northeast of the South Shetland Islands and about 845km from Ushuaia. The International Association of Antarctica Tour Operators issued statement saying the wave that hit the Clelia II caused a broken bridge window and some electrical malfunctions that temporarily knocked out some communications and affected engine performance”.

2011 - MV POLAR STAR.

Date: Monday, 31 January 2011

The POLAR STAR struck an uncharted rock while anchoring near Detaille Island at the Antarctic Peninsula. No one was hurt in the accident, which led to a “minor breach of the outer hull,” according to IAATO. There were no reports of injury to any of the 80 passengers and 35 crew aboard the

¹¹ Supra Fn. 50.

¹² Oversight of the Cruise Ship Industry: are current Regulations Sufficient to Protect Passengers and the Environment? Hearing before the Committee on Commerce, Science, and Transportation United States Senate One Hundred Twelfth Congress Second Session March 1, 2012 https://www.govinfo.gov/content/pkg/CHRG-112shrg77338/pdf/CHRG_112shrg77338.pdf.

ship following the incident and no evidence of fuel oil leakage¹³. The vessel received permission from its flag state and classification society to depart its location near Detaille Island, and proceeded north along the Antarctic Peninsula, with the intention to return to Ushuaia, Argentina under its own power with all passengers and crew aboard¹⁴. But on Wednesday, it decided to drop the passengers off in the South Shetland Islands before crossing the Drake Passage as a precautionary measure. “The company is currently arranging alternative transportation for its passengers,” IAATO said in a statement¹⁵. The vessel had been traveling to Antarctica since 2001. She was registered in Barbados, built 1969 and re-build in 2000; 105 berths, 50 crew; length: 86.5 meters, breadth: 21.2 meters, draft: 6.85 meters, gross tons: 4,998, Ice Class: DNV Ice 1A¹⁶, (equivalent of Polar Code ice class PC 7 Summer/autumn operation in thin first-year ice, which may include old ice inclusions)¹⁷.

2011 - MV SEA SPIRIT

Length 90.6 meters (297 ft.). Beam 15.3 meters (50 ft.) Speed 15 knots, berths 114, Crew 72¹⁸

Tourism Incidents 2011-12¹⁹

Incidents during the 2011-12 season included:

MV Sea Spirit temporarily grounded in Whalers Bay, Deception Island on 9 Dec. 2011, floating free at the next high water. Reports indicated no threat to human life and no damage to the environment. A subsequent diving inspection indicated no damage to the vessel. The incident was reported to the Deception Island Management Group (DIMG), and subsequently the IAATO Marine Committee issued an IAATO Safety Advisory on Whalers Bay (See ATCMXXXV/IP38).

IAATO report on Tourism Incidents 2014-15²⁰

During the 2014-2015 season, there were several incidents involving non-IAATO yachts. These included a grounding in the South Shetlands that resulted in an IAATO operator repatriating seven Polish nationals. Any such incidents are reported back to the associated Treaty Party or Competent Authority if there is one.

¹³ <http://edition.cnn.com/2011/TRAVEL/02/03/antarctica.cruise/index.html>.

¹⁴ UPDATE IAATO on MV Polar Star - Cruise Passenger (2) <https://cruiseassenger.com.au/iaato-update-mv-polar-star/>.

¹⁵ <http://edition.cnn.com/2011/TRAVEL/02/03/antarctica.cruise/index.html>.

¹⁶ UPDATE IAATO on MV Polar Star - Cruise Passenger (2) <https://cruiseassenger.com.au/iaato-update-mv-polar-star/>.

¹⁷ <https://balticsearouteing.dk/media/9984/56-equivalence-of-ice-classification-rules.pdf>.

¹⁸ <https://poseidonexpeditions.com/ships/sea-spirit/>.

¹⁹ Report of the International Association of Antarctica Tour Operators 2011-12.

²⁰ Report of the International Association of Antarctica Tour Operators 2014-15 <https://iaato.org> > 2020/03 > ATCM38_ip084_e.

IAATO Report on Tourism Incidents 2015-16²¹

IAATO Operators that were reported to date during the 2015-16 season include: On 15 November 2015, **OCEAN ENDEAVOUR** struck ice causing some damage to the hull during the night near the South Shetland Islands.

The collision occurred near the South Shetland Islands. The ship was carrying a total of 167 passengers (24 different nationalities), all of which remained on board and safe. They were all disembarked in Ushuaia Argentina on Dec 16²². The vessel did not require any assistance and with the agreement of the both Flag State and Classification Society proceeded back to the port of Ushuaia to undertake full repair.

On 14 December 2015, 10 Zodiacs were temporarily stranded at Port Lockroy during a zodiac cruise for 8 hours due to shifting pack ice. IAATO is grateful to the support afforded by the UK Antarctic Heritage Trust during this time, which in addition to the mandatory safety equipment carried ensured that passengers were safe and comfortable during the stranding.

During the 2015-2016 season, there were several incidents involving non-IAATO yachts where IAATO operators assisted with the response. These included two groundings: one off Cuverville Island from yacht Tarka and the second near Vernadsky Station of a yacht Angelique II.

IAATO Report on Tourism Incidents 2017-18²³

The 2017-18 season saw no major incidents involving IAATO Operators. In all, a total of eight medical evacuations have been reported by IAATO Operators, all via Frei base, using flights from both DAP and ALE. In all instances both IAATO and the Operators involved are grateful for the assistance provided. Following a thorough investigation regarding allegations of a waste compliance issue from the previous season, IAATO members voted to place an Operator on probation with their membership status changed to “not in good standing” until certain criteria have been met. The Operator’s competent authority has been informed.

IAATO Report on Tourism Incidents 2018-2019

The 2018-19 season saw no major incidents involving IAATO Operators. In all, 14 medical evacuations have been reported by IAATO Operators. In all instances both

IAATO and the Operators involved are grateful for the assistance provided

IAATO Report on Tourism Incidents 2020-21²⁴

There were no major incidents involving IAATO Operators during the 2020-21 season.

²¹ Report of the International Association of Antarctica Tour Operators 2015-16 https://legacy.iho.int/mtg_docs/rhc/HCA/HCA14/ATCM39_ip103_e.pdf.

²² <https://www.cruisemapper.com/accidents/Ocean-Endeavour-1095>.

²³ Report of the International Association of Antarctica Tour Operators 2017-18 <https://iaato.org/wp-content/uploads/2020/03/Report-of-IAATO-IP070.pdf>.

²⁴ Report of the International Association of Antarctica Tour Operators 2020-21 https://iaato.org/2021/07/ATCM43_ip109_e-.

Antarctic Passenger Rights ANNEX 2 IAATO Vessel Registry

Vessel Name	Port/Country of Registry
Bark Europa	Netherlands
Celebrity Infinity	Malta
El Doblón	Poland
Expedition	Liberia
Fram	Norway
Greg Mortimer	Bahamas
Greg Mortimer	Bahamas
Hamburg	Bahamas
HANSEATIC inspiration	Malta
HANSEATIC nature	Malta
HANSEATIC spirit	Malta
Hebridean Sky	Bahamas
Heritage Adventurer	
Hondius	Netherlands
Island Sky	Bahamas
L'Austral	France
Le Boreal	France
Le Commandant Charcot	France
Le Lyrial	France
Le Lyrial	France
Le Soleal	France
Legend	Panama
M/V Norwegian Star	Bahamas
M/V Oceania Insignia	Marshall Islands
M/V Seven Seas Voyager	Bahamas
Magellan Explorer	Bahamas
MS Fridtjof Nansen	Norway
MS Marina	Marshall Islands
MS Roald Amundsen	Norway
MY Hans Hansson	Saint Vincent and the Grenadines
MY Hanse Explorer	Antigua and Barbuda
MY Hanse Explorer	Antigua and Barbuda
Nansen Explorer	Norway
National Geographic Endurance	Bahamas
National Geographic Explorer	Bahamas
National Geographic Resolution	Bahamas
Ocean Adventurer	Portugal
Ocean Diamond	Portugal

Annex 2

Antarctic Passenger Rights ANNEX 2 IAATO Vessel Registry

Ocean Endeavour	Portugal
Ocean Explorer	Bahamas
Ocean Explorer	Bahamas
Ocean Nova	Bahamas
Ocean Nova	Bahamas
Ocean Nova	Bahamas
Ocean Victory	Bahamas
Octopus	Cayman Islands
Oosterdam	
Ortelius	Netherlands
Plancius	Netherlands
RV Odyssey	Marshall Islands
S/V Australis	Cook Islands
S/V Icebird	Cayman Islands
S/V Ocean Tramp	Saint Vincent and the Grenadines
S/V Podorange	United Kingdom
S/V Santa Maria Australis	Germany
S/V Selma Expeditions	Poland
S/V Spirit of Sydney	Saint Vincent and the Grenadines
S/V Vaïhéré	France
S/Y Jagare	
S/Y YPAKE II	Brazil
Sapphire Princess	
Scenic Eclipse	Bahamas
Sea Spirit	Portugal
Sea Spirit	Portugal
Seabourn Quest	Bahamas
Seabourn Venture	Bahamas
Seaventure	Cyprus
SH Minerva	Malta
SH Vega	
Silver Cloud	Bahamas
Silver Endeavour	Bahamas
Silver Explorer	Bahamas
Silver Wind	
Sylvia Earle	Bahamas
Sylvia Earle	Bahamas
Ultramarine	Marshall Islands
Ushuaia	Togo
Viking Octantis	Norway
Viking Polaris	Norway
Vinson of Antarctica	Cayman Islands
Volendam	Netherlands
World Explorer	Portugal
World Navigator	Portugal
World Traveller	Portugal
World Traveller	Portugal

Antarctic Passenger Rights ANNEX 3 Standard Term and Conditions

Annex 3

CRYSTAL CRUISES 2021-2024 Crystal Cruises General Ticket Terms & Conditions (Australia / New Zealand)¹

The Contract:

Crystal Cruises agrees to provide the Cruise on its Ship to the Guest for the Cruise Fare in accordance with the Ticket contract

1. Definitions

These terms have meanings as follows:

“Australian Consumer Law” or “ACL” means Schedule 2 of the Competition and Consumer Act 2010 (Cth) and any equivalent state or territory legislation;

“CCA” means the Competition and Consumer Act 2010 (Cth)

“CGA” means the Consumer Guarantees Act 1993 (NZ)

“Cruise” means the Voyage carried out in accordance with the Ticket;

“Cruise Fare” means the fare payable for the Voyage;

“Crystal Cruises” or “Crystal” includes the Ship, its owner, operator, manager, charterer and agents, any and all affiliated or related companies and the sales representatives and all employees, officers, crew, pilots, and agents of such individuals and companies;

“Guest” refers to a passenger or passengers on the ship and includes every person named on the face of the Ticket;

“Ship” includes the ship named in the Ticket or any ship substituted for the ship named in the Ticket, and its tenders or any other means of conveyance controlled by Crystal Cruises;

“Ticket” refers to the document issued by Crystal for the Voyage;

“Ticket contract” means the Ticket, including the terms and conditions which are set out in this document, which form the contract for the Cruise

“Voyage” means the itinerary and all services to be supplied for the Cruise described in the Ticket.

¹ <https://www.crystalcruises.com/legal/aus-nz-crystal-cruises-general-ticket-terms-conditions>.

8 Limitation of Liability

General

- 8.4 Where consumer laws or other laws permit Crystal Cruises to exclude its liability, Crystal Cruises will not be liable for:
- a) loss of, or damage to, any baggage or other belongings; or
 - b) sickness, injury or death, unless caused by Crystal Cruises' proven negligence or failure to provide services with due care and skill and that are reasonably fit for purpose.
- 8.5 In addition, Crystal Cruises' liability will be reduced in proportion to any negligence or fault on your part.
- 8.7 If a Guest suffers death or personal injury by accident at a time when the Guest has cover under the Accident Compensation Act 2001 (NZ), that cover shall provide the full extent of the Guest's right to compensation for such death or personal injury.

9 Travel Insurance:

- 9.1 It is strongly recommended that you purchase appropriate international travel insurance as soon as you pay your deposit on the Cruise Fare. Without travel insurance, you will be responsible to bear cancellation charges, medical and hospital costs in any case where the Accident Compensation Act 2001 (NZ) does not apply, repatriation, loss or damage to possessions, and any other associated costs yourself.

14 Non-Liability for Medical Treatment:

- 14.1 Medical Practitioners, physicians and/or nurses are on board the Ship for the treatment of crew members and for the convenience of the Guest and at the request of the Guest, may give medical assistance to the Guest. Crystal Cruises is not a healthcare provider, does not undertake to treat or care for the Guest medically and is not responsible for the failure to provide medical treatment for the Guest. Crystal Cruises shall not be liable for any aspect of medical treatment provided to the Guest, including, but not limited to, the consequences of any examination, advice, diagnosis, medication, treatment, prognosis or other professional services which such doctors or nurses may furnish the Guest. These medical providers exercise their own medical judgment and expertise.

Notice Requirements For Claims:

- 19.1 For property, contract and all other non-personal injury claims: a written claim for loss of or damage to baggage, valuables and other personal belongings must be made to Crystal Cruises before the guest leaves the disembarkation area to enable Crystal Cruises to investigate any damage and to conduct a search for claimed lost articles. All other non-personal injury claims must be made in writing as soon as they arise.

In respect of claims arising on cruises outside the U.S. and made under EU regulation 392/2009, liability for loss of or damage to property is limited to the amounts there specified. Guests embarking on a cruise in a European member state port are also afforded rights under EU regulation 1177/2010². For a copy of EU regulation 392/2009 and/or a copy of EU regulation 1177/2010, visit https://ec.europa.eu/transport/themes/passengers/maritime_en.

23. Warranties/Consequential Damages Excluded

All warranties including warranties of fitness for use and merchantability are expressly excluded from this agreement, insofar as it is permissible under the applicable consumer laws. Crystal Cruises shall not be liable for any indirect, special or consequential damages.

24. Notice Concerning Safety, Security and Health

Crystal Cruises endeavours at all times to exercise reasonable care for Guests' comfort and safety on board its Ships. Crystal Cruises cannot guarantee freedom from all risks associated with war, terrorism, crime, health risks or other potential sources of harm. Crystal Cruises reminds all Guests that they must ultimately assume responsibility for their activities while ashore and for their other travel choices. The U.S. Dept. of State, the Australian Department of Trade and Foreign Affairs (DFAT) and government agencies regularly issue travel advisories and warnings to travellers giving details of local conditions in specified cities and countries according to such agencies' perceptions of risks to travellers. Crystal Cruises recommends that Guests and their travel agents obtain and consider such information when making travel decisions.

21. Choice of Law and Jurisdiction:

- 21.1 This contract is governed by the laws in force in Victoria. You agree that any action you bring against Crystal Cruises will be brought in Australia and will be subject to Victorian law. You hereby agree to only bring an action against Crystal Cruises, and not against any of its related bodies corporate as defined in the Corporations Act 2001 (Cth). In addition to the limitations of liability expressly provided in this contract, Crystal Cruises shall be entitled to the maximum protection allowed by law, including any statutory protection as to the amount of damages recoverable. In no event, however, will Crystal Cruises be

² REGULATION (EU) No 1177/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004

Article 1 Subject matter

This Regulation establishes rules for sea and inland waterway transport as regards the following: (a) non-discrimination between passengers with regard to transport conditions offered by carriers; (b) non-discrimination and assistance for disabled persons and persons with reduced mobility; (c) the rights of passengers in cases of cancellation or delay; (d) minimum information to be provided to passengers; (e) the handling of complaints; (f) general rules on enforcement.

Antarctic Passenger Rights ANNEX 3 Standard Terms and Conditions

liable for any damage, loss, injury or death not caused by the negligence of Crystal Cruises, to the extent permitted by Australian law, as outlined by paragraph 8 of this contract.

26. Agreement

26.1 The provisions of the ticket represent the entire agreement and a binding contract between the Guest and Crystal Cruises. The Guest's acceptance of the ticket constitutes the Guest's consent to these provisions. These provisions supersede any oral or written representations, with the exception of the provisions of the Cruise Lines International Association (CLIA) Passenger Bill of Rights, to which Crystal Cruises agrees and which is set forth on the crystal cruises website at crystalcruises.com.

26.2 If the provisions of the Passenger Bill of Rights are inconsistent with the provisions otherwise set forth in this Ticket, then the provisions of the Passenger Bill of Rights shall prevail. Any change in these provisions must be in writing, signed by the president of Crystal Cruises, and may require a commensurate increase in fare. These terms & conditions are subject to change with notice. The provisions of the Ticket with respect to liability limitations, claims, time limits, notice, jurisdiction and dispute resolution are for the benefit of Crystal Cruises and any agents, independent contractors, concessionaires and/or suppliers of Crystal Cruises.

UK & EU Crystal Cruises Standard Conditions of Carriage³

1 Construction and Definitions

"Carrier – means Crystal Cruises® LLC, which includes the companies dba as Crystal Yacht Cruises™, and Crystal River Cruises™. Carrier includes the Owner and/or Charterer whether Bare Boat/Demise Charter, Time Charterer, Sub-Charterer, manager or operator of the Ship to the extent that each of them acts as Carrier or performing Carrier (in accordance with the definition provided in the Athens Convention 1974 and 2002).

Organiser – is the party with whom the Guest has entered into a contract for the cruise and/or Package as also defined under the Council Directive 90/314/EEC of 13th June 1990 on Package Travel, Package Holidays and Package Tours or other relevant legislation or regulation.

(NB: EU countries must not introduce regulations providing a level of traveller protection, which diverges from Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements. The directive repealed Directive 90/314/EEC with effect from 1 July 2018.)⁴

"Guest" means the purchaser of the Contract and any person or persons named in the Contract including Minors who sail on the Vessel.

³ <https://www.crystalcruises.com/legal/crystal-uk-eu-standard-conditions-of-carriage>

⁴ https://e-justice.europa.eu/content_package_travel_directive_20152302-35909-en.do

9. Medical facilities/treatment on board and ashore

The Guest acknowledges that whilst there is a qualified doctor on board the cruise ships and the Yacht it is the Guests obligation and responsibility to seek medical assistance if necessary during the Cruise. The ship's doctor is not a specialist and the ship's medical Centre is not required to be and is not equipped to the same standards as a land based hospital. The ships medical Centre is not designed for the provision of extensive or continuing treatment. The ship carries medical supplies and equipment in accordance with the requirements of its flag state. Neither the Carrier nor the ship's doctor shall be liable to the Guest as a result of any inability to treat any medical condition as a result. Charges will apply for services dispensed by the ships medical Centre. The Carrier shall not be liable for any aspect of medical treatment provided to the Guest, including, but not limited to, the consequences of any examination, advice, diagnosis, medication, treatment, prognosis or other professional services which such doctors or nurses may furnish the Guest. The Carrier makes no warranty as to the quality of any such medical services.

Wherever possible, the Carrier will offer general assistance to any Guest who suffers illness, personal injury or death during the period of the cruise, whether or not arising from an activity forming part of the cruise and whether or not the result of fault by any party. Any costs or expense which is reasonably incurred by the Carrier for or on behalf of the Guest in respect of any form of medical, dental or similar treatment, hotel, transportation, repatriation, including, but not limited to such costs and expenses incurred by or on account of services provided by port agent and other shore side service providers, including luggage shipping costs, or any other expense shall be repayable by the Guest to the Carrier, whether or not such sum is covered by the Guest's travel insurance.

12. Limitations of Liability for Loss of Life or Injury and or Damage to Property

Where the booking has been made in a European Union Member State (EU) or the ship has an EU flag or where the first port of embarkation or final port of disembarkation is in the EU international carriage of passengers and their luggage by sea for shall be governed by EU Regulation 392/2009 and where ratified the Athens Protocol 2002, which may be found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/261628/Misc.6.2013_Prot_2002_Athens_8760.pdf and <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:131:0024:0046:EN:PDF>

Any liability of the Carrier for death or personal injury or for loss of or damage to luggage arising out of carriage by sea shall be solely brought and determined in accordance with the Athens Convention 2002 EU Regulation 392/2009 or where applicable the 2014 Order or Athens Convention 1974.

15. Time Limits and Notice Requirements for Claims

For Illness, Injury or Death: Any incident or accident resulting in

Antarctic Passenger Rights ANNEX 3 Standard Terms and Conditions

emotional injury, bodily injury, illness or death to a Guest must be reported immediately to a Ship's Officer. The Carrier will not be liable therefore and no claim may be brought except as provided by law. For claims made under the Athens Convention or EU Regulation 392/2009, these must be notified within 28 days of disembarkation and a claim filed in the Courts of England within two years of the date of disembarkation or in the case of death from the date of disembarkation would have taken place.

21. Law and Jurisdiction

Subject to the jurisdictional provisions of the Athens Convention 1974 and 2002 and EU392/2009 (The Conventions) being applied all other disputes and matters howsoever arising between the Guest and the Carrier (including in connection with the Carriage and or its execution and or these Conditions shall unless the Carrier expressly agrees otherwise in writing be subject to the laws of England and shall be brought in the Courts of England to the exclusion of any other venue, law or jurisdiction. This includes US Guests where the cruise does not begin or finish or call at any US port Guests with claims under The Conventions may at their option choose English law and jurisdiction.

23. Damages Excluded

The Carrier shall not be liable for any indirect, special or consequential damages.

SILVERSEA CRUISES

TERMS & CONDITIONS

Rights reserved and limits of responsibility

IMPORTANT NOTICE – PLEASE READ

Terms and Conditions apply to all Silversea vessels.

Notes: Terms & Conditions for a Silversea World Cruise and its individual voyage segments may vary. Please refer to the World-Cruise terms and conditions for further details.

1. GENERAL TERMS AND CONDITIONS

Any and all information contained herein is in effect at this time and is subject to change at any time.

Information contained herein does not form part of any offer or contract. The transportation of guests and baggage on Silversea vessels is provided solely by Silversea and is governed by the terms and conditions printed on the Holiday Contract. The Holiday Contract will be included with your travel documents, is available upon request, or can be accessed through our website at silversea.com, and contains complete and important information regarding cancellations, itineraries, Silversea's liability, health and immigration requirements, and other relevant terms and conditions. The terms and conditions of the Holiday Contract will apply to persons who

have booked a cruise regardless of whether or not they have embarked the vessel. Please read your Holiday Contract carefully. Should the terms and conditions of the Holiday Contract be modified, a revised Holiday Contract, the terms of which will govern the subject cruise, will be sent to guests at least 150 days before sailing. To the extent that any of the information in these Booking Terms & Conditions conflicts with the terms of the Holiday Contract, the terms and conditions contained in the Holiday Contract shall control.

O. Travel Insurance

Travel Insurance must be taken out at the time of booking and details of the Insurance stated on the Guest Information Form. This must include cover for cancellation or curtailment of the holiday by yourself as well as the cost of repatriation in the event of accident or illness. It is your responsibility to arrange suitable insurance cover for your holiday. If you require further information, we recommend that you speak to an independent insurance broker or expert. If any insurance policy is returned during a “cooling-off” period, then equivalent insurance must be taken out and paid for immediately and details immediately provided to Silversea.

P. General Exclusions

Silversea will not pay for claims arising out of loss or damage directly or indirectly occasioned by circumstances where performance and /or prompt performance of the Holiday Contract is prevented by reason of war, or threat of war, riot, civil strife, industrial dispute whether by Silversea’s employees or others, terrorist activity or the threat of terrorist activity, failure of supplies of power, health risks or epidemics, natural or nuclear disaster, fire or adverse weather conditions or adverse sea states, suicide or attempted suicide or deliberate exposure to unnecessary danger (except in an attempt to save human life), or the consequences of participating in an unusual and dangerous activity and all similar circumstances outside Silversea’s control.

J. Health & Medical Requirements

All guests are required to report in writing to Silversea at the time their reservation is made:

- Any physical or mental condition that may require medical or professional treatment or attention during the voyage.
- Any condition that may render the guest unfit for travel or that may require special care or assistance.
- Any condition that may pose a risk or danger to the guest or anyone else on board the ship.
- Any condition that may require oxygen for medical reasons.
- Any intention or need to use a wheelchair cart, other mobility device or a service or assistance animal aboard ship.

By booking passage and by boarding the ship, the guest represents and warrants that he / she is physically and otherwise fit to travel, and that the guest will comply at all times with applicable rules and regulations of the ship and orders and instructions of the ship’s officers and medical staff. Silversea

reserves the right without liability to require a guest to disembark and / or to refuse to board and transport a guest who, in the judgment of Silversea or the ship's Master, is unfit to travel or may require care beyond that which Silversea is reasonably able to provide. Silversea strongly recommends wheelchair guests travel with someone who is able to assist them both ashore and at sea as Silversea may be unable to offer special assistance. Please note that wheel-on and / or wheel-off access may not be available at some ports-of-call. Wheelchair guests must bring their own collapsible wheelchair.

Guest Copy

HOLIDAY CONTRACT TERMS & CONDITIONS IMPORTANT NOTICE

Where a Holiday is booked other than through Silversea (whether through a third party travel agent, tour operator or otherwise) ("Third Party"), the Third Party is deemed to be an agent for the Guest in relation to the formation and performance of the Holiday Contract including, without limitation, payment of the Holiday Price. By booking the Holiday (whether through a Third Party or otherwise), the Guest irrevocably agrees to be bound by these Terms and Conditions (including this notice).

1. Definitions and interpretation

"Guest" means the person identified as the lead passenger on a booking and references to "guests" shall include the Guest and, if applicable, any other members of the Guest's party;

"Holiday" means the holiday arranged by or on behalf of Silversea and supplied by Silversea and/or SCL (as defined below) which is the subject of a reservation by a Guest and is governed by the Holiday Contract. For the avoidance of doubt, the Holiday excludes any Additional Service, which if Silversea agrees to arrange, shall form a separate and severable contract between the guests and each one of them and Silversea;

"Holiday Contract" means the contract concluded between the Guest and Silversea and/or SCL incorporating these Terms and Conditions upon Silversea's receipt of the applicable deposit in accordance with clause 3.1;

"Silversea" means Silversea Cruises (UK) Ltd Level 3, The Asticus Building, 21 Palmer Street, London SW1H 0AD, United Kingdom,

"SCL" means Silversea Cruises Ltd. with a registered office of Sassoon House, Shirley Street & Victoria Ave., Nassau, New Providence, The Bahamas; and its successors, assigns and transferees;

"Vessel" means the vessel that will be utilised for the provision of the Holiday.

4. Excursions, Lecturers and Personalities

4.1 Any and all Excursions included within the Holiday may be subject to minimum or maximum numbers of participants. Excursions are subject to availability. Silversea has no liability for any land based arrangements which do not form part of the Holiday booked with Silversea. Excursions, lecturers and personalities may vary from those advertised in advance.

- 4.2 Subject to clause 12, Silversea shall not be liable for any loss or damage, including but not limited to, loss of enjoyment, disappointment or distress for changes to, or cancellation of any Excursions, lectures and personalities.

12. Liability

- 12.1 Subject to the provisions of the Conventions and Regulations referred to in clauses 12.4 to 12.9 Silversea and SCL each accept responsibility for death, injury or illness caused by the negligent acts and or omissions of it and anyone who supplies service which form part of the Holiday. Silversea and SCL limit their liability, where applicable, by the Conventions and Regulations mentioned in 12.4 to 12.9 inclusive. In any event, Silversea is not responsible for any improper or non-performance which is:

- a) wholly attributable to the fault of the guests;
- b) attributable to the unforeseeable or unavoidable act or omission of a third party unconnected with the provision of any services to be provided under the Holiday Contract;
- c) attributable to an unusual or unforeseeable circumstance beyond the control of Silversea and/or anyone who supplies services which form part of the Holiday the consequences of which could not have been avoided even if all due care had been exercised, including (but not limited to) an event of force majeure; or
- d) attributable to an event which Silversea and/or anyone who supplies services which form part of the Holiday could not even with all due care have foreseen or forestalled.

- 12.2 For claims not involving personal injury, death or illness or which are not subject to the Conventions and Regulations referred to in 12.4 to 12.9 inclusive, Silversea and SCL's liability for improper performance of the Holiday Contract shall be limited to maximum of twice the Holiday Price, which the affected guest paid (not including premiums and amendment charges).

- 12.3 All carriage (by land, air and sea) is subject to the terms and conditions of carriage of the actual carrier. These conditions of carriage may limit or exclude liability, are expressly incorporated into the Holiday Contract and also form the terms and conditions of separate contracts between the guests and the particular carrier as contained in that carrier's ticket which is provided to the guest before the scheduled departure date. Copies of these terms and conditions are available on request from Silversea.

- 12.6 Carriage of passengers and their luggage by sea and the liability of carriers in the event of accidents is governed by EC Regulation No. 392/2009 of the European Parliament and of the Council of 23 April

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2009 on the liability of carriers of passengers by sea in the event of accidents as subsequently amended or modified ("Regulation A").

- 12.7 Insofar as Silversea and/or SCL may be liable to guests in respect of claims arising out of carriage by air or carriage by sea, Silversea and/or SCL shall be entitled to all the rights, defences, immunities and limitations available, respectively, to the actual air carrier (including his own terms and conditions of carriage) and under the Athens Convention, and nothing in these Terms and Conditions shall be deemed a surrender thereof. To the extent that any provision in these Terms and Conditions is made null and void by the Warsaw Convention, the Montreal Convention or the Athens Convention or any legislation compulsorily applicable or is otherwise unenforceable, it shall be void to that extent but no further.
- 12.8 Insofar as the Holiday or any part of it may be performed on a vessel not owned by Silversea and/or SCL, it is agreed that Silversea and SCL, as the case may be, shall at all times nevertheless be deemed a vessel owner for the purposes of the Convention on Limitation of Liability for Maritime Claims 1976, whether as amended by the Protocol of 1996 or otherwise and as in force in any relevant jurisdiction from time to time, and so entitled to limit liability.
- 12.9 Except for claims arising out of carriage by air (as provided by 12.4), any liability in respect of death and personal injury and loss of and damage to luggage which Silversea and/or SCL may incur to guests, whether under the Holiday Contract in accordance with these Terms and Conditions or otherwise, shall always be subject to the limits of liability contained in either the Athens Convention or Regulation A.
- 12.10 Notwithstanding anything to the contrary elsewhere in these Terms and Conditions, neither Silversea nor SCL shall in any circumstances be liable for any loss or anticipated loss of profits, loss of revenue, loss of use, loss of contract or other opportunity nor for any other consequential or indirect loss or damage of a similar nature.

PASSENGER COPY
SILVERSEA CRUISES LTD.
PASSAGE CONTRACT

ISSUED SUBJECT TO IMPORTANT TERMS AND CONDITIONS
PLEASE READ CAREFULLY BEFORE ACCEPTING

IMPORTANT NOTICE TO PASSENGERS

THIS PASSAGE CONTRACT IS A LEGALLY BINDING CONTRACT BETWEEN YOU, THE PASSENGER, AND SILVERSEA CRUISES LTD. (THE "CARRIER"). THIS PASSAGE CONTRACT CONTAINS IMPORTANT TERMS AND CONDITIONS. YOU ARE ESPECIALLY DIRECTED TO CAREFULLY READ AND

UNDERSTAND SECTIONS 11, 12, 13 AND 20, AS THEY CONTAIN SIGNIFICANT LIMITATIONS ON YOUR RIGHTS TO ASSERT CLAIMS FOR PERSONAL INJURIES, ILLNESS OR DEATH AND BAGGAGE AND PERSONAL PROPERTY LOSS AGAINST CARRIER, THE VESSEL, RELATED ENTITIES AND THEIR OFFICERS, AGENTS AND EMPLOYEES.

PLEASE NOTE: PASSENGER ACKNOWLEDGES AND UNDERSTANDS THAT HE/SHE IS REQUIRED TO READ THIS TICKET IN ITS ENTIRETY PRIOR TO MAKING ANY PAYMENT FOR THE CRUISE BOOKING. THE BOOKING AND ANY

PAYMENT MADE TOWARDS THE PURCHASE OF A CRUISE WITH THIS CARRIER CONSTITUTES ACCEPTANCE BY PASSENGER OF ALL TERMS AND CONDITIONS OF THIS PASSAGE CONTRACT, AS IT MAY BE AMENDED OR MODIFIED REGARDLESS OF WHETHER PASSENGER EMBARKED THE VESSEL.

1. DEFINITIONS

- A. The term "Carrier" includes Silversea Cruises Ltd., any parent, subsidiary, affiliate, or successor company, the Vessel (or any substitute vessel) named on this Passage Contract (the "Ticket"), the Vessel's owners, operators, managers and charterers and all launches and craft belonging to any such Vessel or owned or operated by its owners, operators, managers, or charterers.
- B. The term "Vessel" means the ship chartered, operated, or provided by Carrier upon which Passenger has booked passage and/or embarked.
- C. The term "Voyage" means the voyage from the port of embarkation to the port of disembarkation.
- D. The term "Optional Package Programmes" means, individually and collectively, the Silver Shore Programmes and pre-booked shore excursions, unless otherwise indicated.²
- E. The terms "You" and "Passenger" mean the person(s) booking and/or purchasing space through Carrier and/or who embark upon the Vessel and any accompanying minors. The benefits and limitations of this Passage Contract shall apply to all such persons and entities as set forth in Sections 5 and 24 below.
- F. "Passage Contract" means this "Ticket," as it may be amended or modified, which is a legally binding contract between You and Carrier.
- G. "Force Majeure" means and includes war, or warlike conditions, terrorist activities, breakdown, fire, perils of the seas, storms, "foundering" or other weather related occurrences, earthquake, flood, vandalism, destructive acts of God or of government, political disturbances, legislative enactments, embargo, riot, civil commotion, regulatory interference, strikes, lockouts, shortages, industrial and labor disputes and all other causes beyond the reasonable control of Carrier.

7. PASSENGER RESPONSIBILITIES

Prior to boarding You are required to complete a "Guest Information

Form.” No questions may be left unanswered. You may not be permitted to board the Vessel or embark on the cruise, or be asked to disembark after boarding, if complete information has not been provided.

The “Guest Information Form” requests the following information: Full name of each passenger Passport details Birth date Telephone numbers (landline and mobile) Email addresses Home addresses Contact information of family members or others in the event of an emergency (Carrier must be able to reach each passenger’s emergency contact at any time of day)...

At the time of embarkation, the Passenger is responsible for having received all medical inoculations necessary for the Voyage and having in their possession this Ticket, valid passports, visas, medical card and any other travel and health documents necessary for the scheduled ports of call and disembarkation... It is the responsibility of each Passenger to determine what travel documents, visas, and medical inoculations are required for all ports of call on the scheduled itinerary, and Carrier shall have no responsibility to provide such information to Passengers. In the event Carrier provides information or advice as to necessary travel documents, visas and medical inoculations as a courtesy, Passengers are still obligated to personally verify such information with the appropriate government authorities.

You must attend all mustering drills while aboard the Vessel. This is an exercise that is required by law and is held for your safety. Your failure to attend a mustering drill may result in your disembarkation from the Vessel without liability to Carrier.

10. GENERAL LIABILITY LIMITATIONS – IMPORTANT NOTICE – PLEASE READ ⁵

A. LIABILITY LIMITATIONS FOR LOSS OF LIFE AND/OR PERSONAL INJURY CARRIER IS NOT LIABLE FOR INJURY, ILLNESS, OR DEATH OF ANY PASSENGER UNLESS DIRECTLY CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF CARRIER.

FOR PURPOSES OF THIS TICKET, ANY INJURY, ILLNESS OR DEATH OF ANY PASSENGER CAUSED BY AN EVENT OF FORCE MAJEURE AS DEFINED IN THE SECTION OF THIS TICKET TITLED “DEFINITIONS” WILL NOT BE DEEMED TO BE DIRECTLY CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF CARRIER.

PASSENGER UNDERSTANDS AND AGREES THAT CARRIER SHALL HAVE NO LIABILITY FOR ANY INJURIES OR DAMAGES RESULTING FROM EVENTS OF FORCE MAJEURE.

THE PASSENGER ASSUMES THE NORMAL RISKS OF TRAVEL BY SEA.

⁵ Caps as in the original document <http://www.silversea.com/terms-conditions/passage-contract/>.

IN NO EVENT SHALL CARRIER BE LIABLE TO PASSENGER WITH RESPECT TO ANY OCCURRENCE TAKING PLACE OTHER THAN ON THE VESSEL OR LAUNCHES OWNED OR OPERATED BY CARRIER.

ON INTERNATIONAL VOYAGES WHICH NEITHER EMBARK, DISEMBARK NOR CALL AT ANY U.S. PORT AND WHERE THE PASSENGER COMMENCES THE VOYAGE BY EMBARKATION OR DISEMBARKS AT THE END OF THE VOYAGE IN A PORT OF A EUROPEAN MEMBER STATE, CARRIER SHALL BE ENTITLED TO ANY AND ALL LIABILITY LIMITATIONS AND IMMUNITIES FOR LOSS OF OR DAMAGE TO LUGGAGE, DEATH AND/OR PERSONAL INJURY AS PROVIDED UNDER EU REGULATION 392/2009 ON THE LIABILITY OF CARRIERS TO PASSENGERS IN THE EVENT OF ACCIDENTS. UNLESS THE LOSS OR DAMAGE WAS CAUSED BY A SHIPPING INCIDENT, WHICH IS DEFINED AS A SHIPWRECK, CAPSIZING, COLLISION OR STRANDING OF THE SHIP, EXPLOSION OR FIRE IN THE SHIP, OR DEFECT IN THE SHIP (AS DEFINED BY THE REGULATION), CARRIER'S LIABILITY IS LIMITED TO NO MORE THAN 400,000 SPECIAL DRAWING RIGHTS ("SDR") PER PASSENGER (APPROXIMATELY US\$608,000 OR AU\$654,000, WHICH FLUCTUATES DEPENDING ON THE DAILY EXCHANGE

RATE AS PUBLISHED IN THE WALL STREET JOURNAL) IF THE PASSENGER PROVES THAT THE INCIDENT WAS A RESULT OF CARRIER'S FAULT OR NEGLECT.

IF THE LOSS OR DAMAGE WAS CAUSED BY A SHIPPING INCIDENT, CARRIER'S LIABILITY IS LIMITED TO NO MORE THAN 250,000 SDRS PER PASSENGER (APPROXIMATELY US\$380,000 OR AU\$409,000, WHICH FLUCTUATES DEPENDING ON THE DAILY EXCHANGE RATE AS PUBLISHED IN THE WALL STREET JOURNAL).

COMPENSATION FOR LOSS CAUSED BY A SHIPPING INCIDENT CAN INCREASE TO A MAXIMUM OF 400,000 SDRS PER PASSENGER UNLESS CARRIER PROVES THAT THE SHIPPING INCIDENT OCCURRED WITHOUT CARRIER'S FAULT OR NEGLECT.

SHIPPING INCIDENTS DO NOT INCLUDE ACTS OF WAR, HOSTILITIES, CIVIL WAR, INSURRECTION, NATURAL DISASTERS, OR INTENTIONAL ACTS OR OMISSIONS OF THIRD PARTIES. IN CASES WHERE THE LOSS OR DAMAGE WAS CAUSED IN CONNECTION WITH WAR OR TERRORISM, CARRIER'S LIABILITY FOR ANY PERSONAL INJURY OR DEATH (WHETHER OCCURRING DURING A SHIPPING INCIDENT OR A NON-SHIPING INCIDENT) IS LIMITED TO THE LOWER OF 250,000 SDRS PER PASSENGER OR 340 MILLION SDRS PER SHIP PER INCIDENT.

PUNITIVE DAMAGES ARE NOT RECOVERABLE FOR CRUISES COVERED BY EU REGULATION 392/2009. FOR A COPY OF EU

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REGULATION 392/2009, VISIT <http://eurlex.europa.eu/lexuriserv/lexuriserv.do?uri=oj:l:2009:131:0024:0046:en:pdf>. IN ADDITION, GUESTS EMBARKING A CRUISE IN A EUROPEAN MEMBER STATE PORT ARE AFFORDED RIGHTS UNDER EU REGULATION 1177/2010. FOR ADDITIONAL INFORMATION ON EU REGULATION 392/2009 AND EU REGULATION 1177/2010, VISIT CARRIER'S WEBSITE AT <http://www.silversea.com/terms-conditions/passage-contract/>.

CARRIER SHALL NOT BE LIABLE TO PASSENGER FOR DAMAGES FOR EMOTIONAL DISTRESS, MENTAL SUFFERING/ANGUISH OR PSYCHOLOGICAL INJURY OF ANY KIND UNDER ANY CIRCUMSTANCES, EXCEPT WHEN SUCH DAMAGES RESULTED FROM (a) PASSENGER SUSTAINING ACTUAL PHYSICAL INJURY, OR (b) PASSENGER HAVING BEEN AT ACTUAL RISK OF PHYSICAL INJURY, OR (c) WHEN SUCH DAMAGES ARE DETERMINED TO BE INTENTIONALLY INFLICTED BY CARRIER

12. TIME LIMIT FOR REPORTING INJURY, LOSSES AND CLAIMS

PASSENGER UNDERSTANDS AND AGREES THAT:

- A. CLAIMS FOR INJURY, ILLNESS OR DEATH: ANY INCIDENT OR ACCIDENT RESULTING IN INJURY, ILLNESS, OR DEATH TO THE PASSENGER MUST BE REPORTED IMMEDIATELY TO THE VESSEL'S OFFICERS. CARRIER WILL NOT BE LIABLE FOR ANY CLAIM FOR PERSONAL INJURY, ILLNESS OR DEATH UNLESS A DETAILED WRITTEN CLAIM IS PRESENTED TO CARRIER WITHIN SIX (6) MONTHS AFTER THE DATE OF THE INCIDENT OR ACCIDENT.

LAWSUITS MUST BE FILED BY PASSENGER WITHIN ONE (1) YEAR OF THE DATE OF THE INCIDENT OR ACCIDENT CLAIMED OR ALLEGED TO HAVE CAUSED THE INJURY, ILLNESS, OR DEATH.

- B. ALL OTHER CLAIMS: CARRIER WILL NOT BE LIABLE FOR ANY OTHER CLAIM AGAINST CARRIER, INCLUDING BUT NOT LIMITED TO CLAIMS RELATING TO A PASSENGER'S BAGGAGE, ANY ALLEGED VIOLATION OF CIVIL RIGHTS, DISCRIMINATION, CONSUMER OR PRIVACY LAWS, OR OTHER STATUTORY, CONSTITUTIONAL OR LEGAL RIGHTS, OR FOR ANY LOSSES, DAMAGES OR EXPENSES RELATING TO OR IN ANY WAY ARISING UNDER, IN CONNECTION WITH, OR INCIDENT TO THIS TICKET OR THE PASSENGER'S VOYAGE, OTHER THAN FOR INJURY, ILLNESS OR DEATH, UNLESS A DETAILED WRITTEN CLAIM IS PRESENTED TO CARRIER WITHIN THIRTY (30) DAYS OF THE DATE OF THE CLAIM OR ALLEGED LOSS. SUIT MUST BE FILED BY PASSENGER WITHIN SIX (6) MONTHS AFTER THE PASSENGER'S ARRIVAL AT THE FINAL PORT LISTED ON THE TICKET, OR IN THE CASE OF NON-ARRIVAL, FROM THE DATE ON WHICH THE PASSENGER SHOULD HAVE ARRIVED. ANY SUCH LAWSUIT

MUST BE BROUGHT BY OR ON BEHALF OF THE INDIVIDUAL PASSENGER CONCERNED.

C. IF A WRITTEN CLAIM IS NOT MADE AND SUIT IS NOT FILED WITHIN THE TIME PROVIDED IN THIS SECTION 13, THEN THE PASSENGER WAIVES AND RELEASES ANY RIGHT HE OR SHE MAY HAVE TO MAKE ANY CLAIM AGAINST CARRIER ARISING UNDER, IN CONNECTION WITH, OR INCIDENT TO THIS TICKET OR THE VOYAGE.

13. ITINERARY/CHANGES/SUBSTITUTION OF VESSELS/SAFETY AND SECURITY

Carrier visits numerous ports around the world. Passengers assume responsibility for their own safety and Carrier cannot guarantee Passengers' safety at any time. Risks ashore could include war, terrorism, crime or other potential sources of harm. The United States Department of State and other government agencies regularly issue advisories and warnings to travellers giving details of local conditions. Carrier strongly recommends that Passengers and their travel agents obtain and consider such information when making travel decisions. Carrier assumes no responsibility for gathering such information.

14. HINDRANCE OF PERFORMANCE OF VOYAGE

Except as provided, if the performance of the Voyage or any portion thereof is hindered or prevented (or if in the opinion of Carrier or the Captain is likely to be hindered or prevented) by reason of any event or occurrence as set forth in Section 14 of this Ticket or for any other reason which in the opinion of the Captain is required for the safety of passengers' property and the Vessel, Carrier shall have no liability to Passengers as a result of such cancellation, termination or modification. However, if the Voyage is cancelled or terminated early due to mechanical failure of the Vessel, each Passenger shall be entitled to a full refund for a cancelled Voyage or a partial refund for a terminated Voyage. For Voyages terminated early due to mechanical failure of the Vessel, Carrier shall also provide transportation to the Vessel's scheduled port of disembarkation or at Carrier discretion to the Passenger's home city; and lodging if disembarkation and an overnight stay in an unscheduled port are required.

15. HEALTH AND MEDICAL MATTER/RESPONSIBILITY OF PASSENGER TO INFORM CARRIER OF HEALTH CONDITIONS OR PHYSICAL OR MENTAL LIMITATIONS

Each Passenger acknowledges and voluntarily accepts and assumes the risks inherent in travel by sea, including the risk that advanced medical attention or emergency medical disembarkation may be delayed or impossible due to the location of the Vessel, prevailing weather conditions or other circumstances. Passenger represents and warrants that he or she is physically and otherwise fit to travel on the Voyage. All

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Passengers are required to report to Carrier at the time of booking, and follow-up in writing, any of the following

- A) Any physical or mental condition that may require medical or professional treatment or attention during the Voyage; B) Any condition that may render the Passenger unfit for travel, or that may require special care or assistance;
- C) Any condition that may pose a risk or danger to the Passenger or anyone else on board the Vessel;
- D) Any condition that may require oxygen for medical reasons; or
- E) Any intention to use or need to use a wheelchair, cart, other mobility device or a service or assistance animal on board the Vessel.

CARRIER CANNOT GUARANTEE THAT CERTAIN MEDICAL SERVICES WILL BE AVAILABLE ONBOARD THE VESSEL AND IF MEDICAL SERVICES ARE AVAILABLE, THEY ARE SOLELY FOR THE PASSENGER'S CONVENIENCE. THE MEDICAL SERVICES THAT ARE AVAILABLE WHILE ONBOARD THE VESSEL ARE LIMITED AND PASSENGER UNDERSTANDS THAT THERE MAY BE CIRCUMSTANCES WHERE NEEDED MEDICAL SERVICES CAN ONLY BE PROVIDED BY A SHORESIDE MEDICAL FACILITY OR MEDICAL SPECIALIST.

20. CHOICE OF LAW/PLACE OF SUIT; WAIVER OF TRIAL BY JURY; CLASS ACTION WAIVER

THIS TICKET AND ALL DISPUTES OR CLAIMS WHATSOEVER BY PASSENGER SHALL BE GOVERNED EXCLUSIVELY, IN ALL RESPECTS, AND WITHOUT REGARD TO CONFLICT OF LAW PRINCIPLES, BY THE GENERAL MARITIME LAW OF THE UNITED STATES INCLUDING THE DEATH ON THE HIGH SEAS ACT (46 USCS § 30302). EXCEPT AS OTHERWISE EXPRESSLY SPECIFIED IN THIS TICKET, PASSENGER AGREES THIS CHOICE OF LAW SUPERSEDES AND PREEMPTS ANY PROVISION OF LAW OF ANY OTHER STATE OR NATION.

IT IS SPECIFICALLY AGREED BY AND BETWEEN YOU, THE PASSENGER, AND CARRIER THAT ANY AND ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN CONNECTION WITH, OR INCIDENT TO THIS TICKET, YOUR BOOKING OF SPACE OR YOUR CRUISE SHALL BE LITIGATED SOLELY AND EXCLUSIVELY, IF AT ALL, IN AND BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA IN DADE COUNTY, FLORIDA

NEITHER CARRIER NOR PASSENGER SHALL HAVE THE RIGHT TO TRIAL BY JURY AND EACH EXPRESSLY WAIVES SUCH RIGHT.

RESOLUTION OF ALL DISPUTES HEREUNDER SHALL BE BY AND BETWEEN CARRIER AND PASSENGER INDIVIDUALLY AND SHALL NOT BE LITIGATED AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS ACTION

22. WARRANTIES/CONSEQUENTIAL DAMAGES EXCLUDED. ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF FITNESS FOR USE, SEAWORTHINESS AND MERCHANTABILITY ARE EXPRESSLY EXCLUDED FROM THIS AGREEMENT. CARRIER SHALL NOT BE LIABLE FOR ANY 18 INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES.

Hurtigruten Booking Terms and Conditions 2021/22⁶

1. YOUR CONTRACT

Your contract is with Hurtigruten Ltd., a company wholly owned by Hurtigruten ASA, on the basis of these conditions and the information contained in the brochure, and shall be governed by English law and the jurisdiction of the English Courts. You may however choose the law and jurisdiction of Scotland or Northern Ireland if you wish to do so. When you book an air package holiday or sailing with us the contract between us will exist as soon as you or your travel agent asks us to confirm your booking. We then become responsible to provide you with the voyage arrangements or air package holiday you have booked and you become responsible to pay for them, in each case subject to these terms and conditions. You will also become responsible to pay for any additional arrangements made by us on your behalf including International Flights not included in any air package, optional excursions, travel insurance or other arrangements requested by you and booked...

4. FITNESS TO TRAVEL ON THE SHIP, PREGNANCY, DISABILITY OR REDUCED MOBILITY, MEDICAL/MOBILITY EQUIPMENT

In order to ensure that the Carrier is able to carry passengers safely and in accordance with applicable safety requirements established by international, EU or national law or in order to meet safety requirements established by competent authorities including the ships flag state every Passenger warrants that he/she is fit to travel by sea and that his/her conduct or condition will not impair the safety of the ship or inconvenience the other passengers. We reserve the right to require any Passenger to produce medical evidence of fitness to travel in order to assess whether that Passenger can be carried safely in accordance with applicable international, EU or national law. If we consider it necessary, we are entitled to administer a health questionnaire prior to boarding.

10. OUR LIABILITY TO YOU

- i) Except where otherwise expressly stated in these booking conditions, we regret we cannot accept liability or pay any compensation where the performance of our contractual obligations

⁶ <https://www.antarctica-cruising.com/hurtigruten/booking-conditions.htm>.

is prevented or affected by or you otherwise suffer any damage or loss as a result of 'force majeure'. In these Booking Conditions, 'force majeure' means any event which we or the supplier of the service(s) in question could not, even with all due care, foresee or avoid. Such events may include war or threat of war, riot, civil strife, actual or threatened terrorist activity, industrial dispute, natural or nuclear disaster, adverse weather conditions, fire and all similar events outside our control.

- ii) We will accept responsibility for the arrangements we agree to provide or arrange for you as an 'organiser' under the Package Travel, Package Holidays and Package Tours Regulations 1992 as set out below. Subject to these booking conditions, if we or our suppliers perform or arrange your contracted holiday arrangements negligently, taking into consideration all relevant factors, we will pay you reasonable compensation.
- iii) Where death and or personal injury and or loss of or damage to property occurs during carriage by air or by sea then liability and the extent of damages recoverable will be dealt with by International Conventions as set out in paragraphs (v) and (vi) and not otherwise.
- iv) As set out in these booking conditions we limit the maximum amount we may have to pay you for any claims you may make against us which do not involve personal injury, illness or death. Except where loss of and/or damage to luggage or personal possessions is concerned if we are found liable to you on any basis the maximum amount we will have to pay you is twice the price (excluding insurance premiums and amendment charges) paid by or on behalf of the person(s) affected in total unless a lower limitation applies to your claim under clause 10(vi) below.
- v) [...]
- vi) Travel by sea is governed by the provisions of the Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 as amended in 1976 ("The Athens Convention) and where applicable from 1 January 2013 EU Regulation 392/2009 relating to the Liability of carriers of passengers by sea in the event of accidents ("EU Regulation 392/2009). For the purposes of the Athens Convention and EU Regulation 392/2009 we are the Contracting Carrier.

The Athens Convention and EU Regulation 392/2009 limit the Carriers' liability for death or personal injury or loss or damage to luggage and makes special provision for valuables. It is presumed that luggage has been delivered to you undamaged unless written notice is given by us and/or the performing Carrier...

In so far as we may be liable to a Client in respect of claims arising out of carriage by sea, we shall be entitled to all the rights, defences, immunities and limitations available, respectively, to the actual carrier and under the relevant Conventions and nothing in these Booking

Conditions shall be deemed as a surrender thereof. To the extent that any provision in these Booking Conditions is made null and void by the Athens Convention or EU Regulation 392/2009 or any legislation compulsorily applicable or is otherwise unenforceable, it shall be void to that extent but not further.

Any liability in respect of death and personal injury and loss of and damage to luggage which we may incur to you shall always be subject to the limits of liability contained in the Athens Convention or EU Regulation 392/2009 for death/personal injury of 46,666 Special Drawing Rights (SDR) or 300,000 SDR under Athens Convention or 400,000 SDRs under EU Regulation 392/2009 except in the case of liability for war or terrorism 250,000 SDRs.

12. INSURANCE

It is a condition of the contract with us that every member of the booking has travel insurance in force for the entire duration of the booking, covering at least the cancellation of the booking and providing medical cover for illness or injury and repatriation while overseas. Please provide us with the name of your insurer, together with their 24-hour emergency number when you book or as soon as possible.

PRINCESS CRUISES

Passage Contract

IMPORTANT NOTICE TO GUESTS: PLEASE CAREFULLY READ THE FOLLOWING PASSAGE CONTRACT TERMS THAT GOVERN ALL DEALINGS BETWEEN YOU AND CARRIER, AFFECT YOUR LEGAL RIGHTS, AND ARE BINDING ON YOU TO THE FULL EXTENT PERMITTED BY LAW; PARTICULARLY SECTION 13 GOVERNING THE PROVISION OF MEDICAL AND OTHER PERSONAL SERVICES, SECTIONS 14 AND 15 LIMITING CARRIER'S LIABILITY FOR YOUR DEATH, ILLNESS, INJURY, OR DAMAGE CLAIMS RELATING TO BAGGAGE OR PERSONAL PROPERTY, AND SECTION 16 LIMITING YOUR RIGHT TO SUE, REQUIRING ARBITRATION AND WAIVER OF JURY TRIAL FOR CERTAIN CLAIMS, AND WAIVER OF YOUR RIGHT TO ARREST OR ATTACH THE SHIP.

1. INTRODUCTION; DEFINITIONS; GOVERNING LAW.

Upon booking the Cruise, each Guest named on the booking confirmation/statement explicitly agrees to the terms of this Passage Contract. Any Guest booking or purchasing the Cruise represents that he or she is authorized by all accompanying Guests to accept and agree to all the terms and conditions set forth herein.

You acknowledge and agree that, except as otherwise expressly provided herein, the resolution of any and all disputes between Carrier and any Guest shall be governed exclusively and in every respect by the general maritime law of the United States without regard to its choice of law principles, except in cases involving death arising outside the United States which shall be governed exclusively by the Death on the High Seas Act, 46 U.S.C. § 30301, et seq. To the extent such maritime law is not applicable, the laws of the

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State of California (U.S.A.) shall govern the contract, as well as any other claims or disputes arising out of that relationship. You agree this choice of law provision replaces, supersedes and preempts any provision of law of any state or nation to the contrary.

This Passage Contract constitutes the entire understanding and agreement between You and Carnival plc, the Operator of some “Princess Cruises” ships (the “Carrier”), as defined below, and supersedes any other prior oral, implied, written or other representations or agreements between You and Carrier, except that in the event of a direct conflict between a provision of this Passage Contract and a provision of the Cruise Industry Passenger Bill of Rights (PBOR) in effect at the time of booking, the PBOR controls [...]

“Cruise” means the scheduled voyage as published in the booking confirmation/statement and/or boarding pass issued in connection with this Passage Contract, as may be amended pursuant to this Passage Contract, from the port of embarkation to the port of disembarkation, and also includes any air, rail, road or sea transport and any land accommodation components of any land-sea package sold, taken with or included in the price of the Cruise, and any activities, shore excursions, tours, or shore side facilities related to or offered during the Cruise.

7 RIGHT TO DEVIATE FROM SCHEDULED ROUTE, CHANGE PORT OF EMBARKATION/DISEMBARKATION, SUBSTITUTE TRANSPORTATION, CANCEL CRUISE AND ACTIVITIES, AND CHANGE OR OMIT PORTS OF CALL; SUBSTITUTION.

In the case of mechanical failures that cause the scheduled cruise to be cancelled, You are entitled to a full refund of the Cruise Fare and the Taxes, Fees & Port Expenses; or for mechanical failures that cause a cruise to be terminated early, a partial refund of the Cruise Fare and any unused Taxes, Fees & Port Expenses, travel expense to transport You to the scheduled port of disembarkation or Your home city at Carrier’s discretion, and overnight lodging if an unscheduled stopover is required. You shall have no claim against Carrier, and Carrier shall not be liable for damages or a refund of the Cruise Fare, any portion thereof, or other payment, compensation or credit of any kind; nor for hotel or meal charges, travel expenses or other loss, delay, inconvenience, disappointment or expense whatsoever, which shall be the Guest’s responsibility, whenever the cancellation or change was otherwise beyond Carrier’s exclusive control.

Carrier’s non liability extends without limitation to any of those causes described in Section 15(B) and/or inclement weather; health, medical or environmental considerations; labor, political or social disturbances or unrest; or operational, commercial or safety reasons; or was based on a good faith belief by the Carrier or the Ship’s Captain that the Cruise or any portion thereof might endanger the Ship or expose any person or property to loss, injury, damage or delay. Except as provided above for mechanical failures, whenever the performance of the Cruise is hindered or prevented by any cause or circumstance whatsoever, the Cruise may be terminated and You may be landed with no further liability of the Carrier for refund, payment, compensation or credit of any kind.

If, and only when, the cancellation or change was for reasons other than described in the preceding paragraph, and was within the exclusive control of Carrier, You agree the liability of the Carrier, if any, shall nonetheless be limited as follows:

- A. If Carrier cancels the Cruise before it has started, it shall refund the Cruise Fare (less any air or accommodation charges incurred) and the Taxes, Fees & Port Expenses.
- B. If the sailing is delayed and You are not accommodated on board the Ship, Carrier may arrange accommodations and food at no additional expense to You.
- C. If the scheduled port of embarkation or disembarkation for a Cruise is changed, Carrier shall arrange transportation to it from the originally scheduled port.
- D. If the Cruise is terminated or ends early Carrier, at its option, may issue a cruise credit, make a proportionate refund of Your Cruise Fare, transfer You to another Ship or transport You to the scheduled final port.
- E. If You pay the Carrier an amount above the Cruise Fare for a shore excursion or other activity that is cancelled, You will be limited to a refund, if any, of the amount paid for the cancelled activity.

Under no circumstances shall the Carrier be or become liable for consequential or other damages of any kind sustained by any Guest except as expressly provided herein.

13. HEALTH, MEDICAL CARE AND OTHER PERSONAL SERVICES.

Due to the nature of travel by sea and the ports visited, the availability of medical care may be limited or delayed and emergency medical evacuation will not be possible from every location to which the Ship sails. All health, medical or other personal services in connection with Your Cruise are provided solely for the convenience and benefit of Guests who may be charged for such services. You accept and use medicine, medical treatment and other personal services available on the Ship or elsewhere at Your sole risk and expense without liability or responsibility of Carrier whatsoever, and agree to indemnify the Carrier for all medical or evacuation costs or expenses incurred on Your behalf. Doctors, nurses or other medical or service personnel work directly for Guest and shall not be considered to be acting under the control or supervision of Carrier, since Carrier is not a medical provider. We do not undertake to supervise the medical expertise of any such medical personnel and will not be liable for the consequences of any examination, advice, diagnosis, medication, treatment, prognosis or other professional services which a doctor or nurse may or may not furnish You. Similarly, and without limitation, all spa personnel, instructors, guest lecturers, entertainers and other service personnel shall be considered independent contractors who work directly for the Guest.

15. LIMITATIONS ON CARRIER'S LIABILITY; INDEMNIFICATION.

- A. General: Nothing contained in this Passage Contract shall limit or deprive Carrier of the benefit of the applicable statutes or laws of the

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United States of America or any other country; or any international convention providing for release from, or limitation of, liability.

- B. Acts Beyond Carrier's Control, Force Majeure: Except as provided in Section 7 with regard to refunds and certain other expenses for cruises that are cancelled or terminated due to mechanical failures, Carrier is not liable for death, injury, illness, damage, delay or other loss to person or property of any kind caused by an Act of God; war; civil commotions; labor trouble; terrorism, crime or other potential sources of harm; governmental interference; perils of the sea; fire; seizure or arrest of the Ship; the need to render medical or other assistance, or any other cause beyond Carrier's exclusive control, or any other act or omission not shown to be caused by Carrier's negligence.
- C. Claims for Emotional Distress: Carrier shall not be liable to the Guest for damages for emotional distress, mental suffering or psychological injury of any kind, under any circumstances, except for such damages proven in a court of competent jurisdiction arising from and attributable to Guest's physical injury or as the result of Guest having been at actual risk of immediate physical injury proximately caused by Carrier's negligence ("Emotional Harm").

16. NOTICE OF CLAIMS AND ACTIONS; TIME LIMITATION; ARBITRATION; FORUM; WAIVER OF CLASS ACTION; WAIVER OF RIGHT TO IN REM PROCEDURES OF ARREST AND ATTACHMENT.

The following provisions are for the benefit of the Carrier and certain third party beneficiaries as set forth above in Section 1:

- A. Notice of Claims and Time Limits for Legal Action:
 - i) Claims for Injury, Illness or Death: In cases involving claims for Emotional Harm, bodily injury, illness to or death of any Guest, no lawsuit may be brought against Carrier unless (1) written notice giving full particulars of the claim is delivered to Carrier within 6 months from the date of the Emotional Harm, bodily injury, illness or death, (2) a lawsuit on such a claim is filed within 1 year from the date of the injury, illness or death, and (3) valid service of the lawsuit is made within 90 days of filing the complaint.
 - ii) [...]
- B. Forum and Jurisdiction for Legal Action:
 - i) Claims for Injury, Illness or Death: All claims or disputes involving Emotional Harm, bodily injury, illness to or death of any Guest whatsoever, including without limitation those arising out of or relating to this Passage Contract or Your Cruise, shall be litigated in and before the United States District Court for the Central District of California in Los Angeles,
 - ii) All Other Claims; Agreement to Arbitrate: All claims other than for Emotional Harm, bodily injury, illness to or death of a Guest, whether based on contract, tort, statutory, constitutional or other legal rights, including without limitation alleged violations of civil rights, discrimination, consumer or privacy laws, or for any losses,

damages or expenses, relating to or in any way arising out of or connected with this Passage Contract or Guest's cruise, with the sole exception of claims brought and litigated in small claims court, shall be referred to and resolved exclusively by binding arbitration.....
The arbitration shall be administered by National Arbitration and Mediation („NAM“)

C. WAIVER OF CLASS ACTION: ...

D. WAIVER OF RIGHT TO IN REM PROCEEDINGS: ...

Costa Crociere S.p.A⁷

Passage Ticket Contract

Important notice: this is your passage ticket contract. Read it carefully as it governs your legal rights. Pay particular attention to paragraphs 1 through 9 which limit the carrier's liability and your right to take legal action.

By accepting or using this ticket, you, the Guest, acknowledge, accept and agree to all of its terms and conditions. Certain provisions are highlighted to call your attention to them but all provisions are important and binding upon you. The Carrier undertakes to transport the Guest and the Guest's baggage only under the following conditions, which the Guest acknowledges and undertakes to comply with fully. The limitations and contractual provisions herein shall apply to any and all disputes between the Guest and the Carrier, regardless whether the incident giving rise to the dispute occurs on board the Vessel, ashore, or while the Guest is in route to or from the Vessel by any mode of transportation, including without limitation tenders, buses, taxis, air carriers or private transportation.

In the event of a direct conflict between a provision of this contract and a provision of the Cruise Industry Passenger Bill of Rights (PBOR) in effect at the time of booking, and published on our website, the PBOR controls.

DEFINITION OF TERMS USED IN THIS TICKET

When used in these General Conditions of Passage Ticket Contract (sometimes referred to as the "Contract"), the word "Guest" shall mean each and any person traveling hereunder, including any persons traveling with the person or persons named on the ticket or carried according to this Contract. It also means any such Guest's spouse, estate, executors, administrators, heirs, successors, and assigns and if a minor shall include the minor and the parent, guardian and persons in charge of the minor.

The word "Carrier" when used herein shall mean Costa Crociere S.p.A., an Italian corporation, the Vessel and other vessels owned, chartered, operated, marketed or provided by Costa Crociere S.p.A., and all of their officers, staff members, crewmembers, agents and assigns.

The word "Vessel" when used herein shall mean the vessel specified herein and any other vessel on which the Guest may be traveling or against which the Guest may assert a claim.

⁷ www.costacruises.com › general-conditions › contract

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2. NOTICE OF CLAIMS AND LIMITATION OF ACTION

The Carrier shall not be liable for any physical or emotional injury, illness or death of the Guest unless written notice of the claim with full particulars is delivered to the Carrier or its duly authorized agent within 185 days after the date of injury, illness or death. No legal proceedings whatsoever shall be maintainable in any event unless filed within one year after the date of injury, illness or death, and unless valid service is effected upon the Carrier within 120 days after commencement of the proceeding. The Carrier shall not be liable for any claims whatsoever, other than for physical or emotional injury, illness or death of the Guest, unless written notice of the claim with full particulars is delivered to the Carrier or its duly authorized agent within thirty (30) days after the Guest shall be landed from the Vessel, or in the case the voyage is abandoned within thirty (30) days thereafter. No legal proceeding whatsoever, other than for personal injury, illness or death, shall be maintainable in any event unless filed within six (6) months after the Guest shall be landed from the Vessel, or in the case the voyage is abandoned within six (6) months thereafter, and unless valid notice or service is effected upon the Carrier within 120 days after commencement of the proceeding.

3. CHOICE OF FORUM; ARBITRATION OF CERTAIN CLAIMS; NO ARREST OF VESSEL

- a) Any claim, controversy, dispute, suit, or matter of any kind whatsoever arising out of, concerned with, or incident to any Cruise or in connection with this Contract shall be instituted only in the courts of Genoa, Italy, to the exclusion of the courts of any other country, state, or nation. Italian law shall apply to any such proceedings, without effect to Italian choice-of-law principles.
- b) No Right of Arrest. The Guest hereby waives any right to arrest or otherwise detain the Vessel in any jurisdiction.

4. LIMITATIONS OF LIABILITY OF THE CARRIER

The Carrier shall be liable only for its negligence. The Carrier shall not be liable for acts of god, acts of war, civil commotion, riots, strikes, acts of terrorism or acts of sovereign states or governments. In addition to all of the restrictions and exemptions from liability provided in this Contract, the Carrier claims the benefit of all restrictions, exemptions and limitations of liability set forth in the "Convention Relating to the Carriage of Guests and Their Luggage by Sea of 1974" as well as the "Protocol to the Convention Relating to the Carriage of Guests and Their Luggage by Sea of 1976" ("Athens Convention"), and the "Convention on Limitation of Liability for Maritime Claims" of 1976 ("LLMC Convention") which limit the liability of the Carrier for death of or personal injury to the Guest to no more than 46,666 Special Drawing Rights ("SDRs") as defined therein, and all other limits for damage or loss to personal property. The value of 46,666 SDRs is equal to approximately U.S. \$64,891 at the time of printing of this Contract and the current value is publicly available and published in the Wall Street Journal and on the Internet at www.imf.org/external/np/fin/data/rms_sdrv.aspx. Further, the Carrier shall be entitled, to the maximum extent allowed

by law, to any and all liability limitations and immunities provided under the International Convention on Travel Contracts (“CCV Convention”) signed at Brussels, Belgium on April 23, 1970. In the event of any conflicts between the referenced provisions of the United States Code, the Athens Convention, the LLMC and the CCV, the Carrier shall be entitled to invoke whichever provisions provide the greatest limitations and immunities to the Carrier. Nothing in this Contract is intended to, nor shall it operate to, limit or deprive the Carrier of any such statutory limitation or exoneration from liability.

(NB: under Italian law [clause 3] EU Regulation 392/2009 respectively the 2002 Protocol applies. To what extent the CCV Convention may apply has been discussed above.)

Polar Latitudes Inc⁸.

ELIGIBILITY

In general there are no specific physical requirements for travel in Antarctica. However, we are traveling to the most remote region of the world and we are traveling on a ship which, at times, may be in rough seas and which has limited facilities. Passengers with unstable medical/health issues may not be appropriate for this type of expedition and are advised to exercise appropriate caution.

INSURANCE

All passengers must carry a Travel Insurance Plan. This Plan must cover personal injury, medical expenses, repatriation expenses, evacuation expenses, and pre-existing medical conditions. As any potential evacuation from Antarctica can cost up to \$150,000, we recommend that no policy carry less than this amount of coverage. Polar Latitudes will require information as to carrier, policy number, and a 24-hour contact number. Additionally, passengers are strongly advised to carry a Comprehensive Travel Insurance Plan which should also include coverage for cancellation, curtailment, trip interruption, and all other expenses which might arise as a result of loss, damage, injury, delay or inconvenience occurring to or otherwise involving a passenger. Please also note: Travel to Antarctica carries with it a slight but inherent risk that a voyage may be interrupted after the voyage has begun. In such matters the Master of the vessel has full authority to make decisions that can affect itineraries and trip length. In such a case, Polar Latitudes cannot be responsible for situations outside its control, and in the event of financial losses, your travel insurance may be your only recourse for recovery of funds. Should you elect to travel without comprehensive insurance you are accepting this risk.

⁸ <https://polar-latitudes.com/terms-and-conditions/>

ITINERARIES

Polar Latitudes' captain and expedition team will do everything possible to complete the voyage as outlined in the voyage itinerary. However, itineraries in polar regions are heavily dependent on weather and ice conditions. Occasionally conditions and or safety concerns require Itinerary changes. The Captain and expedition team will accordingly make every effort to find the best alternative to the original itinerary while keeping passengers informed and updated. Itinerary changes are not subject to passenger approval/consent, and in the event of such a change no refunds or price adjustments are possible. Placement of a booking with Polar Latitudes amounts to an acknowledgement that itinerary changes are possible.

RESPONSIBILITY

Polar Latitudes is a qualified tour operator that organizes and administers its polar voyages. Polar Latitudes will provide services in conjunction with local operators and air and sea operators. The designated operator(s), in turn, acts only as an agent for any transportation carrier, hotel, ground operator, or other suppliers of services connected with these tours ("other providers"), and the other providers are solely responsible and liable for providing their respective services. The passenger tickets in use by the carriers shall constitute the sole contract between the carriers and the passenger; the carriers are not responsible for any act, omission, or event during the time participants are not aboard their conveyances.

Quark Expeditions⁹

6.0 Emergency Evacuation Insurance and Travel Insurance

Due to the remoteness of where we travel, an adequate medical facility could be 72 hours away or more, and emergency evacuation and adequate medical treatment may be delayed or unavailable in certain areas.

- 6.1 Emergency Evacuation Coverage – Complimentary for all Quark guests
Emergency evacuation insurance, to a maximum benefit per paying traveler of US\$500,000, is included complimentary in the cost of all QEI trips. Included coverage is applicable only to travel occurring between the first and last day of the expedition purchased from QEI. Additional days of travel prior to the expedition and/or after the expedition, including pre- and post-packages/hotels/flights, purchased from QEI or from suppliers other than QEI are not covered by the included emergency evacuation insurance. The passenger is responsible for determining that this coverage provided by QEI is sufficient.

6.2 Comprehensive Travel Insurance

QEI highly recommends that you and all members of your party have comprehensive travel insurance coverage. Due to the remoteness of the

⁹ <https://www.quarkexpeditions.com/expedition-terms-and-conditions>

areas in which we travel, travellers should have a minimum level of cover sufficient to cover the entirety of their medical risk and exposure including emergency medical coverage. QEI requires that you have adequate medical coverage prior to embarkation. The travel insurance policy should also cover trip cancellation insurance, trip delay, interruption or after departure coverage, baggage and repatriation.

Please ask your Polar Travel Adviser about Tripmate Tour and Cruise Travel Protection for US and Non-US residents or book your travel insurance at <http://www.quarkexpeditions.com/travel-insurance>.

4.0 Adventure Options

Prices quoted are based on group participation and no refunds will be made for any part of the program in which you choose not to participate, including but not limited to kayaking, paddle excursion, stand up paddle boarding, camping, skiing, mountain trekking or ballooning (if applicable and which, at the discretion of the Vessel's Master and/or QEI's Expedition Leader, may or may not be used). It is understood that refunds cannot be made to travellers who do not complete the services for any reason whatsoever. QEI and/or the Expedition staff reserve the right to deny participation to anyone who does not follow the rules set out by expedition staff or is deemed by QEI and/or the Expedition staff in its/their sole discretion to be not medically/physically able to participate safely. For the avoidance of doubt, where providers of any such Adventure Options are independent contractors then neither QEI, its affiliates, owners, officers, agents, employees, contractors, nor any associate organization shall be held liable for any act, default, injury (including emotional injury, injury to person or property, or death), loss, expense, damage, deviation, delay, curtailment or inconvenience caused to or suffered by any person or their property, howsoever arising, which may occur or be incurred by any such provider. Adventure Options are not transferable at any time.

21.0 Acknowledgment of Risk

You understand and acknowledge that your travel in connection with and participation in the tour arranged at your request by QEI may involve risk and potential exposure to injury, including emotional injury, injury to person or property and death. You also realize and acknowledge that risk and dangers may be caused by the negligence, fault or wrongdoing of the owners, directors, employees, contractors, subcontractors, officers or agents of QEI or of other participants, contractors and/or subcontractors to QEI. You also recognize and acknowledge that risk and dangers may arise from foreseeable and unforeseeable causes. You fully understand and acknowledge that the aforementioned risks, dangers and hazards are a potential in connection with your travel and recreational activities which may take place during your journey.

22.0 Express Assumption of Risk and Responsibility/Participation

In recognition of the inherent risk of the travels and related activities in which you are intending to engage, you confirm that you are physically and

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mentally capable of participating in the activity, that you are willingly and knowingly electing to participate in this tour in spite of the potential risk of danger, and you willingly and voluntarily assume full responsibility for any injury, loss or damage suffered by you or caused by you, including emotional injury or injury to person or property, whether caused in whole or in part by the negligence, fault or wrongdoing, whether expected or not, of the owners, directors, agents, officers, employees, contractors, or subcontractors of QEI or of other participants. You understand and acknowledge that due to the remoteness of where we travel, emergency evacuation and/or search and rescue may be delayed or unavailable and that medical facilities and supplies may be limited and you acknowledge that it is your responsibility to assess the impact such limitations may have on any existing medical condition(s). You understand and acknowledge that QEI reserves the right to accept or reject any participant for any reason, and QEI or its guide has the right to disqualify you from any trip activity, if in QEI's or such guide's judgment, you are incapable of that activity and/or your continued participation in the tour will endanger yourself or the safety of the group. It is your responsibility and obligation to inform QEI, at the time your reservation is made, of any medical or physical disability or limitation that might disable you or render you unable to perform or safely complete the tour or any activity on the tour. You further acknowledge that you are the best judge of your own conditions and limitations and that it is incumbent upon you to fully disclose the full extent of any such conditions or limitations to QEI. The traveller is hereby expressly advised that the vessel may be powered or operated in whole or in part by nuclear power or a similar power and the traveller hereby accepts all risks, whether known or unknown, inherent therein and agrees that neither Quark nor the vessel owner shall have any liability for injury, illness or death resulting therefrom.

**CMI 125TH ANNIVERSARY (XLIII)
CONFERENCE IN ANTWERP
(18-21 OCTOBER 2022)**

CMI 125TH ANNIVERSARY (XLIII) CONFERENCE IN ANTWERP (18-21 OCTOBER 2022)

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OPENING REMARKS

CHRISTOPHER O. DAVIS, PRESIDENT

Distinguished guests, ladies and gentlemen, it is indeed wonderful to see so many good friends in person in this beautiful venue after three years of pandemic. Likewise, it is my pleasure to inaugurate the 125th anniversary Conference of the Comité Maritime International in the Port of Antwerp. We have much to celebrate today. For those delegates who availed themselves of the opportunity to observe and participate in the meetings of the CMI International Working Group and Standing Committee meetings held yesterday at various law firms and shipping companies in Antwerp, you had the opportunity to witness first-hand the relevant and useful work which is performed by maritime law experts who volunteer countless hours to promote uniformity of maritime law as they have done so for the last 125 years (incidentally, the theme of this Conference), which continues to be the *raison d'être* of the CMI.

When we last gathered in the Port of Antwerp 25 years ago to celebrate the centenary of the CMI, President Allain Phillip's opening speech focused on the illustrious history of the CMI during its first 100 years of existence, and the methodology of the CMI's work output through its International Working Groups, Standing Committees, Questionnaires to National Maritime Law Associations, and the International Sub-Committees whose members would gather to draft maritime Conventions and soft law instruments such as model laws and guidelines. President Phillip also raised in his opening speech the important question (which remains relevant today) of how best to keep National Associations informed of the CMI's work and optimize the flow of knowledge and maritime expertise among the CMI, its members, international governmental organizations, and the shipping community at large. The latter issue will be the subject of discussion during Friday's Assembly, with an update on the Future of the CMI Task Force Report. The history of the CMI was also addressed by President Phillip in his opening remarks 25 years ago, and is detailed in the prologue to the just published 50-year history of the CMI which, hopefully, all of you received a copy of during the registration process for the Conference. The CMI's history and continued relevance will also be touched on by the IMO Secretary General Kitack Lim, and Belgian Vice Prime Minister and Minister of Justice and the North Sea, Vincent Van Quickenborne, both of whom you will hear via video link in a few minutes, and will be addressed in more detail by Past President Patrick Griggs during the Berlingieri Lecture which follows immediately after the opening speeches.

Thus, I thought it best to dedicate the few minutes I have this morning to highlight some of the successes the CMI has achieved over the past few years. Specifically, I will reference five areas which merit mention.

1. UNCITRAL approved in late June of 2022 the text of a new CMI-sponsored Convention on the Recognition of Judicial Sales of Vessels, which will be voted on by the United Nations General Assembly in the next few months. You will hear more on this from Ann Fenech during one of today's Conference work programme sessions, and the work of all past and current members of the International Working Group on Judicial Sales will be recognized on Friday.
2. As already mentioned, a 50-year history of the CMI (in English, French and Spanish), authored by Giorgio Berlingieri and Stuart Hetherington, and beginning where Albert Lilar and Carlo van den Bosch left off in their 75-year history, has just been completed and details the work carried out by the CMI from 1972 to 2022. We are particularly grateful to the French and Spanish Maritime Law Associations for their assistance with the French and Spanish translations of the history.
3. The CMI has formally renewed for another 5 years its Agreement with the National University of Singapore's Centre of Maritime Law on the Database of Judicial Decisions Interpreting Maritime Conventions, an initiative which has taken Francesco Berlingieri's early work in this area to another level, and promises to remain an important signature project of the CMI for decades to come. It is worthy of mention that the Database has achieved an important milestone, namely, 2,000 published summaries from 85 different jurisdictions.
4. The CMI continues to emphasize the importance of promoting the work, of its Young CMI members in several ways, for example,
 - a) As was first done in Mexico City three years ago, the yCMI session in Antwerp will be part of the main Conference work programme;
 - b) The yCMI Essay Prize continues to be held on an annual basis (where possible given the recent pandemic), under the leadership of John Hare, with the aim of promoting the writing of academic-quality papers on maritime law by young maritime lawyers; and
 - c) For the first time, to my knowledge, the Chair of the yCMI Standing Committee was invited to participate in the Executive Council's full-day meeting on 18 October 2022, a tradition which I hope will continue going forward.
5. Last, but not least, the CMI continues to closely scrutinize and evaluate potential new projects, in consultation with National Associations, inter-governmental organizations, and stakeholders in the shipping industry, with a view to ensuring it can contribute in an appropriate manner to the uniformity of maritime law. In this regard, you will be hearing on Friday during the Assembly from John O'Connor, the Chair of the newly-formed International Working Group on possible revision of the 1910 Collision Convention, and related instruments, a new project initially proposed by the Italian Maritime Law Association which was approved by the Executive Council during its March 2022 virtual meeting, endorsed by

Christopher O. Davis, President of the CMI

the International Maritime Organization's Legal Committee, and includes as members representatives of relevant shipping stakeholders such as ICS, IUMI, IGP&I, and others.

Returning to the work programme of the 125th anniversary Conference, its format is different from prior conferences in at least three respects:

1. All meetings of the CMI's International Working Groups and Standing Committees were opened to delegates attending the Conference, to showcase the work of the IWGs and SCs where the real work of the CMI takes place, under the leadership of Chairs and Rapporteurs who spend countless hours of unpaid work on important projects;
2. A Plenary has been convened on Friday morning, 21st October, to approve the new General Average Guidelines and Security Wordings, following up on the work of the General Average Standing Committee in New York in 2016; and
3. During Friday's Assembly, National Associations will be asked to vote on and approve important amendments to the CMI's Constitution, which will allow us to remain compliant with Belgian law, and provide more flexibility to conduct Assemblies virtually and by correspondence.

I would like to conclude my opening remarks by thanking the Belgian Maritime Law Association, its Board of Directors and Organizing Committee, and in particular its President, Vincent Fransen, for hosting this Conference to celebrate the CMI's 125th anniversary. Our thanks also go to Medicongress, the Ghent-based professional conference organizer, and in particular Sofie Philips and Astrid Dedrie, as well as the CMI's Head Office Manager, Evelien Peeters, all of whom spent countless hours ensuring the success of this Conference.

Finally, as many of you know, the Belgian MLA was founded in 1896, one year earlier than the formal establishment of the CMI in 1897, and this is the seventh conference to be held in the Port of Antwerp (the previous conferences were held in 1898, 1921, 1930, 1947, 1972 and 1997). Thus, the CMI, the Belgian MLA and Antwerp have been closely linked for the past 125 years, and will continue to share this close bond going forward. I very much hope all of you will take some time this week to enjoy the charms of this beautiful and historic city, and I look forward to seeing you again in Antwerp 25 years from now, in 2047, when we gather to celebrate the CMI's 150th anniversary.

Thank you very much!

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Christopher O. Davis and Ann Fenech

OPENING SPEECH

VINCENT FRANSEN, PRESIDENT OF THE BELGIUM MLA

Mr. President, Mr. Deputy Prime Minister, Dear Friends of CMI,

On behalf of the Belgian Maritime Law Association I welcome you all to the 125th anniversary of CMI.

When we heard that CMI wanted to organize a celebrative event for 125 years of CMI, the Belgian MLA has kindly requested (not to say “begged”) the EXCO of CMI whether the Belgian MLA would be allowed to again host this event in Antwerp, Belgium same as for its 100th anniversary celebration. Just for the record: no bribes were offered nor requested.

The seat of CMI has indeed been in Antwerp since it was founded now 125 years ago by three esteemed Belgian gentlemen:

- Mr. Louis FRANCK, an art lover, governor of the National Bank of Belgium and minister of the colonies an not to your surprise also a lawyer,
- Mr. Charles LE JEUNE, a broker and average adjuster,
- Mr. Auguste BEERNAERT, Prime Minister and then Minister of State and first out of only 4 Belgian Nobel Peace Prize winners.

These 3 man had only one year before founded the Belgian Maritime Law Association which held its first meeting on 22 November 1896.

In an article Professor Van Hooydonck describes CMI as “A Brilliant Antwerp Invention” and it still is just that today. Just think of the Collision Convention, the Salvage Convention, The Hague and the Hague-Visby Rules, the Arrest Convention and many more, all of which are still relevant many decades after their inception. They were all the result of the hard work of C.M.I. and contributions for the various national Maritime Law Associations.

We remain extremely proud of the vision these man have had 125 years ago and for the legacy they have left for all of us.

I have learned that it was considered some time ago to move the seat of CMI out of Antwerp, Belgium but we are glad that it has remained here and we hope that during this Conference we have and will continue to convince you all that it was the right and only logical decision.

We are in any case very grateful to CMI that it has given us the opportunity to host this Conference.

At the outset – +- 2.5 years ago - we discussed with CMI that we would only host a smaller celebrative event due to Covid concerns and associated travel restrictions. When it became clear that the conference in Tokyo would need to be cancelled due to COVID we agreed that Antwerp should be more than just a 1.5 day celebration event and we decided to upgrade Antwerp to a full Conference. There would always be a risk that COVID would remain

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a concern also today but we are very pleased that we have chosen to just go for it.

Now that we see 380 delegates from 45 different countries in attendance for the Conference and a fully sold out gala dinner this evening with 390 attending and even a waiting list of many more we are delighted that we have pushed forward despite the risk of a (serious) financial downfall. It was apparently the right decision.

This brings me to a small practical point for this evening's gala dinner: As there is a waiting list do let us know asap if for some reason you would not be able to attend this evening so that we may offer your seat to someone on the waiting list. You can always reach out to myself or – even better - just inform 'Medicongress directly. The contact details for Medicongress are in the conference app.

The Belgian MLA also wants to offer a word of thanks.

First of all to our sponsors without whom this event would not have been possible without digging into CMI and the BMLA carefully accumulated reserves.

A special thanks to MULTRASHIP TOWAGE AND SALVAGE, our main sponsor, who are with their contribution towing this Conference to the next level. Hopefully you will not require its salvage services when you wake in the morning after another evening of champagne but they are always there when you need them. Leendert Muller and Eline Muller, thank you.

Many thanks also to COMPAGNIE MARITIME BELGE (CMB) and EURONAV two major Belgian shipowners, to the ROYAL BELGIAN SHIPOWNERS ASSOCIATION, to VAN BREDA MARINE who will host a session on MASS later this afternoon which you should all try to attend and to the German law firm of ARNECKE, SIBETH, DABELSTEIN who are represented at the conference by the ever smiling Dieter Schwampe.

Also many thanks to all our Silver and Bronze sponsors for their generous and selfless contributions.

You will see the sponsors displayed on the conference screens, the conference app, the goodie bag,... Reach out and speak to them as they are one of the main driving factors behind this event.

We cannot thank all our sponsors enough and I would ask for a round of applause as a token of our appreciation.

We thank our event organiser Medicongress for the flawless organisation of this event. We would not have been able to do this without them. Special thanks to Sofie who sometimes sent us e-mails from 5h00 in the morning until well past midnight and who will be with us throughout the conference to answer all your questions.

We also like to thank all the speakers and all the delegates for attending this conference. Without you there simply would not be a conference and we truly appreciate that you have all taken the time out of your busy schedules to join us here in Antwerp.

A final word of thanks goes to the Friends of the National Shipping Museum for making available to us a few pieces from their immense collection to display here on stage.

The steering wheel is part of the sailing yacht OMOO with which Mrs.

Vincent Fransen, President of the Belgium MLA

Annie Vande Wiele was the 1st woman to sail around the world on a sailing yacht in the 1950s.

The painting on display is by the Belgian well known marine painter Henri Joseph Pauwels (who lived from 1903 - 1983).

The ship's bell that you see belonged to the ocean liner MOBEKA which was part of our sponsor CMB's fleet that sailed on Africa. (the so-called "MO" boats : oa MOHASI, MOHIRO...). Built in 1958 at the Belgian Shipyard Cocqueril - Sambre. The ship's bell mounted on the forepeak was rung in case of fog but also when the anchor chain was lowered : every so many " shackles " a bell was rung so that the bridge knew how many meters of anchor chain had been lowered.

We hope that you have already enjoyed the conference so far and that you will continue to do so today and tomorrow, with interesting lectures, a splendid and fully booked gala dinner tonight and of course much more champagne.

I now happily turn over the floor to the Belgian Deputy Prime Minister and Minister of Justice and the North Sea", Mr. 'Vincent Van Quickenborne. We are very grateful and honoured that he has taken the time to be with us here today.



Vincent Fransen

SPEECH CMI CONFERENCE ANTWERP 2022

VINCENT VAN QUICKENBORNE
MINISTER OF THE NORTH SEA

Mister Davies, President of the Comité Maritime International,
Mister Fransen, President of the Belgian Maritime Law Association,
Mister Laurijssen, legal director CMB,
Ladies and gentlemen,
Good morning,

I am honoured to speak here for you. Although I would have preferred to do it live, a council of ministers intervened, and I am forced to do it this way.

Belgium is a maritime nation. Our flag stands for quality, our shipowners for innovation, our ports for sources of strength and prosperity.

When talking about strong European ports, it is impossible not to think about the port of Antwerp, the second largest port of Europe.

In 14th century, the port began to gain in accessibility and international importance. This was due to the infamous floods of the Western Scheldt, which caused Antwerp to gain importance in favour of the port of Bruges.

In the sixteenth century, thanks to its great success as the world's largest port, Flanders reached a Golden Age. The Antwerp port traded products throughout Europe and the world.

Its strategic location allowed the port to grow and create wealth. An ancient saying in the Antwerp port community highlights this interconnectivity: "You only need to put one hand in the Scheldt to be connected to the whole world."

However, in 1585, Antwerp was reached and captured by the Spanish. This caused the Fall of Antwerp, which introduced a period of decline. The port of Antwerp would only regain significance with the arrival of Napoleon Bonaparte more than 200 years later, in the 19th century.

Napoleon saw, like we do today, the importance and benefits of the port's location. However, he took a more sinister view of that advantage, calling it "a loaded gun aimed at the heart of England". He had works carried out, to make the port function again as before and build the 'petit basin', today's Bonaparte dock, and the 'grand basin', today's Willem dock.

The historical value of the port is unmistakable. The contemporary value is undeniable. And the future value is unlimited. Together with the Port of Bruges, the decision was made this year to combine the growth trajectories of both ports in one organisation: Port of Antwerp-Bruges.

I look forward to the promising future of this port and all it will achieve.

But let me go back to Napoleon. His innovations allowed the port of Antwerp to redevelop. In this period, a new policy trend marked the maritime world. Several organisations tried to codify the international maritime law in

its entirety. However, even the International Law Association (ILA) did not succeed and was forced to create a specialised organisation for this purpose.

In 1897, the Comité Maritime International (CMI) was born, here in the great city of Antwerp.

Today, 125 years later, I'm here, virtually, in the beautiful Queen Elizabeth Hall. Celebrating the first time since 1997 that the CMI has come 'home' again, here in Antwerp. And celebrating its achievements.

For example this summer, in cooperation with Belgium, the "Draft Convention on the International Sale of Ships" was approved by the United Nations Commission on International Trade Law also known as UNCITRAL¹. CMI was the absolute initiator of this convention. In fact, they commenced this project back in 2007. For this reason, I am pleased to see the creation of a balanced instrument, in which the rights of all parties, as well as legal certainty and due process remain guaranteed. As a maritime nation, Belgium supports this facilitation of international maritime trade.

The CMI is definitely a carrier of maritime change. In all areas that affect citizens, businesses and other maritime players, it seeks to steer policy and sets out a course towards more international collaboration.

Crime and piracy, oil pollution, places of refuge and offshore activities are examples of areas where I think the CMI is doing ground-breaking work.

Belgium has always been a strong partner of the CMI. In recent years, we have ratified numerous maritime conventions. For instance, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships was ratified a few years ago by the Belgian Parliament and thus entered into force.

Furthermore, the amendments to the IMO Convention were approved by the Council of Ministers and will now be submitted to Parliament.

The Ratification of HNS is also in progress, further negotiations are scheduled for early November.

As you can see, the maritime work behind the scenes is steaming ahead. The Belgian government plays an absolute leading role as a depositary of dozens of CMI treaties. But it doesn't stop there.

Internally, Belgium has also made major steps in implementing and working out new shipping legislation and to unify our maritime law unified. In 2019, after more than 12 years work, we adopted the new Belgian Shipping Code. A codification and modernisation of the Belgian maritime legislation. In 2020 we modified the legislation on pleasure boats. This summer a new law on maritime safety has been adopted and also the fisheries legislation has been amended earlier this year.

Ladies and gentlemen,

I began this story more than seven centuries ago. Since then, the port of Antwerp has gone through an incredible and gigantic transition. This transition was undoubtedly accelerated by the arrival and decisive action of the CMI.

It is absolutely clear that the CMI has become an indispensable organisation in today's maritime world. Together with the support of Belgium, efforts

¹ Uitspraak zoals het geschreven is.

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will be made to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. This will enable the creation of a level playing field and transparent legislation, that will enable the market to innovate and stimulate growth.

To realise strong ambitions, a strong organisation as a mainstay is indispensable. That is why the CMI has strengthened its authority and reputation in the world over the past 125 years.

The ultimate goal is the unification of maritime law.

A goal that can only be achieved with the Committee's help and support. Let me assure you that Belgium will be a strong partner in achieving this.

Thank you and once again my congratulations.

THE CMI – YESTERDAY, TODAY AND TOMORROW

PATRICK GRIGGS

We are here to celebrate the 125th Anniversary of the creation of CMI and this paper is also offered as a tribute to Professor Francesco Berlingieri who was the beating heart of CMI for so many years. Francesco died in Genoa on March 6th 2018 at the grand old age of 96 and had been actively engaged in the work of the CMI for more than half of its 100 plus years existence. Francesco was the third generation of an Italian family of distinguished maritime lawyers all of whom were intimately involved in the work of CMI. I note that his grandfather, also Francesco, was President at the time of the 1925 Genoa Conference. Francesco himself attended his first CMI Conference in Rijeka in 1959 and became President in 1976 a post which he then held until 1991. He was Titulary Professor of Maritime Law at Genoa University from 1954 and published several books including *Berlingieri on Arrest of Ships* – still the best book on the subject of ship arrests. His teaching skills were appreciated by generations of students not only at Genoa University but also at the International Maritime Law Institute in Malt. His importance to the world of maritime law in general and the CMI in particular will be explained later.

It is instructive to look at the current syllabus taught at IMLI for its LLM Programme. This reveals just how much of maritime law is based on international conventions, codes of conduct or sets of international guidelines. There is, of course, nothing “modern” about the idea of unifying maritime law, though early attempts such as the Lex Rhodia, the Laws of Oleron (1160) and Wisby (?1300) tended to be regional rather than international. The purpose of this talk is not to trace the complete history of efforts to harmonise international maritime law but to look, briefly, at what has happened in the 20th and 21st centuries.

In a perfect world shipowners would wish to find that when their ships, in the course of trading, pass from one jurisdiction to another the law in each jurisdiction is the same. It is about that “perfect world” and the extent to which it has been possible to create it that I wish to talk.

In 1873 (or thereabouts) the International Law Association came into existence. Its stated aim was “...the study, clarification and development of international law, both public and private and the furtherance of international understanding and respect for international law.” The ILA is still in existence with its headquarters in London and with branches in 62 countries.

At some time in the 1880s a group of Belgian politicians and lawyers got together to discuss and put before the ILA a proposal to codify the whole body of maritime law. This resulted in a diplomatic conference organised by the ILA and hosted by the Belgian Government in 1885. The conference

failed to make much progress. A second conference was held in Brussels in 1888 and this time it was concluded that a full codification project was much too ambitious. After these two failed conferences the ILA rather lost interest in maritime law though it does seem to have been involved in the revision of the York/Antwerp Rules on General Average in 1890. However, the original group of Belgian politicians and lawyers was not to be denied and an agreement was eventually reached with the ILA that a specialist organisation would be formed to pursue the goal of uniformity of international maritime law.

This organisation came to be known as the Comité Maritime International (CMI) and was formally constituted in 1897 with its headquarters here in Antwerp. The CMI is described in the 1992 revised constitution as “...a non-governmental not-for-profit international organisation ...the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.” (Earlier versions of the Constitution restricted the activities of CMI to private law matters but as more and more conventions began to involve matters of public as well as private law it was decided that the remit needed be extended.)

Even before CMI was formally constituted a circular letter dated July 2nd 1896 was sent out to potentially interested governments and industry parties stating that it was the intention of CMI to promote the establishment of national associations of maritime law and to ensure a structured relationship between them. Importantly, the letter insisted that membership of national associations should be open not only to lawyers but also, most importantly, to shipowners, insurers and all others concerned in maritime commerce. The letter announced that the first project for the newly formed group would be the codification of the law relating to collisions at sea. Thus was the CMI launched on a period of great creativity during which, as the only organisation involved in the unification of maritime law, many of the maritime law conventions, which guide international maritime trade today, came into existence.

It is important to emphasise that the CMI is and always has been a non-governmental organisation and it relishes that fact. During the early part of the 20th century the CMI was the only international organisation working on the unification of maritime law. Significantly its agenda was set by people and organisations within the maritime industries and not by governments. Often its projects were chosen because a particular incident had given rise to problems which demanded an international solution. Occasionally, the reason for starting work on a particular project was a fear that if the industry didn't produce a solution to a problem then governments might intervene and impose a less acceptable one.

It is all very well for a group of individuals involved in the maritime industries to get together and produce a set of rules on a particular aspect of maritime law but quite another to persuade national governments to ratify those rules and implement them as part of their national law. Here the involvement of senior Belgian political figures in the group which created the CMI proved to be vitally important. They were able to persuade the Belgian Government to host Diplomatic Conferences which would be convened,

once the CMI had produced a working text for a convention, with the object of finalising that text. Once the Diplomatic Conference had signed off on the text it was the hope and expectation of the CMI that Governments, having themselves been involved in the final drafting process, would sign, ratify and implement the convention – the greater the number of ratifications the greater the level of uniformity achieved.

It is worth noting that the government delegations to these Brussels Diplomatic Conferences often consisted of the same individuals who had represented their countries at the CMI Conferences which had produced the original CMI draft – governments had the good sense to recognise that the real expertise lay within the shipping community.

As I have said, one of the tasks which CMI set itself was to encourage the creation of national maritime law associations. Setting a good example, the Belgian moving spirits involved in the creation of CMI, set up the Belgian Maritime Law Association in 1896 – one year before the CMI itself came, formally, into existence. Some nations were quicker at responding to the invitation to create a maritime law association than others. For example the French MLA was formed in 1897, the German MLA in 1898 and the USMLA in 1899. It took us in the UK a little time to wake up and our Association (the BMLA) was not formed until 1908. National associations continue to be formed and the current total is 53.

As I have already mentioned the first project for CMI was to be a convention on collisions at sea. This Convention would firmly establish the concept of proportional fault, place an obligation on a shipmaster to render assistance to the vessel with which his ship had been in collision and introduce a 2 year time bar on actions. The Collision Convention 1910 survives unchanged to this day. Not content with working on a collision convention, the CMI also decided to tackle, at the same time, the subject of maritime salvage. The work on these two projects proceeded in parallel and culminated in a Diplomatic Conference convened by the Belgian Government and held in Brussels in 1910. The texts of both Conventions were agreed at the Conference and with 85 ratifications the Collision Convention remains one of CMI's greatest successes. As far as the equally successful Salvage Convention is concerned you will know that in 1989, reflecting many changes in the salvage and marine insurance industries and after extensive behind the scenes work by CMI, a new Salvage Convention passed through the IMO International Conference process and has since been adopted by 69 states.

The general success of the conventions produced by CMI in the early 20th century owes everything to the method of work. Unification of maritime law is just that. It is not the creation of law in a vacuum but an attempt to produce a law which takes into account existing law on the subject. You cannot seek to unify maritime (or any other) law at an international level unless you have a clear idea of the existing law in individual jurisdictions. This is and, as you know, always has been central to the thinking of those running CMI. It follows that, the starting point for every project has been the drafting and circulation of a questionnaire to all national maritime law associations designed to ascertain the national laws on the subject under review. These questionnaires will have been prepared by one of our small

International Working Groups (IWGs) appointed by the CMI Executive Council. Once responses have been received from national associations an International Sub – Committee (ISC) is usually set up tasked with preparing the first draft of an instrument which, by seeking to accommodate as much of existing national laws as possible, stands a good chance of proving widely acceptable. National Maritime Law Associations will be invited to send a representative to join in the work of the ISC.

After getting salvage and collisions out of the way CMI turned its attention to limitation of liability and carriage of goods by sea which resulted in the International Convention for the Unification of Certain Rules of Law Relating to the Limitation of the Liability of Owners of Sea-Going Ships 1924 and the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading. (“Hague Rules” 1924.) Both of these topics have, as you know, been re-visited in more recent years and in passing I should mention an intrinsic weakness in an otherwise sound system – every time a convention is updated some states will adopt the revised version but others will not. This produces a situation (particularly evident in the context of limitation of liability) where different versions of the convention will apply in different parts of the world thus destroying the uniformity which was introduced by the first convention and creating a happy hunting ground for maritime lawyers. There is no easy solution to this problem except to continue to encourage states (as CMI does) to adopt the latest version of a convention.

The CMI continued its good work into the late ‘50s producing conventions on such diverse topics as Civil and Penal Jurisdiction for Collisions, Arrest of Ships, Stowaways, Carriage of Passengers by Sea, Maritime Liens and Mortgages. Not all of these Conventions were as successful as those on collision and salvage – for example the Stowaways Convention never entered into force – largely because it placed an obligation on the state of the first port of call after the discovery of stowaways to take charge of them.

I come now to the incident which nearly led to the demise of the CMI. On Saturday March 18th 1967 the VLCC *Torrey Canyon*, carrying 120,000 tons of crude oil, struck the Pollard Rock on the Seven Stones Reef mid-way between Land’s End and the Isles of Scilly in England. In subsequent days much of this cargo escaped from the wreck causing severe pollution both in England and in France.

This accident highlighted the fact that national laws were inadequate to deal with the issues of liability and compensation arising from oil spills and that there was no international law which applied. I was myself involved with the *Torrey Canyon* case. As a young lawyer I assisted my father who acted for the London Market Excess Liability Cover which bore the brunt of the claims. For the 70th Anniversary of the “*Torrey Canyon*” in 2017 the IMO hosted an event at its Headquarters in London. For that event I was able to find a number of photographs of the ceremony in London at which settlement cheques were handed to representatives of the UK and French Governments. My father featured in these photographs as did Maitre Jean Warot (representing the French Government) both of whom were active in the affairs of CMI.

Patrick Griggs

Less than a month after the “*Torrey Canyon*” incident the British Government submitted a Note to the Inter-Governmental Maritime Consultative Organization (IMCO – now IMO) calling for changes in the law relating to liability for spillages of oil and other chemical substances. The IMCO Council agreed to look into the subject and referred the matter to a newly created Legal Committee which, in its turn, appointed Working Groups I and II – the first to look at issues of public law and the second to look at liability and compensation. At much the same time CMI appointed an International “*Torrey Canyon*” Sub-Committee to work on the private law aspects of liability and compensation in cooperation with IMCO. This Sub-Committee was chaired by Lord Devlin – a member of the Judicial Committee of the UK House of Lords and President of the British Maritime Law Association. Following its usual procedures the CMI sent out questionnaires to its national maritime law associations. On the basis of the responses received the Sub-Committee prepared a preliminary draft convention. This draft convention was considered by the CMI Conference held in Tokyo in March/April 1969. Interestingly the only amendment of substance introduced at the Tokyo Conference was the addition of a provision requiring tankers to carry evidence of the existence of financial resources sufficient to meet claims for pollution. (This has since become an essential feature of all liability conventions.)

The CMI draft convention was submitted to the IMCO Legal Committee for consideration at its meeting in May 1969. The Legal Committee was divided on a number of issues – should liability be strict or fault based, should liability be channelled to the shipowner, should production of proof of financial responsibility be compulsory and what should be the basis for deciding on the jurisdiction for claims? In the event it was agreed to submit both the CMI and the Legal Committee drafts to an International Legal Conference scheduled to take place in Brussels in November 1969. At this Conference a Committee of the Whole under the chairmanship of Dr. Walter Muller (incidentally at that time the Sec. General of CMI) agreed the final text of a convention which was to be known as The International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC 1969).

I said earlier that the “*Torrey Canyon*” incident nearly led to the demise of the CMI. How should this be? It was decided by IMCO, following the undoubted success of CLC 1969, that the Legal Committee should remain in existence with a mission to find other areas of maritime law where harmonisation would benefit the maritime industry thus, effectively, taking over the role of the CMI.

The rest is history. The Legal Committee has gone on to produce numerous liability conventions and to review and update several earlier CMI ones. Whilst there have been one or two instances of conventions which have failed to attract sufficient support to pass the entry into force threshold, the Legal Committee can look back with some satisfaction on what it has achieved. If it can finally “put to bed” the HNS Protocol 2010 (5 ratifications to date and several in the pipeline) it will have achieved its aim of covering all areas of ship operations which can give rise to issues of liability and compensation. That would be quite an achievement.

Why does CMI still exist if all responsibility for harmonisation of maritime law has now been taken over by the IMO Legal Committee?

I emphasised earlier that CMI is a Non-Governmental Organisation (an NGO) and has always prided itself on producing instruments which are seen to be for the general benefit of the shipping industry as well as for the governments of ratifying nations. Inevitably, the Legal Committee, which has taken over the role of CMI, is now political in nature. This has changed the dynamics of the way in which international conventions are developed. All new projects now have to be sponsored by governments and if an NGO, like CMI, comes up with an idea for a new instrument it must first promote it to one or more governments and persuade them that it is worth putting their names to. This, of itself, is not a bad thing but, as I've said, it has changed the dynamics.

That said, CMI does still have other useful roles to play. When it became clear to maritime lawyers that the 1910 Salvage Convention was no longer fit for purpose it was the CMI which took the initiative and began work on a draft which was eventually finalised by the IMO Legal Committee as the 1989 Salvage Convention. Similarly, CMI did much of the preparatory work on the 1976 Limitation Convention. When the time came to update the Hague and Hague/Visby Rules, CMI found that the IMO was not interested. It therefore had to find another international organisation that was interested. Hence, the Rotterdam Rules were jointly developed over several years with UNCITRAL rather than through the IMO Legal Committee. Likewise when the CMI, in recent years, proposed that the Legal Committee should consider producing a convention on the international recognition of the Judicial Sale of Ships the idea was rejected on the basis that there was no "compelling need" for such an instrument. Again, CMI went elsewhere and UNCITRAL recognised the importance of this subject and at the Commission's 55th meeting in June this year it approved an international instrument under which ratifying states will report judicial sales of ships to IMO who will make this data readily available.

For the past few years a CMI International Working Group has been studying the practical and legal consequences of the introduction of automated ships operating without crews. In a report produced in 2017 the IWG reviewed all the international maritime conventions to determine which ones would need to be amended to accommodate unmanned ships. Initially the CMI and several sponsoring nations and NGOs approached the IMO's Maritime Safety Committee (MSC) as a result of which it was decided that there should be a so-called "scoping exercise" to establish which existing maritime law conventions would need to be adapted to cope with the problems presented by ships operating without a crew on board. A submission on the same subject was made by the CMI jointly with 7 states, ICS, and the P. & I. Clubs to the 105th Session of the IMO Legal Committee (LEG 105/11/1) in the April 2018. After some discussion it was decided that this subject should also be added to the Legal Committee's Work Programme. An Intersessional Correspondence Group was set up to advance the scoping exercise and has been instructed to complete its work this year. CMI negotiated and funded an internship for an IMLI graduate to conduct research at IMO on this important subject.

Patrick Griggs

You need only to look at the CMI website to understand that the “*Torrey Canyon*” did not “kill off” the CMI as was feared at the time. Far from it. Just to list a few of the International Working Groups currently operating gives you an idea of how busy we are. MASS (Unmanned Ships), Wrongful Arrest of Ships and its Consequences, Liability of Classification Societies where an “in class” ship is involved in an incident, Container security issues, Cybercrime as it affects ship operations, Fair Treatment of Seafarers following a Maritime Incident, Pollution from Offshore oil and gas exploration/exploitation, the definition of a “ship”, Polar Shipping. The CMI continues to monitor developments in the field of Limitation of Liability and Oil Pollution from Tankers. In conjunction with the IMO Secretariat the CMI is, through its national maritime law associations, encouraging states to ratify and implement international conventions. We have a long term project to create, with the assistance of Singapore University, a database of judicial decisions involving interpretation of international conventions – potentially a useful resource for courts faced with cases involving international conventions. CMI has also been involved in a project, adopted into the Legal Committee’s Work Programme at its 106th Session to develop a “Unified Interpretation” of the test for breaking the owners’ right to limit liability under conventions which contain the right to limit. (Now the subject of 3 IMO Assembly Resolutions). So, here is why CMI still has a useful role to play in the field of international maritime law and explains why we are here in Antwerp today in such numbers.

In retirement I have had the privilege of representing CMI at meetings of the IMO Legal Committee for the past 20 years. The NGOs and other bodies whose representatives sit on the back benches at Legal Committee meetings contribute their practical experience and knowledge to the Committee’s debates. It is certain that without this input many of the instruments which have been introduced would have been flawed. Again, the CMI is able to contribute, along with other NGOs, to the process of drafting conventions that will actually work.

Another excellent example of the CMI’s continuing backbench role involved the 2007 Wreck Removal Convention. This subject was first considered by the Legal Committee at its meeting in October 1995. Discussions were based on a joint submission from the UK, Netherlands and Germany to which was attached a draft convention. As drafted the convention was designed to apply only to wrecks *outside* the territorial waters of contracting states. The CMI was, perhaps, a little slow in getting involved. However, an IWG was set up to look at the subject and to review the text of the draft convention. The IWG produced a report (submitted to the Legal Committee in October 1996) in which it reported that national laws on wreck removal appeared to be so similar that it would be sensible to make this a more ambitious project and to unify the law relating to wreck removal to cover wrecks both inside and outside territorial waters. The 3 sponsoring states were resistant to any change and found general support within the Legal Committee for a convention relating only to wrecks lying outside territorial waters. As the convention was developed over the next few years the CMI (and others) kept reminding the Committee that the opportunity of

introducing a universal wreck removal regime was being missed. It was not until the meeting of the Legal Committee in Paris in the Autumn of 2006 (less than one year before the Nairobi Conference at which the final text of the Convention was adopted) that the wisdom of extending the scope of the convention to cover wrecks both inside and outside territorial waters was finally accepted. At this late stage in drafting the only practical way of extending the convention to cover wrecks within territorial waters was to provide an “opt-in”. In other words states, when ratifying the convention, could, if they wished, give notice that they would be applying the convention to wrecks within their territorial waters as well as outside. At last, sense had been seen! Having said that the hastily drafted “opt-in” provision has, perhaps not surprisingly, created problems for ratifying, opt-in states when drafting their implementation legislation.

At the time of CMI’s Centenary in 1997 Dr. Frank Wiswall, a good friend and long term servant of CMI wrote: “The challenge of the next century is to develop the CMI and its work so as to be of continuing and visible utility.” I hope that I have demonstrated that in the past 25 years we have done just that and I also hope that we are all persuaded that the CMI will continue to have a role to play. The members of our national associations are generally people “in the trade” whose practical contributions are vital to making IMO conventions “fit for purpose”.

I cannot finish without putting in a word for the International Maritime Law Institute in Malta which has now been in existence for over 30 years. Students from around the world (currently up to 60 each year) undertake a full, very intensive academic year studying maritime law in general and international maritime law conventions in particular. Amongst other projects they are required to take a convention of their choice and draft implementing legislation. There has just been a change of Director at the Institute. Professor David Attard who, over the past 30 years, has built IMLI into a first class academic institute of learning, retired as Director in June (though he will continue to teach) and Professor Norman Martinez (who has himself taught at the Institute for over 20 years) has taken over. We should wish him luck.

I and others connected with CMI deliver a series of lectures each year at IMLI. Travel expenses are covered by the CMI Charitable Trust and I regard this as a further example of where we, at CMI, can use our knowledge and share it with younger generations. The CMI also sponsors a prize awarded to a top IMLI student which includes an invitation to attend a CMI Conference. I believe that last year’s prize winner is with us here in Antwerp.

I would not wish anyone to think that involvement with CMI is in any way dull. Over the years we’ve had a great deal of fun. Who will forget the boat trip on the St Lawrence Seaway during the Montreal Conference in 1981, the visit during the Paris Conference in 1990 to the vineyard at Clos de Vougeot where each lunch place setting was surrounded by (I think) 10 glasses (most of us slept soundly on the train ride back to Paris), the evening at the Opera House during the Sydney Conference in 1994. Vancouver in 2004 gave many of us the opportunity to travel on to Alaska. Lasting friendships and business contacts have been made through CMI. Plenty of good wine has been drunk and some pretty special meals have been eaten. Nothing

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can quite compare however with the dinner served on October 1st 1898 at the Antwerp Conference. I have the menu here Royal Oysters, Oxtail Soup, “hot/cold little thrushes”, Salmon Trout Sainte Riche, Beef fillet, ortolans (stuffed song birds) in baskets, Partridge Vigneron, Variegated Compote, Ice Cream, Fruit and Dessert. All washed down with large quantities of vintage wines! I suspect that the menu for our end of Conference dinner will be somewhat simpler but (this being Antwerp) just as good!

As I said at the outset, this paper is offered as a tribute to Professor Francesco Berlingieri. During the period of his Presidency CMI was still in its post *Torrey Canyon* phase when it had lost its position as the only organisation concerned with the unification of maritime law. Throughout his life of service to CMI he remained persuaded of the continuing importance of our work. But for him the CMI would probably have ceased to exist. So, we who have come after him have much to thank him for.

P.J.S. Griggs CBE.
Past President CMI.
October 2022.

INTRODUCTORY REMARKS JUDICIAL SALE OF SHIPS

ANN FENECH

*Co-Chair IWG on Convention on the
International Effects of Judicial Sales of Ships*

Ladies and Gentlemen,

thank you very much indeed for attending our session this morning on Judicial Sales of Ships.

At the very beginning of this session I would like to thank 3 people who unfortunately could not be with us today, Henry Li my co-chair and chair of the first working group on Judicial Sales, Stuart Hetherington Past President of CMI who identified UNCITRAL as being the ideal home for the Beijing Draft and Alex von Ziegler Past Secretary General of CMI and the representative delegate of Switzerland at UNCITRAL – instrumental in convincing delegates at UNCITRAL of the CMI cause in 2017 and 2018.

Dear friends, today we are on the cusp of a Convention on the international effects of Judicial Sales of Ships to be referred to as the Beijing Convention on Judicial Sales when the General Assembly in its current 77th session adopts the Convention.

We got to this point first and foremost thanks to my co-chair Henry Li who brought this challenging problem to the attention of CMI.

There have been and there are instances of ships being sold in judicial sales free and unencumbered to *buona fide* purchasers paying good money only to have their voyages interrupted and ships arrested later by the vessel's previous creditors; instances where registries are reluctant to delete vessels sold in judicial sales and/ or mortgages of vessels sold in judicial sales; instances where creditors are reluctant to delete their existing privileges and hypothecs following judicial sales; all of this leading to huge uncertainty and rather chaotic situations for the new owners and for the new financiers lending money for the purchase of these vessels having extended financing on the understanding that they would be financing vessels which would be free and unencumbered only to find themselves having to deal with previous mortgagees – all resulting in serious interruption to the smooth operation of international Trade.

The working group chaired by Henry Li worked tirelessly to produce the Draft International Convention on Foreign Judicial sales of Ships and Their recognition, known as the Beijing Draft. The Beijing Draft was finalised in Hamburg in 2014 and from then started the task of finding the Beijing Draft a home.

After approaches to IMO, the CMI approached UNICTRAL and in 2017

presented a proposal highlighting these challenges which exist in a number of jurisdictions, and at its 50th session, the Commission suggested that the CMI should hold a Colloquium with the industry with a view to discussing the issue and reporting back to the Commission.

A very successful Colloquium was held in Malta in February 2018 attended by 180 persons from over 60 countries representing different governments, the judiciary, international banks, shipowners, maritime service providers, ship brokers, ship repairers, shipping registries, harbour authorities.

All expressed their support for the need of such a convention which would bring certainty leading to more confidence in Judicial sales, comfort to the financiers, leading in turn to higher prices resulting in more funds to pay the creditors and ultimately the defaulting owner.

The results of the Colloquium were presented by Alex von Zeigler on behalf of the Government of Switzerland at the fifty first session of UNCITRAL in June of 2018. It was a very exciting moment for Alex von Ziegler and for Stuart Hetherington then President of CMI and myself who together presented the case at the Commission's 51st session leading it to decide that this was a topic which would be added to the work programme of the Commission. The Commission decided that: *"In support of the proposal it was noted, by the Commission, that that issue had the potential to affect many areas of international trade and commerce not only the shipping industry with several examples of that impact being provided."* It was subsequently decided by UNCITRAL that working group V1 would take on this project.

Working group V1 first met to deliberate our Beijing Draft in May 2019 at the UN in New York at its 35th session under the chairmanship of Prof. Beate Czerwenka and the eagle eyes of the Principal Legal Officer in the Secretariat Jose Angelo Estrella Faria.

The majority of the delegates representing the various states at this first meeting did not have a maritime background and they were rather bemused by the extent of the complications that arise in our world of enforcement of maritime claims against vessels leading to judicial sales of ships. As a result it was necessary at that first session for us to explain the whys and wherefores of every article. There were enough of us in the room to lead and add to the discussion including myself for and on behalf of CMI, Alex von Ziegler representing Switzerland, Henry Li and Bei Ping Chu representing China, Frank Nolan representing the United States of America, Tomotaka Fujita representing Japan, Eduardo Albors and Manuel Alba representing Spain, Peter Laurijssen representing the International Chamber of Shipping and BIMCO, Margot Harris representing Law Asia, Karina Albors represented the Arbitrators group, Brian Murphy representing IUMI, and Judge Neil McKerracher the Australian admiralty judge representing the International Association of Judges.

That 35th meeting resulted in the 1st revision of the Beijing draft.

However the experience at the 35th session clearly taught us that we had to encourage our national maritime law associations to work towards encouraging their governments to request the attendance of maritime law experts as part of state delegations to assist the state delegates in the

deliberation of this highly specialised convention. At that early stage we could already see that one of the main challenges was going to be to convince the delegates that what international trade required was a convention and not a model law.

This effort led to a marked increase in maritime lawyers accompanying state and NGO delegations in the sessions that followed all the way to the 55th Commission session in June of this very year. Peter Kragic represented Croatia, Diego Chami represented Chile, John O'Connor represented Canada, Jan Erik Poetschke represented Germany, David Testa represented Malta, Harmen Hoek, Muge Amber Kontakis and Richard Singleton represented the IBA.

Another thing we learnt from the 1st session of May 2019 was that going forward it would be useful for the CMI to provide in advance of the sessions a set of Meeting Notes in which we could highlight important issues, explain them and offer possible solutions.

Thus following each revised draft and before its discussion our CMI working group prepared what became known as the CMI Meeting Notes.

In the midst of the 6 sessions of working group VI held between May 2018 and February 2022 we had 2 years of pandemic. During this period sessions were held either virtually or semi virtually. This produced major challenges for the Secretariat at UNCITRAL as well as the delegates. For a number of delegates joining from diametrically opposed time zones, these sessions meant remaining awake during the night and delegations had to improvise by communicating with each other via whats ap rather than having important yet informal discussions over a coffee!

The 6 sessions were packed with agreements, disagreements and invigorating debate but above all the desire to produce a “ratifiable” convention which could deal with the challenges envisaged and that is precisely what I believe we have before us. Is it perfect? Probably not but it is a very good effort! It is to be noted that our Beijing Draft, continued to be referred to as the Beijing Draft throughout the sessions and a decision was taken that the instrument was to be in the form of a Convention.

The CMI used the time in between the sessions to work with the Secretariat, to understand concerns raised by delegations, to bridge distances and work on solutions and to strengthen existing relationships with numerous organisations such as the IMO and the EU. The extent of the support of the IMO was evidenced by the fact that it agreed to act as the Repository for the Notice of Judicial Sale and the Certificate of Judicial sales. Special thanks go to Frederick Kenney, Director legal affairs and external relations division, as well as to the EU Commission with whom through Angel Sears de bono legal and policy officer within the directorate general for justice and consumers, we enjoyed a first class working relationship.

We have before us dear friends a convention which we believe is crisp, clear and to the point. It has 16, substantive articles which will be the subject of discussion by our distinguished panellists very shortly. To help us better understand various aspects of the Convention the Secretariat will provide Explanatory notes to assist us to iron out the creases, clarify and to assist with the proper interpretation of the articles.

Ann Fenech

I would now like to end this introduction by thanking a number of persons.

Kate Lannan and Renaud Sorieul who were the two persons who guided the President of CMI then, Mr. Stuart Hetherington, in the initial stages and approaches to UNCITRAL with the CMI Beijing Draft. Ryan Harrington from the UNCTRAL secretariat who came to Malta and supported the Colloquium and participated in the debate.

We cannot thank enough Madame Chair of working group VI here with us today, Prof Beate Czerwenka, who handled the proceedings brilliantly notwithstanding the diversity of opinions and styles and kept us all on track enabling the successful conclusion to our deliberations.

Thanks go to the Secretary General of UNCITRAL Madame Joubin Bret and the Secretariat of UNCITRAL and to all the staff both in Vienna and in New York.

We are particularly grateful to Alex Kunzelmann, the producer of so many reports including we were informed, the explanatory notes on which so much emphasis has been placed by so many delegations throughout the six sessions.

Last but not least Jose Angelo Estrella Faria – Principal Legal Officer and Head, Legislative Branch International trade Law Division, who has also very kindly accepted our invitation to address us today. This gentleman had the remarkable ability to provide an acceptable solution to several delegations holding divergent views. I said this in my closing remarks at the Commission in June and I will say it again here, that on so many occasions his skilful and insightful drafting did not just save THE day, but saved MANY days and we are indebted to him.

Of course a big thank you goes to the NMLAs who from the very beginning of this project in 2007 were instrumental in providing, through the various questionnaires all the relevant material and in acting as intermediaries between their governments and the CMI. This would not have been possible without you.

Last but not least the members of the CMI IWGs on Judicial Sales. I speak about 2 IWGs – in the plural. The first IWG under the Chairmanship of Henry Li worked as I said tirelessly to produce the Beijing Draft. The members of this group were: Henry Li, Jonathan Lux, Andrew Robinson, Frank Smeele, William Sharpe, Lawrence Teh, Frank Nolan, Louis N. Mbanefo, Benoit Goemans, Klaus Ramming, Aurelio Fernandez-Concheso.

The 2nd International working group which took the convention to UNCITRAL and through UNCITRAL were myself and Henry Li as co-chairs, Alex von Ziegler, Stuart Hetherington, Frank Nolan, Peter Laurijssen, Jan Erik Poetschke, Tomotaka Fujita, Paula Backden, Eduardo Albors, Beiping Chu, and Luc Grellet.

I hope that has set the scene to our session this morning – Thank you.

TO BEIJING VIA VIENNA AND NEW YORK – THE UNCITRAL/CMI COMMON JOURNEY TOWARDS THE NEWEST MARITIME CONVENTION

JOSE ANGELO ESTRELLA FARIA*

One of the oldest international non-governmental organizations in the legal field, the *Comité Maritime International* (CMI) can look back with pride at a remarkable contribution to the unification and harmonization of maritime law over its long history. As we celebrate its 125th anniversary, nothing would be more befitting than to discuss the contribution of the CMI to the development of the newest international maritime law convention: the United Nations Convention on the International Effects of Judicial Sales of Ships (hereinafter “Convention”), which the General Assembly of the United Nations is expected to adopt at its 77th session in the coming weeks. Not having the privilege of being a member of this prestigious institution, I will not do it from an internal viewpoint, but from the perspective of CMI’s partner in this journey: the United Nations Commission on International Trade Law (UNCITRAL).¹

The new convention was not the first incursion of UNCITRAL into maritime law. Neither was it the first occasion of cooperation with the CMI, but it was a particularly fruitful one, allowing the project to be completed within an unusually short period for an international convention. We will hear about the Convention from my learned panel fellows but allow me nevertheless to briefly recapitulate its main features.

B. Outline of the new Convention

In many States, courts have the authority to order the sale of a ship to satisfy a legal claim. Such a claim is typically brought against the ship or shipowner to foreclose a ship mortgage (in the event of default in repayment) or to enforce a maritime lien against the ship. The judicial sale procedure is typically preceded by the arrest of the ship.

While the international community has achieved significant progress

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¹ A subsidiary organ established by the U.N. General Assembly in 1966, UNCITRAL has the general mandate to further the progressive harmonization and unification of the law of international trade (see General Assembly resolution 2205(XXI), of 17 December 1966 (reproduced in *Yearbook of the United Nations Commission on International Trade Law* (“UNCITRAL Yearbook”), vol. I: 1968-1970, part one, chap. II, sect. E).

in harmonizing rules on the arrest of ships,² much less progress has been achieved in harmonizing rules on the judicial sale of ships.³ As such, it remains for each State to prescribe the rules governing the procedure and legal effect of judicial sales ordered by its courts, although in many States the judicial sale has the legal effect of conferring “clean title” on the purchaser (i.e. it extinguishes all rights and interests that were previously attached to the ship, including mortgages and maritime liens). It also remains for each State to prescribe the rules governing the legal effect within its jurisdiction of foreign judicial sales.

The Convention harmonizes the latter rules. Put in another way, it establishes a harmonized regime for giving international effect to judicial sales, while preserving domestic law governing the procedure of judicial sales and the circumstances in which judicial sales confer clean title. By ensuring legal certainty as to the title that the purchaser acquires in the ship as it navigates internationally, the Convention is designed to maximize the price that the ship can attract in the market and the proceeds available for distribution among creditors, and to promote international trade.

The basic rule of the Convention is that a judicial sale conducted in one State Party which has the effect of conferring clean title on the purchaser has the same effect in every other State Party (article 6). The basic rule is subject only to a public policy exception (article 10).

The Convention regime prescribes additional rules which establish how a judicial sale is given effect after completion. The first is a requirement that the ship registry deregister the ship or transfer registration at the request of the purchaser (article 7). The second is a prohibition on arresting the ship for a claim arising from a pre-existing right or interest (i.e., a right or interest extinguished by the sale) (article 8). The third is the conferral of exclusive jurisdiction on the courts of the State of judicial sale to hear a challenge to the judicial sale (article 9).

To support the operation of the regime and to safeguard the rights of parties with an interest in the ship, the Convention provides for the issuance of two instruments – a notice of judicial sale (article 4) and a certificate of judicial sale (article 5). It also establishes an online repository of those instruments which is freely accessible to any interested person or entity (article 11).

The Convention regime is “closed”, in the sense that it applies only among States Parties (article 3). Yet it is “not exclusive”, in the sense that it does not displace other bases for giving effect to judicial sales (article 14).

The Convention was completed in record time for an international treaty,

² See, e.g., the International Convention Relating to the Arrest of Seagoing Ships (1952), United Nations, *Treaty Series*, vol. 439, No. 6330, and International Convention on Arrest of Ships (1999), United Nations, *Treaty Series*, vol. 2797, No. 49196 (hereinafter the “Arrests Conventions”).

³ Efforts to harmonize rules on the recognition and enforcement of maritime liens and mortgages have addressed judicial sales. See, e.g., article 9 of the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1926), League of Nations, *Treaty Series*, vol. CXX, No. 2765, and articles 11 and 12 of the International Convention on Maritime Liens and Mortgages (1993), United Nations, *Treaty Series*, vol. 2276, No. 40538.

and despite the interruptions and delays caused by the pandemic (see section D). To a large extent, this was the result of the excellent cooperation and division of labour between UNCITRAL and the CMI (section E). To a large extent it was also a reflection of the narrow and sharply defined scope of the Convention, as opposed to the broader and more controversial matters on which UNCITRAL had worked before (section C).

C. UNCITRAL and maritime law

The work leading to this new Convention originated in a proposal by the CMI to the fiftieth annual session of UNCITRAL (Vienna, 321 July 2017) for possible future work on cross-border issues related to the judicial sale of ships.⁴ The proposed set put the reasons for undertaking such new project and noted CMI's experience working with UNCITRAL, "most recently" on the convention known as the "Rotterdam Rules".⁵

As a matter of fact, the two organizations had been in contact since the early days of UNCITRAL. Already the first work programme adopted by UNCITRAL included the study of the feasibility of harmonization of the carriage of goods by sea. At that time, the United Nations Conference on Trade and Development (UNCTAD) had begun to examine means to address the dissatisfaction of developing countries with the "traditional maritime law prevailing among the 'colonialist' powers".⁶ The project was eventually transferred to the newly established UNCITRAL after the United Nations General Assembly recommended that UNCITRAL to deal with shipping legislation as a matter of priority.⁷ After eight years of preparation at the UNCITRAL Working Group on Transport Law, at which CMI participated actively, a draft was eventually submitted to a diplomatic conference convened by the General Assembly of the United Nations at Hamburg held at Hamburg, where the convention was adopted on 31 March 1978. It became known as the "Hamburg Rules".⁸

The Hamburg Rules introduced some important changes in the carrier's liability regime. They extended the carrier's liability to cover loss of, or damage to, the goods, as well as from delay in delivery, if the cause of the loss, damage, or delay took place while the goods were in the carrier's

⁴ Proposal of the Comité Maritime International (CMI) for possible future work on cross-border issues related to the Judicial sale of ships, 13 April 2017 (UN document A/CN.9/923, hereafter "CMI Proposal").

⁵ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by General Assembly resolution 63/122, of 11 December 2008 (reproduced in *UNCITRAL Yearbook*, vol. XXXIX:2008, part one, sect. B)).

⁶ Joseph C. Sweeney, *UNCITRAL and the Hamburg Rules: The Risk Allocation Problem in Maritime Transport of Goods*, 22 J. Mar. L. & Com. 511, 529 (1991). For an overview of the evolution of carrier liability and the context of international negotiations, see José Angelo Estrella Faria, "Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules", *Texas Journal of International Law*; vol. 44 (Spring 2009), No. 3, pp. 277-319.

⁷ General Assembly resolution 2421 (XXIII), of 18 December 1968.

⁸ United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) (United Nations, *Treaty Series*, No. 29215, vol. 1695, p. 3).

custody.⁹ The Hamburg Rules did not link between the shipper's right to claim compensation for cargo loss or damage to a breach of the carrier's obligation to make the ship seaworthy. Moreover, the Hamburg Rules reduced the long list of defenses provided in the Hague Rules¹⁰ to only three: (1) the carrier took all reasonable measures to avoid the damage; (2) the loss, damage, or delay was caused by fire; or (3) the loss, damage, or delay was due to efforts of the carrier to save life or property at sea.¹¹

Thirty-five States have since ratified or acceded to the Hamburg Rules,¹² but very few industrialized countries have done so, primarily due to opposition by shipowners and marine insurers.¹³ Therefore, the impact of the Hamburg Rules has remained limited, even though several countries where the Hamburg Rules are not in force have nevertheless incorporated various provisions into their domestic laws.¹⁴

When the Hamburg Rules finally entered into force, on 1 November 1992, nearly 20 years after the work had started, technological and market changes were about to transform shipping into a different industry from what it was when the rules were negotiated in the 1970s. The competitive environment was rapidly evolving, and new solutions were being sought for some of the controversial issues of the preceding decades. Containerization, multimodality and a new competitive environment following the demise of the liner conference system and the abolition of their antitrust privileges had all a dramatic impact on industry structure and business models. Increased use of information technology in transport logistics soon showed the shortcomings of an international regime predicated on the use of printed documents.

If the CMI had been reluctant to engage in the process that led to the adoption of the Hamburg Rules, this time around it took the lead in promoting the new harmonization work.

At its twenty-ninth session (New York, 28 May-14 June 1996), UNCITRAL considered a proposal to include in its work program a review of current practices and laws in the area of the international carriage of goods by sea, aiming to establish uniform rules where no such rules existed

⁹ Hamburg Rules, art. 5, para. 1.

¹⁰ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, 25 August 1924, *League of Nations Treaty Series*, vol. 120, p. 155 (hereinafter "Hague Rules").

¹¹ Hamburg Rules, art. 5, paras. 1, 4(a), 6.

¹² Status available under <https://treaties.un.org/>, "Multilateral Treaties Deposited with the Secretary-General", "Chapter XI: Transport and Communications".

¹³ See Sweeney, p. 530 et seq.

¹⁴ For instance, Australia (Carriage of Goods by Sea Act, 1991, No. 160, Part 3 (Austl.)) (current version, Carriage of Goods by Sea Act No. 109 (2006)), available at <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/9DEB6AB9BDA1E327CA2572040004203A?OpenDocument>. The Act came into force on October 31, 1991) and Canada (Carriage of Goods by Water Act, R.S.C., ch. 21, Part II (1993) repealed by 2001 S.C., ch. 6, sec. 130 (Can.)). The Nordic countries have also adopted many parts of the Hamburg Rules that are not incompatible with the text and underlying policies of the Hague-Visby Rules (see Jan Ramberg, *New Scandinavian Maritime Codes*, in *Il Diritto Marittimo* 1222, 1222 (1994) (describing the acceptance by Nordic Countries of the notion of the freight forwarder as a contracting carrier).

and to achieve greater uniformity of laws.¹⁵ Three years later CMI informed UNCITRAL, at its thirty-second session (Vienna, 17 May-4 June 1999) that it had entrusted a working group to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.¹⁶ UNCITRAL and CMI engaged in consultations with a broad base of stakeholders.¹⁷ There was general consensus that, with the changes brought about by the multimodal transport and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing.¹⁸

In the light of the consultations and preliminary work, UNCITRAL assigned the project to its Working Group on Transport Law. The Working Group has held thirteen sessions between 2002 and 2008. The General Assembly, acting as a conference of diplomatic plenipotentiaries, adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea at its 63rd annual session, on 11 December 2008.¹⁹

The Rotterdam Rules deal with a wide range of issues, most of which are novel terrain for a uniform transport law instrument. No previous convention, for example, had attempted to offer detailed rules on delivery, right of control and transfer of rights in goods. As regards matters already dealt with in earlier instruments, the Rotterdam Rules aims at enhancing legal certainty by codifying decades of case law and practice or clarifying earlier texts, where necessary. Therefore, they do much more than merely revising the liability regime for door-to-door carriage.

Admittedly, with their 96 articles, the Rotterdam Rules are also a much more ambitious text than any of the preceding liability conventions, which is also one of the reasons for the slow pace of ratification, event among the 25 countries that have signed them so far.²⁰ We and our colleagues at the CMI remain, however, confident that the time and effort invested in the Rotterdam Rules will eventually bear fruit. The Hague Rules themselves only became a success more than a decade after their adoption.

¹⁵ *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (U.N. Doc. A/51/17), para. 210.

¹⁶ *Ibid. Fifty-fourth Session, Supplement No. 17* (U.N. Doc. A/54/17), para. 413.

¹⁷ *See id.* paras. 410-18 (including, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors).

¹⁸ *See id.* (discussing the findings of the CMI working group regarding a lack of harmonization in electronic commerce).

¹⁹ General Assembly resolution 63/122, of 11 December 2008, annex (reproduced in *UNCITRAL Yearbook*, vol. XXXIX:2008, part one, sect. B).

²⁰ Status available under <https://treaties.un.org/>, "Multilateral Treaties Deposited with the Secretary-General", "Chapter XI: Transport and Communications".

D. Drafting history of the new Convention

Let us now turn our attention back to the new convention of the judicial sale of ships. The original proposal presented by the CMI to UNCITRAL in 2017 drew attention to problems arising around the world from the failure to give recognition to foreign judgments ordering the sale of ships.²¹ It was stated that a short, self-contained instrument along the lines of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)²² could provide a solution to those problems by enabling clean title to vessels to be recognized across borders. While swift resolution of the questions raised by the proposal was encouraged, it was agreed that additional information in respect of the breadth of the problem would be useful.²³

UNCITRAL therefore requested the CMI to develop and advance the proposal by holding a colloquium to provide additional information to allow UNCITRAL member States to take an informed decision in due course. The Commission further agreed that UNCITRAL, through its secretariat, and States would support and participate in the Colloquium and to revisit the matter at a future session.²⁴ To that end, following a request from the Government of Malta, the UNCITRAL secretariat extended a formal invitation to all Member and Observer States of UNCITRAL to participate in a high-level technical colloquium in respect of the cross-border judicial sale of ships.

The colloquium, which took place in February 2018, resulted in several findings. It was agreed that the “lack of legal certainty in relation to the clean title which a judicial sale is intended to confer on a buyer” led to problems in the de-registration process in the country of the former flag.²⁵ It was also agreed that the lack of legal certainty created obstacles in respect of the clearance of all former encumbrances and liens, which in turn created a risk of costly and lengthy proceedings, thereby interrupting trade and shipping. Finally, there was broad agreement that the gap could be filled from a legal perspective by providing an instrument on the recognition of judicial sales of ships.

The outcomes and conclusions of the colloquium were summarized in an additional proposal submitted to the fifty-first session of UNCITRAL (New York, 25 June-13 July 2018) by the governments of Malta and Switzerland in support of the original CMI proposal.²⁶ Malta and Switzerland noted that the lack of recognition of the judicial sale of ships had the potential to affect many areas of international trade and commerce, not simply the shipping industry, with several examples of that impact being provided. In support

²¹ See CMI Proposal (UN document A/CN.9/923), *supra*, note 4, p. 5-6.

²² United Nations, *Treaty Series*, vol. 330, No. 4739.

²³ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 456465.

²⁴ *Ibid.*, para. 464465.

²⁵ See A/CN.9/944/Rev.1, p. 5.

²⁶ Possible future work on cross-border issues related to the judicial sale of ships: Proposal from the Governments of Malta and Switzerland, 26 March 2018 (U.N. Doc. A/CN.9/944/Rev.1).

of work being undertaken by UNCITRAL, various parallels were drawn between the work being undertaken in Working Group V on recognition of insolvency-related judgments and a possible instrument on the judicial sale of ships.²⁷ UNCITRAL agreed to add the topic of judicial sale of ships to its work programme and assign it to its Working Group VI, after it had completed its work on secured transactions.²⁸

At its thirty-fifth session (New York, 13-17 May 2019), the Working Group considered the topic for the first time,²⁹ and decided that the draft convention on the recognition of foreign judicial sales of ships, prepared by the CMI and approved by the CMI Assembly in Beijing in 2014 (known as the “Beijing Draft”), would provide a useful basis for discussion (*ibid.*, para. 25). At its fifty-second session (Vienna, 8-19 July 2019), the Commission expressed its satisfaction with the progress made by the Working Group.³⁰

The Working Group continued its work at its thirty-sixth session (Vienna, 18-22 November 2019), on the basis of a first revision of the Beijing Draft³¹, which had been prepared by the secretariat to incorporate the deliberations and decisions of the Working Group at its thirty-fifth session. The Working Group considered several key provisions of the first revision and expressed a preliminary view that the instrument should take the form of a convention, while agreeing that a final decision on the matter should be made at a future session.³² At the resumed fifty-third session of the Commission (Vienna, 14-18 September 2020), support was expressed for the instrument taking the form of a convention, with the observation being made that only a convention was capable of ensuring the level of uniformity needed to affirm the international effects of judicial sales of ships.³³ The Commission confirmed that the Working Group should continue its work to prepare an international instrument on the topic.³⁴

The thirty-seventh session of the Working, originally scheduled to take place from 20 to 24 April 2020 in New York had to be postponed because of the COVID-19 pandemic. It was then held online in Vienna from 14 to 18 December 2020. In the meantime, the secretariat had prepared a second revision of the Beijing Draft³⁵ reflecting the deliberations and decisions of the Working Group at its thirty-sixth session. The Working group proceeding

²⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 243.

²⁸ *Ibid.*, para. 252.

²⁹ Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session (New York, 13-17 May 2019) (U.N. Doc. A/CN.9/973).

³⁰ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 189.

³¹ Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft: Note by the Secretariat, 10 September 2019 (U.N. Doc. A/CN.9/WG.VI/WP.84).

³² See Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session (Vienna, 18-22 November 2019) (U.N. Doc. A/CN.9/1007).

³³ *Official Records of the General Assembly, Seventy-fifth Session, Supplement No. 17* (A/75/17), part two, para. 47.

³⁴ *Ibid.*, para. 51(f).

³⁵ Draft Instrument on the Judicial Sale of Ships: Annotated Second Revision of the Beijing Draft: Note by the Secretariat, 11 February 2020 (U.N. Doc. A/CN.9/WG.VI/WP.87).

with an article-by-article reading of the revise draft and agreed to continue working on the assumption that the instrument would take the form of a convention.³⁶ At its thirty-eighth session (New York, 19-23 April 2021), the Working Group considered several outstanding issues from its thirty-seventh session on the basis of a third revision of the Beijing Draft,³⁷ as well as proposals relating to the grounds for avoidance and defining the time of judicial sale.³⁸ The Commission, at the fifty-fourth session (Vienna, 28 June-16 July 2021), expressed its satisfaction with the progress made by the Working Group.³⁹

At its thirty-ninth session (Vienna, 18-22 October 2021), the Working Group considered a fourth revision of the Beijing Draft,⁴⁰ and made progress in its consideration of several open issues, including (a) dealing with clean title sales, (b) the content and function of the notice requirements for judicial sales benefiting from the recognition regime under the draft convention, (c) the content and issuance of the certificate of judicial sale, and (d) the functioning of the proposed repository mechanism.⁴¹

The Working Group completed a further article-by-article review of the substantive provisions of a draft convention and considered the preamble and final clauses of the draft convention at its fortieth session (New York 7-11 February 2022), on the basis of a fifth revision of the “Beijing Draft” that had been prepared by the secretariat.⁴² The Working Group requested the secretariat to revise the draft convention to reflect its deliberations and decisions during the session, and to transmit the revised draft to the Commission for consideration and possible approval at its fifty-fifth session.⁴³ 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.

The Commission considered the revised draft⁴⁴ and a compilation of comments submitted by States and international organizations⁴⁵ at its fifty-

³⁶ See Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session (Vienna, 14-18 December 2020) (U.N. Doc. A/CN.9/1047/Rev.1).

³⁷ Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft: Note by the Secretariat, 9 February 2021 (U.N. Doc. A/CN.9/WG.VI/ WP.90).

³⁸ See Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-eighth session (Vienna, 19-23 April 2021) (U.N. Doc. A/CN.9/1053).

³⁹ *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 211.

⁴⁰ Draft Instrument on the Judicial Sale of Ships: Annotated Fourth Revision of the Beijing Draft Note by the Secretariat, 9 August 2021 (U.N. Doc. A/CN.9/WG.VI/ WP.92).

⁴¹ Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-ninth session (Vienna, 18-22 October 2021) (U.N. Doc. A/CN.9/1089).

⁴² Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft Note by the Secretariat, 30 November 2021 (U.N. Doc. A/CN.9/WG.VI/ WP.94).

⁴³ Report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session (New York, 7-11 February 2022) (U.N. Doc. A/CN.9/1095).

⁴⁴ Draft convention on the international effects of judicial sales of ships: Note by the Secretariat, 4 March 2022 (U.N. Doc. A/CN.9/1108).

⁴⁵ Compilation of comments on the draft convention on the international effects of judicial sales of ships: Note by the Secretariat (U.N. Docs. A/CN.9/1109, A/CN.9/1109/Add.1, A/CN.9/1109/Add.2 and A/CN.9/1109/Add.3).

fifth session (New York, 27 June–15 July 2022). The Commission finalized the text and, on 30 June 2022, approved the draft convention and submitted it to the General Assembly for adoption.⁴⁶

The United Nations General Assembly is expected to adopt the Convention during its 77th session before the end of 2022. The General Assembly is also expected to authorize the convening of a ceremony for the opening for signature of the Convention as soon as practicable in 2023 in Beijing, following an invitation by the Chinese Government, and to recommend that the Convention be known as the “Beijing Convention on the Judicial Sale of Ships”.

E. The cooperation between UNCITRAL and CMI

The prestige and reputation of CMI as the reliable legal voice of the shipping industry are beyond doubt. Yet, as a non-governmental organization, it depends on the convening power of States or international organizations for the political finalization and adoption of the standards it promotes as binding norms of public international law. For a long time, States have supported CMI efforts by organizing and hosting diplomatic conferences for the adoption of various conventions initiated by the CMI. More and more, however, States recede from this arena, relying increasingly on existing multilateral intergovernmental organizations, at the global or regional level, to provide the platform for negotiations of that nature.

The proposal submitted by the CMI to the 50th session of UNCITRAL noted in fact the various attempts made by the CMI to find an appropriate forum to further develop and finalize the work that the CMI expert group had started under the initiative of Professor Henry Li of China in 2007, including at the Legal Committee of the International Maritime Organization (IMO) and at the Hague Conference on Private International Law (HCCH), which had both declined to take up the project.⁴⁷

For the CMI, turning to UNCITRAL had various advantages. As part of the United Nations, UNCITRAL was offered full-fledged conference support, organizing sessions, inviting participants, providing meeting facilities with interpretation and translation services in all six official languages of the United Nations.⁴⁸

Moreover, the universal membership of the United Nations ensured wide visibility and political exposure for the project. Indeed, although UNCITRAL’s original membership comprised 29 States (selected from amongst member States of the United Nations), it has been expanded by the General Assembly of the United Nations to 36 States in 1973⁴⁹, 60 States

⁴⁶ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, paras. 24-99.

⁴⁷ See CMI Proposal (UN document A/CN.9/923), *supra*, note 4, p. 5-6.

⁴⁸ Arabic, Chinese, English, French, Russian and Spanish.

⁴⁹ General Assembly resolution 3108 (XXVIII), para. 8 (reproduced in *UNCITRAL Yearbook*, vol. V: 1974, part one, chap. I, sect. C).

in 2002⁵⁰ and 70 States in 2021⁵¹ to reflect the broader participation and contribution by States beyond the existing member States and to stimulate interest in the expanding work programme. Membership of UNCITRAL is structured to ensure that the various geographic regions and the principal economic and legal systems of the world are represented. Thus, the 70 member States⁵² include 16 African States, 16 Asian States, 10 East European States, 12 Latin American States and 16 from the group of West European and other States. Furthermore, all other 123 Member States of the United Nations are invited to participate as observers in UNCITRAL meetings, with the same rights as members.

The six sessions that the working group devoted to this project were well attended – despite the disruption caused by the pandemic and the fact that several delegations could only participate remotely. In keeping with UNCITRAL practice, participants included not only delegates from UNCITRAL member States and observer States, but also various international organizations.⁵³ The high level of attendance was due in part to

⁵⁰ General Assembly resolution 57/20 of 19 November 2002, para. 2 (reproduced in *UNCITRAL Yearbook*, vol. XXXIII:2002, part one, sect. B).

⁵¹ General Assembly resolution 76/109 of 9 December 2021, para. 3 (will appear in *UNCITRAL Yearbook*, vol. LII:2021, part one, sect. B).

⁵² The current 65 members of UNCITRAL, and the years when their memberships expire, are: Afghanistan (2028), Algeria (2025), Argentina (2028), Armenia (2028), Australia (2028), Austria (2028), Belarus (2028), Belgium (2025), Brazil (2028), Bulgaria (2028), Cameroon (2025), Canada (2025), Chile (2028), China (2025), Colombia (2028), Côte d'Ivoire (2025), Croatia (2025), Czechia (2028), Democratic Republic of the Congo (2028), Dominican Republic (2025), Ecuador (2025), Finland (2025), France (2025), Germany (2025), Ghana (2025), Greece (2028), Honduras (2025), Hungary (2025), India (2028), Indonesia (2025), Iran (Islamic Republic of) (2028), Iraq (2028), Israel (2028), Italy (2028), Japan (2025), Kenya (2028), Kuwait (2028), Malawi (2028), Malaysia (2025), Mali (2025), Mauritius (2028), Mexico (2025), Morocco (2028), Nigeria (2028), Panama (2028), Peru (2025), Poland (2028), Republic of Korea (2025), Russian Federation (2025), Saudi Arabia (2028), Singapore (2025), Somalia (2028), South Africa (2025), Spain (2028), Switzerland (2025), Thailand (2028), Türkiye (2028), Turkmenistan (2028), Uganda (2028), Ukraine (2025), United Kingdom of Great Britain and Northern Ireland (2025), United States of America (2028), Venezuela (Bolivarian Republic of) (2028), Viet Nam (2025) and Zimbabwe (2025). The remaining five additional members will be elected during the seventy-ninth session of the United Nations General Assembly, in 2024.

⁵³ Besides governments, UNCITRAL also invites as observers selected international and regional organizations (both intergovernmental and non-governmental) with an interest in the topics under discussion at annual sessions and working groups (General Assembly resolution 31/99, para. 10(c) (reproduced in *UNCITRAL Yearbook*, vol. VIII: 1977, part one, chap. I, sect. C); see also General Assembly resolution 36/32, para. 9 (reproduced in *UNCITRAL Yearbook*, vol. XII: 1981, part one, sect. D)). Observer organizations are encouraged to offer their technical advice and expert contribution during UNCITRAL negotiations. Organizations that participated in the of the sessions of the Working Group included the following: European Union (EU), International Maritime Organization (IMO), World Maritime University (WMU), Gulf Cooperation Council (GCC), Baltic and International Maritime Council (BIMCO), *Barreau de Paris*, China Council for the Promotion of International Trade (CCPIT), *Comité Maritime International* (CMI), Iberoamerican Institute of Maritime Law (IIDM, Inter-American Bar Association (IABA), 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 Transport Workers' Federation, International Union Of Marine Insurance (IUMI), Law Association for Asia and the Pacific (LAWASIA), New York City Bar (NYCBA), *Union internationale des huissiers de justice et officiers judiciaires* (UIHJ).

the established channels of the communication between the United Nations and its Member States and observer organizations, but also to a large extent on the initiative taken by the CMI, through its network of national maritime law associations, to encourage participation and promote the project.

The partnership between UNCITRAL and the CMI to promote the project was completed through an allocation of tasks that – albeit not entirely original since it followed established United Nations practices in dealing with observer NGOs – proved to be very effective. After receiving the initial reaction of member States to the first Beijing draft, which the secretariat transmitted to the Working Group as it had received it from the CMI, the secretariat took upon itself the task of preparing all subsequent versions of the draft convention, always in the light of the discussions that had taken place at the previous session of the Working Group. Entrusting the secretariat with the preparation of new versions of the text avoided “authorship issues”, allowing delegations to discuss and negotiate more freely, as no one needed to consider eventual sensitivities of any given delegate that might be the author a formulation found to be infelicitous or inadequate. With the secretariat serving as a natural buffer, the discussion could proceed in undisturbed and objective fashion. Meanwhile, timely exchanges with the Chair and the CMI before the issuance of new documents ensured the substantive correctness of the revisions made by the secretariat or at least that they accurately reflected the policy choices made by the Working Group.

A second layer of intersessional quality control was then provided through the effective consultations carried out by the CMI with its own experts and interested delegates. Those consultations proved to be extremely useful to bridge gaps between delegations and reach consensus on difficult issues.

Both the secretariat and the CMI also used the time between formal sessions to liaise with IMO, which has an important role to play under the new Convention, and other international organizations, in particular the EU, which played an important and very useful role in coordinating the positions among EU member States and resolving various the issues that some of them had raised in connection with specific provisions. Internal EU coordination was particularly important with respect to the very sensitive issue of the relationship between notice requirements, finality and avoidance of the judicial sales and the conditions under which a foreign sale would not be given effect in a State Party. The EU is bound by its own legal framework to abide by and promote high standards of due process, and several EU member States were reluctant to assume an obligation to give effect to foreign sales if they were not satisfied that the country from which the certificate emanated had duly notified the interested parties and afforded them an opportunity to participate in the proceedings leading to the judicial sale and protect their interests. The opposing view was that such safeguards already existed under domestic law and any qualification of the obligation to give effect to a foreign sale would only serve to invite litigation and erode the value of a certificate. The compromise found in article 4, paragraph 1, takes account of the need for finality and legal certainty, while recognizing that appeal and review procedures are an integral part of the understanding of due process underlying the convention.

The compromise formulation in article 4, paragraph 1, which removed one of the last lingering points of disagreement among negotiating States, was arrived at during informal consultations held between two formal meetings at the last session of the Working Group. This proves again the usefulness of the direct exchanges in a less formal setting, a possibility that all delegations had badly missed during the pandemic years. It also proves that blocks sustaining opposing views in a negotiating process sometimes overestimate the gap between their positions and may be helped by a fresh outsider look.

The secretariat is grateful to the negotiating delegations for their trust in its impartiality and for welcoming the proposals it made to facilitate consensus on this and other points.

Final remarks

For several years now, international lawyers have noticed a decline in multilateral treaty-making, in terms of a lower rate of both adoption and ratification of multilateral treaties. There are several explanations for this “treaty fatigue”, including recent structural changes in the world political and economic order that emerged after the Second World War and a preference for flexibility in the form of non-binding instruments such as guidelines, declarations or memoranda of understanding.⁵⁴

Of course, treaty-making is a complex and time-consuming process, and States carefully ponder their interest before embarking in international negotiations the outcome of which may at times be unpredictable. Yet, treaty-making remains a central tool of international relations and important treaties are still being negotiated at the United Nations. This is particularly true for treaties in more specialized and less politically controversial fields.

It is an honour for UNCITRAL that its member States continue to entrust it with devising solutions for problems that they find important enough to solve through a multilateral negotiation process. We are also grateful to the CMI for giving us another opportunity to work jointly for a better legal environment for world shipping.

⁵⁴ Laurence Boisson de Chazournes, “The International Law Commission in a Mirror - Forms, Impact and Authority,” in United Nations (ed.), *Seventy Years of the International Law Commission*, Leiden Boston, Brill Nijhoff, 2021, p. 141.

KEY CHALLENGES FOR THE UNIFICATION OF THE LAW ON JUDICIAL SALES OF SHIPS

BEATE CZERWENKA

Ladies and Gentlemen,

first of all, I would like to thank the Comité Maritime International, in the person of its Vice-President Dr Ann Fenech, for the invitation to address this audience and to highlight the key challenges for the past work on the unification of the law on judicial sales of ships. As you know I have chaired the UNCITRAL Working Group VI throughout its negotiations on an international instrument regulating certain aspects of judicial sales of ships and have therefore encountered many of the challenges I would like to outline.

As usual international unification of law faces a number of challenges. Even though such international unification aims at minimizing problems arising from the diversity of national legal systems it is not an easy task to elaborate and agree on new international legal provisions which are acceptable to the international community. Not surprisingly, the proponents of international uniform law on judicial sales of ships encountered a number of challenges, among which the following:

- How to find and convince an international organisation of the compelling need for an international instrument on judicial sales of ships?
- How to cope with the time constraints caused by the COVID-19 pandemic?
- How to reconcile the different interests of the key players?
- How to achieve worldwide acceptance of the new convention?

1. Compelling need

Let me start with the first issue: Compelling need. After having finalized the draft International Convention on Foreign Judicial Sales of Ships and their Recognition (known as the “Beijing draft”) the CMI Assembly adopted on 17 June 2014 a resolution stating that the text should be submitted “to such appropriate intergovernmental or international organisation, as the CMI Executive Council thinks appropriate, for its consideration and adoption.”¹ This demand acknowledged that the CMI, unlike in the first 70 years of its existence, was not any more the only body which elaborated international maritime law instruments with the aim to be adopted at a diplomatic

¹ Published on the Website of the CMI under “The Work of the CMI” – “Judicial Sale of Ships”.

conference convened by a state affected by maritime law. Rather, the demand took into account that, after the disastrous Torrey Canyon oil spill off the coast of the United Kingdom in 1967, states became increasingly hesitant in allowing stakeholders to write themselves legal provisions applicable to them and therefore entrusted international organisations to take the lead in the bid to harmonise maritime law. Despite this finding the CMI Assembly also requested the CMI Executive Council “to consider asking a country to convene a diplomatic conference to consider and adopt the said text”² – a request which, in the end, was not met.

The following organizations were taken into consideration:

- the IMO because of its mandate to “ensure and strengthen the linkage between safe, secure, efficient and environmentally friendly maritime transportation, and the development of global trade and the world economy” as well as its involvement in the elaboration of the International Convention on Maritime Liens and Mortgages, 1993, and the International Convention on Arrest of Ships, 1999,³
- the Hague Conference for Private International Law because of its involvement at that time with the elaboration of a global instrument facilitating the recognition and enforcement of foreign judgments in civil or commercial matters (Judgments Project),⁴ which, according to the CMI, could possibly be supplemented by a chapter or a protocol on the recognition of judicial sales of ships,⁵ and finally,
- the United Nations Commission for International Trade Law because of its experience in working on standards in the area of commercial and international trade law and its cooperation with the CMI during the elaboration of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the “Rotterdam Rules”).⁶

Since any international organisation needs to demonstrate why it would take up a project for consideration the CMI was asked to demonstrate a compelling need for a new legal instrument and whether the organisation was the proper forum for further action.⁷ Among the arguments put forward

² Ibid.

³ See IMO Documents LEG 102/11/2 of 2 March 2015 and LEG 103/11/3 of 5 April 2016. See also *Andrew Robinson*, The CMI Draft Convention on Recognition of Foreign Judicial Sales of Ships – Moving Forward with the IMO, CMI Yearbook 2015, 293 ss.

⁴ See Proposal of the Comité Maritime International for possible future work on cross border issues related to the Judicial sale of ships, UN Document A/CN.9/923 of 13 April 2017, Annex, paragraph 9.

⁵ See CMI Newsletter no. 3 of September/December 2016, p. 6. See also Hague Conference on Private International Law (HCCH), Contribution to the second part of the report of the Secretary-General on oceans and the law of the sea, June 2017.

⁶ See UN Document A/CN.9/923, *supra* note 4, at paragraph 10.

⁷ See Report of the Legal Committee on the Work of its one hundred and second session, IMO Document 201/12 of 20 April 2015, paragraph 11.12: “While the Committee did not in principle oppose the contents of the document, further work was required to demonstrate the compelling need for a new convention and whether the Legal Committee was indeed the proper

by the CMI were the following:

- The absence of an international instrument dealing with the recognition of foreign judicial sales of ships hinders rather than promotes global trade and the world economy.⁸
- The lack of legal certainty for the prospective purchaser regarding the international recognition of a foreign judicial sale of a ship and the deletion or transfer of registry has an adverse effect upon the price realized by a ship sold under judicial sale to the detriment of interested parties, including creditors such as port authorities and other government instrumentalities and the maritime industry as a whole.⁹
- Due to this lack of legal certainty purchasers, and subsequent purchasers are also faced with a threat of costly delays and expensive litigation.¹⁰
- Proper registration of ships is key to the sound governance of maritime safety, marine environment protection and marine technical issues.¹¹ Problems in the de-registration process in the country of the former flag interfere with such aim.
- The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The risk that the ship, as at present, may be arrested for claims predating the judicial sale, has the effect that banks providing ship finance have to take into account that the ship will not realize its full market value at a judicial sale.¹²

Despite these arguments, two of the organisations mentioned above were not convinced: The IMO Legal Committee concluded in its meeting on 9 June 2016 that a compelling need had not been established at this point in time.¹³ Similarly the Hague Conference (HCCH) did not take up the subject matter. During discussions within the Council of the Hague Conference on 15 March 2017 some of its members expressed doubt as to whether the HCCH would be the right forum for such work.¹⁴ The view was expressed that such an “esoteric and industry-specific” topic might be better suited to UNCITRAL.¹⁵ So, luckily enough, UNCITRAL, after having asked the

forum for further action.” See also Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017), UN Document A/72/17, paragraph 464: “the Commission agreed that additional information in respect of the breadth of the problem would be useful and that the proposal could be reconsidered by the Commission at a future session.”

⁸ See IMO Document LEG 103/11/3 of 5 April 2016, Annex paragraph 3.1.

⁹ Ibid., at paragraph 4.1.; see also UN Document A/CN.9/923, *supra* note 4, at paragraph 5.

¹⁰ IMO Document LEG 103/11/3 of 5 April 2016, Annex paragraphs 1.3. and 3.14; See also UN Document A/CN.9/923, *supra* note 4, at paragraph 5.

¹¹ IMO Document LEG 103/11/3 of 5 April 2016, Annex., paragraph 1.4.

¹² Ibid., at paragraph 1.7.

¹³ See Report of the Legal Committee on the Work of its one hundred and third session, IMO Document LEG 103/14 of 15 June 2016, paragraph 11.15.

¹⁴ See Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (14-16 March 2017), paragraph 20.

¹⁵ See UN Document A/CN.9/923, *supra* note 4, at paragraph 10.

CMI to organize a colloquium,¹⁶ decided in its session in 2018 that priority, in the allocation of working group time, should be given to the topic of judicial sale of ships.¹⁷

2. Time constraints

The negotiations within the UNCITRAL Working Group VI started in New York in May 2019.¹⁸ After a second meeting in Vienna (18–22 November 2019)¹⁹ the negotiations were adjourned with the spread of the COVID pandemic. So, the unification process was faced with an unprecedented challenge: How to cope with the pandemic without losing too much time?

On 19 August 2020, the States members of UNCITRAL adopted a decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease 2019 (COVID-19) pandemic.²⁰ On the basis of such decision arrangements were made to allow delegations to participate at the sessions in person or remotely. In preparation for the meeting delegations were invited to make written submissions to facilitate the deliberations during the session. In light of the different time zones the meeting times were reduced to four hours a day. Still, it was quite burdensome to delegations to take part in the negotiations. I remember one delegate stating at about 4 am local time: “My brain is not working any more”. Despite all these difficulties, the Working Group managed to finalize the draft in an extraordinary short time. The decisive cause for this was the outstanding spirit of compromise of all delegations throughout the years of negotiations.

3. Balance of Interests

a) Stakeholders

Speaking about “spirit of compromise”: How and in which areas did the key players reach a compromise which can be seen as fair and striking the right balance between the different interests of the key players. Those were:

- the states members of the United Nations Commission on International Trade Law,
- other states member of the United Nations,
- supranational and international organizations as well as other entities such as the European Union, the IMO and the Hague Conference on Private International Law,
- non-governmental organizations such as the CMI, the International Chamber of Shipping (ICS), the Baltic and International Maritime

¹⁶ See the documentation on the CMI and UNCITRAL Colloquium on Judicial Sales, held in Valletta on 27 February 2018, CMI Yearbook 2017–2018, p. 329 ff.

¹⁷ See Report of the United Nations Commission on International Trade Law, UN Document A/73/17, paragraph 252.

¹⁸ See Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session (New York, 13–17 May 2019), UN Document A/CN.9/973 of 24 May 2019.

¹⁹ Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session (Vienna, 18–22 November 2019), UN Document A/CN.9/1007 of 2 December 2019.

²⁰ A/CN.9/1038.

Council (BIMCO), the International Union of Marine Insurance (IUMI), the International Law Institute (ILI), the International Bar Association (IBA), the International Association of Judges (IAJ), the China Council for the Promotion of International Trade (CCPIT), the International and Comparative Law Research Centre (ICLRC the Law Institute for Asia and the Pacific (LAWASIA), International Transport Workers' Federation (ITF), the Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULAG).

b) Major interests

What were their primary interests? Let me start with the CMI as the author of the draft instrument. One of the aims the CMI pursued was that purchasers, and subsequent purchasers, should be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry.²¹ Once a ship was sold by way of a Judicial sale, the ship should, with only very limited exceptions, no longer be subject to arrest for any claim arising prior to its Judicial sale.²² Any remedies against a Judicial Sale should be channelled towards the competent Courts in the State where the Judicial Sale took place.²³ Recognition of a judicial sale could only be refused under very limited circumstances. Likewise, the ICS expressed the view that prospective shipowner purchasers needed to be confident of receiving a clean title to the ship, free of any encumbrances, and capable of being deleted from its old registry and registered in a new registry of the purchaser's choice. At the same time, the ICS pointed out, that it would also be necessary to ensure that there were adequate safeguards for the shipowner seller and its mortgagee and other parties, for example following unlawful or fraudulent claims or actions.

What were the states' interests? Of course, not all states pursued the same aims. Yet, some appear worth mentioning: One obvious aim was to protect the rights and interests of the States' own citizens, among those the lawful creditors who – for one reason or another – might not be able to take part neither in the judicial sale nor in the procedures of distribution of the proceeds. Another aim was to prevent the new instrument from encroaching too much on the procedural law of each State. In this regard reference was made to national law according to which a judicial sale did not have the effect of extinguishing all rights and interests²⁴, to time and form of a notice before a judicial sale²⁵ and to jurisdiction.²⁶ Furthermore, it was suggested that the instrument should neither deal with applicable

²¹ See UN Document A/CN.9/923, *supra* note 4, at paragraph 54.

²² *Ibid.*

²³ See Commentary on the Beijing Draft, CMI Yearbook 2013, 220 (226).

²⁴ See UN Document A/CN.9/973 *supra* note 18, at paragraph 35, UN Document A/CN.9/1007, *supra* note 19, at paragraph 46.

²⁵ See UN Document A/CN.9/1007, *supra* note 19, at paragraph 66.

²⁶ See UN Document A/CN.9/1007, *supra* note 19, at paragraph 70.

law issues relating to the claim giving rise to the judicial sale²⁷ nor with priority of claims²⁸ or wrongful arrest of ships.²⁹ Another concern raised was to preserve the application of existing international conventions such as the Geneva Convention and its Protocol No. 2.³⁰ Finally the suggestion was made that the scope of application of the instrument be limited to judicial sales in international cases.³¹

The representative of the European Union picked up some of these concerns. Above all it pursued the objective to ensure that the “*acquis communautaire*” would remain unaffected. This includes the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)³², the Service of Documents Regulation³³ and the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Accordingly, the concern raised by the representative of the European Union was to ensure that cross-border recognition should be required only of those judicial decisions that comply with basic due process, such as the rights of the owner of the ship and of the right holders to be notified in due time of the upcoming forced sale. In addition, the representative of the European Union advocated that a forced sale would not be done in violation of the exclusive jurisdictional grounds of the State where the recognition is sought.

c) Compromise solutions

How did UNCITRAL balance these different interests? Let me highlight the following compromises:

With regard to the wish not to regulate the conditions upon which the judicial sale should confer clean title on the purchaser the UNCITRAL Working Group agreed to restrict the substantive scope of application: The instrument would not regulate such question, but leave it to the State of judicial sale to prescribe the rules governing the question whether the judicial sale has the legal effect of extinguishing all rights that were previously attached to the ship, including mortgages and maritime liens. Instead, it would apply only to judicial sales that already confer “clean title” (see Article 1 of the Draft Convention).

Furthermore, the UNCITRAL Working Group decided not deal with issues relating to the cross-border recognition of judicial decisions. Rather, it would only regulate the “international effect” of a judicial sale once the purchaser has acquired clean title to the ship and a certificate of judicial

²⁷ See UN Document A/CN.9/973, *supra* note 18, at paragraph 21.

²⁸ See UN Document A/CN.9/1007, *supra* at note 19, at paragraph 53.

²⁹ See UN Document A/CN.9/973, *supra* note 18, at paragraph 23.

³⁰ See Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session (Vienna, 14–18 December 2020), UN Document A/CN.9/1047 Rev. 1, para. 29.

³¹ See UN Document A/CN.9/973, *supra* note 18, at paragraph 36.

³² Official Journal L 351, 20.12.2012, p. 1.

³³ Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.

sale stating that the purchaser has acquired clean title has been produced. The international effect would only be regulated in relation to two aspects: registration and arrest. With regard to the issue of registration the draft convention regulates the conditions under which the registry of a State Party is obliged to delete any mortgage or hypothèque and any registered charges, to delete the ship from the register and to issue a certificate of deletion for the purpose of new registration, and under which the registry in another State Party is obliged to re-register the ship in the name of the purchaser or subsequent purchaser. Furthermore, it regulates the conditions under which the bareboat registry of a State Party is obliged to delete the ship from the bareboat charter register and issue a certificate of deletion.

With regard to the issue of arrest the draft convention regulates the conditions under which the court or other judicial authority in a State Party is obliged to dismiss the application to arrest a ship for a claim arising prior to a judicial sale or to release the ship which has been arrested for a claim arising prior to a judicial sale.

The procedural rules would be limited to basic rules and would serve the sole purpose of regulating the conditions for international effect of the judicial sale. For this purpose, the draft convention contains basic provisions on who should receive which information before a forthcoming judicial sale and what were the minimum requirements for such notice, on the condition upon which a certificate of sale should be issued and the minimum content of such certificate, and – finally – which court has exclusive jurisdiction to hear a claim to avoid or suspend a judicial sale or challenge the issuance of the certificate of judicial sale.

In order to provide for a better protection of creditors maximum transparency a centralized online repository would be established to which the notice of judicial sale, the certificate of judicial sale and any decisions avoiding or suspending a judicial sale would be transmitted for publication.

Finally, the instrument would ensure that there will be not conflict of conventions. Thus, the draft expressly states that it gives priority to the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 (article 13 paragraph 1), that states parties to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil of Commercial Matters, 1965, can apply such convention (article 13 paragraph 2) and that the member states of the European Union are allowed to give priority to EU law in relation to the transmission of a notice between EU member states as well as to jurisdictional rules applicable between EU member States (article 18 paragraph 4).

4. Worldwide acceptance

This brings us to the final challenge: How to convince states to ratify the future convention? Even though the convention requires only three ratifications for entry into force a true success of the Convention will only be achieved if more than 3 states will ratify the convention. In this respect, we are back at the beginning of my remarks: How to convince an institution of the compelling need for an international instrument on judicial sales

Beate Czerwenka

of ships? I believe with the successful adoption of the convention by the General Assembly of the United Nations this year it is obvious that there is a need for such an instrument. In addition, the text proves that it achieved well balanced compromise solutions which take into account the different interests of the stakeholders. It does not interfere too much with national law, unifies the key elements of judicial sales of ships and insofar provides for greater legal certainty. With the help of you, the practitioners, there is a good chance that the convention will gain worldwide acceptance. I would wish it.

THE EU'S ROLE IN THE UN CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS - THE BEIJING CONVENTION ON JUDICIAL SALE OF SHIPS

ANGELE SEARS-DEBONO

Legal and Policy Officer

General introduction

THE COMMON EUROPEAN AREA OF JUSTICE – ARTICLE 81 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Since the entry into force of the Amsterdam Treaty on 1 May 1999, judicial cooperation in civil and commercial matters has been covered by Article 81 of the Treaty on the Functioning of the European Union (TFEU).

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

Although this ‘new’ policy area (judicial cooperation in civil and cooperation matters) – is only 23 years old – the EU has a very intense production of legislative instruments:

- in civil and commercial matters (jurisdiction, recognition, enforcement – ex: Brussels Ia Regulation)
- judicial cooperation (ex: the service of documents regulation (and recast which entered into application on 1 July 2022; the Taking of evidence (and its recast) Regulation)
- family law (jurisdiction, recognition, enforcement ex: the Brussels IIa & b (which only recently entered into application and the Maintenance Regulation).

The European Union's exclusive external competence

The European Union (EU) is competent externally to the extent that it has adopted legislation internally on the same and/or similar subject matter and there is a potential risk of the affectation of the EU *acquis*.

- This has been also affirmed by the European Court of Justice in:
- European Court of Justice (EJC) Opinion 1/03 of 7 February 2006 “Lugano” and ECJ Opinion 1/13 of 14 October 2014 “Hague 1980 Child Abduction Convention”.

In the first one, Opinion 1/03 (EU:C:2006:81), delivered on February 7, 2006, the Court was requested by the Council to answer whether the conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters falls entirely within the sphere of exclusive competence of the Community, or within the sphere of shared competence of the Community and the Member States.

In the second one, Opinion 1/13 (EU:C:2014:2303), of 14 October 2014; the European Commission asked the Court whether the exclusive competence of the European Union encompasses the acceptance of the accession of a non-Union country to the Convention on the civil aspects of international child abduction concluded in the Hague on 25 October 1980.

In both cases the Court's ruling supports the exclusive competence of the Union.

The EU has acquired the exclusive competence to negotiate and conclude international agreements in matters affecting the provisions of the EU instruments in civil and commercial matters.

EU international agreements – different types of agreements in Union law

- A. Agreements concluded by the EU only ("EU-only")
- B. "Mixed" Agreements, concluded by the EU and by the Member States:
 - 1) Bilateral Mixed Agreements
 - 2) Multilateral Mixed Agreements

A. "EU only" agreements:

Agreements with third states or international organisations

- concluded by the Union (and/or Euratom) itself, or
- concluded by the Member States acting on behalf of the Union.

B. Mixed Agreements:

1. Bilateral mixed Agreements:

Agreements between "*of the one part*" the Union (and Euratom) and its Member States, acting jointly, and "*of the other part*" a third country or international organisation.

Examples: Association agreements; Cooperation and Partnership agreements, Aviation agreements, European Economic Area (EEA).

2. 'Multilateral' Agreements

Agreements concluded by the Union and by (all or some) of its Member States and by third countries, whereby in principle all Contracting Parties have rights and obligations against each other.

Examples: most WTO agreements; some Conventions of the Council of Europe; the Paris agreement on climate change; certain regional fisheries conventions; the UNIDROIT Cape Town Convention and its Protocols; UN Conventions – including the Beijing Convention.

The importance of the Beijing Convention on judicial sale of ships for the European Union and its Member States

The establishment of a multilateral instrument on the international effects of a judicial sale is of direct relevance in the context of the Union's policy aimed at increasing growth in international trade and foreign investment, in line with the conclusions of the European Council of 20-21 October 2016¹, and reiterated by the European Council of 22-23 March 2018².

Over the years, the increase of international trade, foreign investment and global mobility of citizens have augmented both the legal risks for the companies and citizens involved and the potential costs of protecting international investments. Businesses transacting internationally seek legal certainty. The need for legal certainty does not only arise for companies including SMEs but also for EU citizens engaged in commercial activities who travel and have commercial relations outside the European Union.

The instrument dealing with the international effects of a judicial sale of a ship providing uniform rules with regard to the legal effects of that judicial sale and the deregistration or registration of that ship could contribute to the creation of a stable and predictable legal environment globally both for EU citizens and EU companies operating in third countries, thus promoting trade and economic growth.

A multilateral instrument on the international effects of a judicial sale of ships will underpin the growth of trade through increased legal certainty and will thus promote a stronger Europe in the world, as stipulated in the Commission Work Programme 2022³. Additionally, such an instrument will contribute to continue ensuring a transparent and inclusive trade policy, one of the commitments of the Commission's Trade for All Communication⁴, and as renewed in its Trade Policy Review - An Open, Sustainable and Assertive Trade Policy Communication adopted in February 2021⁵. Maritime transport plays a leading role in international trade, and it is estimated that more than 90% of world-wide traded goods are transported by sea⁶, which makes the ship a vital asset without which global commerce would not be possible. Therefore, considering that ships are the most cost-effective mode of transport, it is irrefutable that shipping is crucial for the world's economic

¹ The Council underlined "that an ambitious trade agenda could lead in the medium term to an overall increase of 2% in growth and the creation of over 2 million jobs" and commended in particular to work towards a comprehensive transatlantic trade and investment agreement.

² The Council reaffirmed "its commitment to an open and rules-based multilateral trading system with the WTO at its core, firm in the belief that free and fair trade is one of the most powerful engines for growth, supporting millions of jobs and contributing to prosperity" and it would continue "to pursue a robust trade policy, to promote its values and standards globally and to seek a level playing field".

³ Commission Work Programme 2022, COM(2021) 645 final.

⁴ Trade for All: Towards a more responsible trade and investment policy, COM(2015) 497 final.

⁵ Trade Policy Review - An Open, Sustainable and Assertive Trade Policy Communication COM(2021) 66 final.

⁶ Ocean shipping and shipbuilding - OECD (last visited at 07/12/21).

and social development⁷. On the other hand, matters related to international shipping are often afflicted with legal difficulties arising from the lack of international harmonisation, and unlike some areas of international shipping, a uniform instrument in relation to judicial sales of ships does not currently exist.

Given the lack of harmonisation between States on certain aspects of the judicial sale procedure, such an instrument could promote legal certainty and predictability at international and European level which would mean that EU stakeholders, and specifically prospective purchasers of ships are afforded the necessary and adequate protection, which in turn would bolster international maritime trade and commerce.

The EU and the Beijing Convention on judicial sale of ships

The European Commission which has observer status at UNCITRAL, representing the EU and its Member States and acting on a mandate given to it by the Council of the European Union (that is representatives from each of the 27 member states) participated in the meetings of Working Group VI on the basis of the positions adopted by the Council (known as ‘coordinated positions’).

The EU has exclusive external competence on some provisions of the Beijing Judicial Sales of Ships

How?

The EU is competent externally to the extent that it has adopted legislation internally on the same and/or similar subject matter and there is a potential risk of the affectation of the EU *acquis*.

Specifically with regard judicial sales of ships:

Article 81(2)(a) provides for measures aimed at ensuring “*the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases*” and Article 81(2)(c) covers the compatibility of the rules applicable in the Member States concerning jurisdiction, including for example in relation to actions concerning the annulment or suspension of the judicial sale of a ship.

Article 81(2)(b) and (d) further provide for “*the cross-border service of judicial and extrajudicial documents*”.

Moreover, Article 81(2)(e) aims to ensure the “*effective access to justice*”.

Brussels Ia Regulation:

In line with the policy objective to facilitate access to justice, in particular by providing rules on the jurisdiction of courts and rules on a rapid and simple recognition and enforcement of judgments in civil and commercial

⁷ “How Shipping has changed the world and the social impact of shipping”, 7 September 2010 (last visited 07/12/21).

matters given in the Member States, the legislator adopted the (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)⁸. The Regulation determines the courts of which Member State have jurisdiction to decide on a civil and commercial dispute where there is an international element. It further provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required, and that judgments as well as authentic instruments given in a Member State and enforceable in that State shall be enforced in another Member State without any declaration of enforceability being required. It also provides for two forms, namely, the certificate concerning a judgment and the certificate concerning an authentic instrument or a court settlement.

Service of Documents:

In addition, the EU has an internally well-developed system regulating the cross-border service of judicial and extrajudicial documents between the Member States. The service of documents system, which has applied since May 2001⁹, provides, *inter alia*, a procedure for the service of documents via designated “transmitting agencies” and “receiving agencies” without recourse to consular and diplomatic channels, and other methods of service. The system of judicial cooperation of service of documents has been recently modernised through the introduction of new rules¹⁰ seeking to improve the efficiency and speed of cross-border judicial proceedings by taking advantage of digitalisation and the use of modern technology, aiming to ultimately advance access to justice and a fair trial for the parties.

At the international level, the Hague Convention of 2005 on Choice of Court Agreements¹¹, the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹² as well as the parallel agreement concluded with Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters have the same scope of application as Regulation (EU) No 1215/2012

⁸ OJ L 351, 20.12.2012, p.1.

⁹ Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; OJ L 324, 10.12.2007, p. 79-120; Special edition in Croatian: Chapter 19 Volume 007 pp. 171-212. (Service of Dppocuments Regulation).

¹⁰ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast); OJ L 405, 2.12.2020, pp. 40-78.

Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast); OJ L 405, 2.12.2020, pp. 1-39.

¹¹ 510bc238-7318-47ed-9ed5-e0972510d98b.pdf (hcch.net).

¹² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 339, 21.12.2007, pp. 3-41; Special edition in Croatian: Chapter 19 Volume 014 pp. 281-319.

covering judgments and authentic instruments in civil and commercial matters (Brussels I a Regulation).

There is currently no specific international framework for certain aspects of the judicial sales of ships and specifically the recognition of foreign judicial sales of ships and their effects. Only certain issues arising in the context of judicial sale of ships have been to a limited extent subject to harmonisation on both the international and European level. This situation creates legal uncertainty, which does not benefit international trade and commerce.

The Beijing Convention will thus complement the existing framework in the Union when it is ratified by interested Member States, and on the international scene on the recognition and enforcement of judgments in civil and commercial matters, ensuring the recognition of effects of judicial sales of ships internationally.

- Member States retain their competence for the other provisions
- The Judicial Sales of Ships Convention includes a REIO clause (*Article 18*) allowing the EU to become a Contracting Party There is only one REIO where its MS have transferred national competences to it and it is the EU, there is no other comparable situation in the world.

Regarding the disconnection clause, this the most used system to reach the objective that EU Law is applied by Member States instead of international agreements. It is not the only system, as for instance Cape Town Convention and its Protocols have no proper disconnection clause, but the same objective is reached through a system of opt-in /opt-out declarations on certain matters. *Without a disconnection clause the EU will not be in a position to sign/ ratify and therefore the EU member states won't either.*

A disconnection clause is needed:

- to ensure legal security and clarity and prevent future conflicts;
- to ensure the consistency of any national measures taken on the basis of the Convention with EU law , and to avoid the fragmentation of the internal market and the hampering of its development.

The EU and the Comité Maritime International (CMI) - the road towards the finalisation of the Beijing Convention on judicial sale of ships

The European Commission negotiated the Beijing Convention on behalf of the European Union, for the parts falling within the exclusive competence of the European Union, and actively participated in all the formal and informal sessions/consultations. The Commission and the CMI worked closely in this process. The CMI has been instrumental in continuously provided its expertise on the technical matters.

The CMI was fundamental in securing and achieving difficult compromises between the EU and the members of the Working Group resulting in reaching a consensus on particularly important issues for the EU and its Member States for example on Article 4 (addition: due process – access to justice –*which shall also provide procedures for challenging the judicial sale prior to its completion.*).

Next Steps of the EU in relation to Beijing Convention on Judicial Sale of Ships

Subject to the time of the signatory ceremony, **a provisional roadmap** has been set up by the European Commission:

- *Step 1*: 2nd semester of 2023: Internal assessment on the feasibility for the EU to become a contracting Party. A positive outcome will lead to the next steps.
- *Step 2*: 2nd – 3rd semester of 2023
- Workshop on the Beijing Convention on judicial sale of ships
- *Step 3*: Proposal for a Council Decision on the signing, on behalf of the European Union, of the United Nations Convention on the international effects of judicial sales of ships.

Next steps of the EU in relation to the Beijing

- Next step after the signature:

Declarations

Article 18(2) provides that “[a] regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. [...]”.

Legal consequences

Authorisation granted after conclusion of Council decision/signature by EU:

- Those EU Member States which are interested are then allowed to sign the Beijing Convention on Judicial Sale of Ships

SCOPE OF APPLICATION: WHAT IS COVERED BY THE CONVENTION AND WHAT IS NOT?

TOMOTAKA FUJITA

1. Introduction

The 55th Session of the United Nations Commission on International Trade Law (UNCITRAL) approved the “Draft Convention on the International Effects of Judicial Sales of Ships.”¹ The Draft is sent to United Nations Assembly and will hopefully be finally adopted in a few months. The Draft has been developed UNCITRAL Working Group VI since 2019 and the basis of the deliberation, as you all know, was “Beijing Draft” prepared by Comité Maritime International (CMI).²

This presentation titled “Scope of Application” explains what is covered by the Convention and what is not. I try to focus on the differences between the text of convention and that of the Beijing Draft. The text of the Beijing Draft has been intensively reconsidered during the deliberation in the Working Group and final text of the Convention is substantially different from the Beijing Draft. I assume you are all familiar with the Beijing Draft but are not with the final text. It is worth confirming what is changed or added in the final text.

2. Judicial Sale of a Ship

1) Judicial Sale of a Ship under the Convention

Article 3(1) of the Convention provides that it applies to a “judicial sale” of a ship.³ Article 1(a) defines the term “judicial sale” as “any sale of a ship: (i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and (ii) For which the proceeds of sale are made available to the creditors.”

¹ Report of the United Nations Commission on International Trade Law Fifty-fifth session (27 June-15 July 2022), A/77/17, Annex I

² A/CN.9/WG.VI/WP.82 - Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International

³ Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:
 - (a) The judicial sale is conducted in a State Party; and
 - (b) The ship is physically within the territory of the State of judicial sale at the time of that sale.
2. This Convention shall not apply to warships or naval auxiliaries, or other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service.

2) Transfer of Clean Title

One should note that there is an important difference from the Beijing Draft which cannot easily be ignored. The definition of “judicial sale” under the Beijing Draft requires that a judicial sale should be the one “by which Clean Title to the Ship is acquired by the Purchaser.” The element is missing in the final text. The Convention, unlike the Beijing Draft, applies to a judicial sale in a contracting state regardless whether it confers clean title to the purchaser.

During the deliberation at UNCITRAL Working Group, it was recognized that judicial sales does not always confer clean title to the purchaser in number of states. What is worse, courts in such states sometimes cannot even know whether clean title is finally transferred in a particular judicial sale when the procedure commences. Therefore, if we include the transfer of clean title in the definition of judicial sale, such courts should proceed with the procedure of judicial sale without knowing whether the Convention eventually applies or not. It could cause problem with the application of Article 4 which provides the notice to the creditor which should be sent prior to the procedure of judicial sales.

At the same time, the purpose of the convention, as is stated in Article 1⁴, is to govern the international effects of a judicial sale of a ship that confers clean title on the purchaser. Therefore, it would be unnecessary or even undesirable to intervene with judicial sales of a ship which do not eventually confer clean title.

The solution adopted under the final text of the Convention is as follows. Article 3(1) opens its gate of the Convention to all judicial sales of a ship whether they confer clean title or not. At the same time, most part of the Convention applies after the judicial sale is completed and it applies if and only if the judicial sale conferred clean title to the purchaser in a particular case. Article 5 provides that a certificate of judicial sale is issued when a judicial sale that conferred clean title to the ship is completed. Articles 6 to 10 applies only when the certificate is issued which implies clean title is transferred to the purchaser. Essentially all substantive provision except Article 4 presupposes the clean title is transferred in a particular case.

Therefore, the scope of the Convention looks quite different from the Beijing Draft at the first glance, the real effects are not much different between the two texts.

3) Nature of the Claims Enforced by the Judicial Sale

There is no restriction for the nature of the claims which triggers the judicial sale. During the deliberation in UNCITRAL Working Group, some delegates argued that the Convention should limit its scope to the sales enforcing commercial or maritime claims. However, most delegates agreed that the nature of the claims which triggered the judicial sale is irrelevant

⁴ Article 1. Purpose

This Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser.

the viewpoints of the purchaser. Final text has no restriction for the nature of the claim. It is sufficient that the proceeds of sale are made available to the creditors.

One should also note that the judicial sale initiated by a public authority other than courts such as the tax authority are not automatically excluded from the Convention's scope as far as the proceeds of sale are made available to the creditors. Although there were some discussions in the Working Group, it was agreed that there is no distinction from the viewpoint of the purchaser even if judicial sales conducted by the court a public authority other than courts.

4) *Judicial Sale of a "Ship"*

The Convention applies to a judicial sale of a "ship", which means "any ship or other vessel registered in a registry that is open to public inspection 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." (Article 2(b)) The key to this definition is the registration and possibility of a judicial sale. Please note that the vessels for inland navigation are not excluded. This may cause problems with some states which are party to the Convention on the Registration of Inland Navigation Vessels (1965) which could cause conflict with regulation of this Convention. Article 13(1)⁵ provides a safeguard for those states.

3. Judicial Sales in Non-contracting States

Article 3(a) restricts the Convention's application to a judicial sale conducted in a State Party. This is another important difference from the Beijing Draft. Article 9 of the Beijing Draft provides "State Parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties." In other words, Beijing Draft applies to a judicial sale in non-contracting states unless a contracting state excludes it by a reservation.

I assume that the Beijing Draft intends to expand its scope as much as possible. However, there is no guarantee that judicial sales conducted in non-contracting states comply with the procedural requirements, *inter alia*, notice requirement under the Convention. What is worse, the Beijing Draft might have adverse effect for its promotion because even non-contracting states can issue certificates which are recognized by some, if not all, contracting states. In this sense, the final text of the Convention is more sensible.

However, the difference between final text and Beijing Draft may not be as large as it looks. I think even under Beijing Draft, most contracting states choose to make a reservation to limit application to judicial sales conducted

⁵ Article 13. Relationship with other international conventions

1. Nothing in this Convention shall affect the application of the Convention on the Registration of Inland Navigation Vessels (1965) and its Protocol No. 2 concerning Attachment and Forced Sale of Inland Navigation Vessels, including any future amendment to that convention or protocol.

in contracting states because they cannot be sure if certificate is issued in accordance with the Convention's requirements. The ultimate result would be the same as provided by the final text.

Please note, however, that the Convention does not prohibit contracting state from recognizing the effect of judicial sale conducted in non-contracting states if they wish to do so. Article 14 confirms that "nothing in this Convention shall preclude a State from giving effect to a judicial sale of a ship conducted in another State under any other international agreement or under applicable law."

4. Issues Not Governed by the Convention

Article 1 of the final text provides that the Convention governs the international effects of a judicial sale of a ship. It should be noted, however, not all effects of a judicial sale are not governed by the Convention. The focus of the Convention is the transfer of clean through a judicial sale and other aspects are not touched. Article 15⁶ clarifies the point. For example, the Convention does not address how the proceeds of a judicial sale are distributed among the creditors. Nor does it provide the issue whether or how personal claim against the previous shipowner is affected by the judicial sale.

Even certain aspects relating to the transfer of clean title of the ship is not governed by the Convention. Article 9 of the Convention provides the jurisdiction regarding the avoidance or suspension of the effect of judicial sales. However, the Convention does not address the effect of the decision rendered by the courts designated under Article 9. It is left to applicable law which is usually the *lex fori* of the court in the judicial sale. The issue was intensively discussed in the UNCITRAL Working Group and some delegates strongly stressed that the Convention itself instead of the domestic law of contracting states should provide the effect, *inter alia*, international effect of the avoidance or suspension. However, many delegates hesitate to have lengthy discussion to solve a difficult question which would arise under only extremely rare cases in most jurisdictions.

5. Conclusions

In this short presentation, I explained what is covered by the Convention and what is not. Although there are substantial differences between the final text and the Beijing Draft, the eventual function of the Convention remains essentially the same. I hope the presentation helps the better understanding of the Convention.

⁶ Article 15. Matters not governed by this Convention

1. Nothing in this Convention shall affect:

(a) The procedure for or priority in the distribution of proceeds of a judicial sale; or
(b) Any personal claim against a person who owned or had proprietary rights in the ship prior to the judicial sale.

2. Moreover, this Convention shall not govern the effects, under applicable law, of a decision by a court exercising jurisdiction under article 9, paragraph 1.

ARTICLE 4. NOTICE OF JUDICIAL SALE

FRANK NOLAN

Article 4 of the Convention sets out rules and requirements for notice of judicial sale which must be satisfied in order to qualify the sale for a Certificate of Judicial Sale. The Certificate of Sale is the document which requires a State Party to issue deletion certificates from prior registry or reregister the vessel in either case upon request of the purchaser or subsequent purchaser. Also, in the event a vessel is arrested or detained in another State Party after a Judicial Sale based on a claim arising prior to the Judicial Sale, the courts of the State party where such arrest or detention occurs is required to release the vessel upon production of a Certificate of Judicial Sale.

The delegates to UNCITRAL Working Group VI struggled mightily to arrive at the agreed language of Article 4. The many maritime practitioners in the Working Group repeatedly emphasized that the primary purpose of a notice of sale was to drive interest in the vessel and thus to maximize the sale price, usually at auction, for the ultimate benefit of the vessel's creditors. Some pointed out that the commencement of arrest proceedings and delivery of an order of arrest to the master of the vessel constituted all the notice to vessel owner interests that was traditionally required. Other traditional modes of notice in vessel judicial sales were publication in local press.

Article 4 begins in paragraph 1 by stating that judicial sales "shall be conducted in accordance with the laws of the State of judicial sale" making clear that the Convention does not interfere with the domestic processes of judicial sales in the States where they are conducted. However, paragraph 1 adds that the State of judicial sale "shall also provide for challenges to the judicial sale prior to its completion..." This language was inserted at the final session of the Working Group after strenuous debate among the delegates. The insertion was ultimately agreed with the understanding that all or most States already have domestic law practices and procedure which would satisfy this requirement and that no new legislative or regulatory action would be required in such cases. (See Explanatory Notes 99 and 100). An example of an acceptable provision satisfying the Convention language would be the opportunity for challenges to the sale prior to entry of a court's final order of sale under US law. The Convention itself is silent on what constitutes an acceptable provision. Moreover, it should be borne in mind that such procedures refer to challenges to the provisional sale remedy only and not to the filing, allowance or ranking of claims or the distribution of the proceeds of any such sale. The language of Article 4, paragraph 1 also does not apply to any post-sale challenges, which are addressed in Article 9 and which are allowed only in the State of judicial sale. The delegates were repeatedly reminded that the judicial sale of vessels is a provisional remedy

intended to convert the idled vessel, a wasting asset, into cash for eventual distribution to the claimants in the proceeding and, at the same time, to cut off continuing custodial costs for the arrested vessel.

The notice provisions set forth in Article 4 reflect a compromise with some incidental and perhaps unintended benefits. Importantly, the provisions are drafted in such a way that no State is required to implement or enforce heightened notice provisions. Instead, Article 4.2 provides that a certificate of judicial sale “shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship in accordance with the requirements of paragraphs 3 to 7...” of Article 4.

Paragraph 3 requires notice be given to:

- a) the ship’s registry, a feature welcomed by some ship registries which have been blind-sided by flag vessels being sold without the registry’s knowledge;
- b) holders of any mortgage, hypothec or registered charge, where in each can the register is open to the public and at which copies can be made. The public access to the registry is a requirement of other conventions and domestic laws of many jurisdictions as a fraud preventive requirement for recognition of foreign instruments;
- c) Maritime lien claimants who have notified the court or other public authority conducting the judicial sale. It is understood that this notice requirement would be satisfied by written filing of claims or intervention in the underlying arrest process. The language of paragraph 3 leaves the manner of notice to “the regulations and procedures of the State of judicial sale;”
- d) The owner of the ship’s; and
- e) to the bareboat charterer registry and to the person listed on bareboat charterer therein, in any case where a ship is enrolled in such a registry.

Article 4, paragraph 4 requires that a Convention notice satisfy the laws of the State of Judicial sale and also incorporate the items set out in Annex 1 of the Convention, “Minimum information to be contained in the notice of judicial sale.” The requirements set forth in Annex 1 are generally reflections of typical judicial sale requirements under a number of State domestic law requirements and are not burdensome, in any event.

Article 4, paragraph 5 retains the publication requirement typical of existing domestic law requirements, but refines it helpfully. Paragraph 5(a) refers to “press or other publications available in the State of judicial sale, a recognition that not every State has a press establishment, but that it is recognized that many specialized publications and general media often flow through many jurisdictions beyond their place of origin or establishment.

Paragraph 5(b) sets out the most novel feature of the notice provision, requiring that the notice be “transmitted to the repository referred to in article 11 for publication.” That repository will likely be the International Maritime Organization (“IMO”). Publication would occur by entry of the individual notice into the IMO’s GSIS system or its successor. The advantage of this process will be the creation of a central notice filing location, clearing away many concerns about the adequacy of notice. While the access to insert or

change information in GSIS would be restricted to authorized persons, the public will have open access to the posted information.

Article 4, paragraph 6 requires that the notice filed with the reporting be in one of the working languages of the repository or be accompanied by a translation into one of the working languages. In the case of the IMO, it means that notice as filed be in one of 3 languages: English, Spanish or French.

Article 4, paragraph 7 establishes rules as to the information on which notice providers may rely for determining whom to give notice. These are specified as follows:

- a) Information in the register of ships and bareboat charters register as the case may be;
- b) Information in the registry, where mortgages or hypothèque are registered; and
- c) Information on maritime lien claims filed with the court or other public authority responsible for conducting or supervising the judicial sale.

These provisions of Article 4 provide useful bright line rules for the notice provider's reliance. Even though the notice requirements themselves exceed the minimal standards set out in many existing domestic laws, they are not exorbitant. It is not difficult to foresee that the combination of this list of notification recipients and the public access to the repository could lead to greater uniformity in this aspect of judicial sales and itself reduce frivolous challenges to foreclosure sales.

CERTIFICATE OF JUDICIAL SALES ARTICLE 5 DRAFT CONVENTION ON THE INTERNATIONAL EFFECTS OF JUDICIAL SALES OF SHIPS THE “BEIJING CONVENTION”¹

JAN-ERIK PÖTSCHKE

One of the fundamental results of the new Beijing Convention is the certification of a judicial sale that conferred clean title to the ship by way of a certificate of judicial sale according to Article 5. The purpose of the certificate is to provide documentary evidence that the judicial sale conferred clean title to the ship under the law of the state of judicial sale. This includes that the judicial sale was conducted in accordance with the requirements of that law and the requirements of the “Beijing Convention”.

The certificate of judicial sale itself is no document of title, i.e. does not replace the order or decision of the authority conducting the judicial sale under the law of the state of judicial sale whereby the purchaser acquires ownership of the ship. Accordingly, it is not comparable to Bills of Lading, whereby ownership of the goods can be transferred by endorsement of the Bill of Lading. In addition to certify that a transfer of clean title by way of a judicial the sale took place, the certificate identifies the purchaser, who acquired clean title in the judicial sale.

From the purpose of the certificate of judicial sale it is apparent that the certificate shall only be issued after completion of a judicial sale. There have been lengthy discussions, to which extent it is necessary to define or describe a completion of a judicial sale in the “Beijing Convention”. In the end this point has not been taken up by and has been left to the law of the state of judicial sale, who in accordance with its regulation and procedures shall issue the certificate of judicial sale to the purchaser. The same applies to the authority, who shall issue the certificate of judicial sale. The “Beijing Convention” refers to the court or other public authority that conducted the judicial sale, or other competent authority of the state of judicial sale. This is another proof that the “Beijing Convention” does not intend to change the domestic procedural rules in a state of judicial sale, but rather establishes a harmonised regime for giving international effect to judicial sales while preserving domestic law governing the procedure of judicial sales and the circumstances, in which judicial sales confer clean title.

The contents of the certificate of judicial sale is described in Article 5 (2) (a) – (k) of the “Beijing Convention”. Article 5 (2) refers to a model of a

¹ The name “Beijing Convention” is not officially awarded but in Article 17 (1) a provision is made for a signing ceremony in Beijing.

certificate contained in Annex II. Next to a statement that the ship was sold in accordance with the requirements of the law of the state of judicial sale and the requirements of the “Beijing Convention” a statement is made that the judicial sale has conferred clean title to the ship on the purchaser, names the state of judicial sale, identifies the authority issuing the certificate and the name of the court or other public authority that conducted the judicial sale, including the date of sale, and obviously, the object, i.e. name of the ship, her registry or equivalent registry, the IMO number and, last but not least, the owner of the ship immediately prior to the judicial sale and the name and address of the purchaser. The certificate of judicial sale shall identify the date and place of issuance and shall bear a signature or stamp of the authority issuing the certificate or other confirmation of authenticity. According to Article 5 (6) the certificate of judicial sale may be issued in the form of an electronic record, provided the information contained therein is accessible so as to be usable for subsequent reference, a reliable method is used to identify the authority issuing the certificate and to detect any alteration to the record after the time it was generated.

Historically the idea of a model certificate is not new. The international working group of the CMI, who proposed in its draft to make reference to a model certificate, had the practitioners in mind like ship registries, judges, banks, mortgagees, investors etc. The concept of such specimen is known from the Brussels-I-Regulation Council Regulation (EC) No 44/2001 of 22 December 2000 (see Article 54 +58, Annex 5) wherein the enforceability of court decisions is confirmed. A further specimen of a certificate can be found in Regulation (EC) No 805/2004 of EU Parliament and Council of 21.04.2004 (see Article 9, Annex I; Article 24, Annex II) for a European Enforcement order for uncontested claims. The Regulation (EC) No 1896/2006 of EU Parliament and Council of 12.12.2006 (see Annex 7) provides for a specimen for European orders for payment procedures. Last but not least, the shipping practice is used to work with specimen as can be seen from various publications and standard contracts issued by BIMCO.

With the certificate of judicial sale the further procedures to deal with the ship subject to a judicial sale is facilitated. Persons who wish to acquire title to the vessel from the purchaser named in the certificate of judicial sale are referred to as “subsequent purchasers” by definition of Article 2 (j) of the Beijing Convention. The subsequent purchaser can use the certificate of judicial sale and apply for

- (a) deletion of the ship in the ships registry, where the vessel is registered at the time of the judicial sale, and
- (b) new registration of a ship in not necessarily the same but more likely another ship register, although it is understood that the subsequent purchaser would need to prove that he became the new owner of the ship and that he qualifies for registration in the state of the ships registry according to the rules and procedures applying in that new state of registration.

It is commonly accepted that a certificate of judicial sale alone does not substitute the further conditions required by the state of the ships registry for a new registration of the vessel.

Next to the notice of judicial sale described in Article 4 of the Beijing Convention the certificate of judicial sale according to Article 5 can be regarded as the most visible product of the “Beijing Convention”, which shall safeguard and harmonize the further actions required to give full effect to a judicial sale conducted in a state party to the “Beijing Convention”. There is no obligation for states, which are no state party to the “Beijing Convention”, to accept the certificate of judicial sale, but on the other hand the certificate of judicial sale has to be considered as reliable evidence about the completion of a judicial sale that conferred clean title to the ship under the law of the state of judicial sale.

October 2022

JUDICIAL SALE COMPLETED AND CERTIFICATE ISSUED. NOW WHAT? ARTICLES 7, 8 AND 9

PETER LAURIJSEN FICS

Vice President Belgian MLA

Once the judicial sale has been completed and the certificate of judicial sale has been issued in accordance with Article 5, the purchaser of the vessel will wish to delete the vessel from its old register and register her in the register of his choice. In this overview, we will be looking into Article 7 (*Action by registry*), dealing with the action to be taken by the registry in state parties. Upon registration of the vessel in the purchaser's register of choice, the purchaser will wish to operate and trade the vessel without interference by lien holders, ship financiers and other creditors holding claims pre-dating the vessel's judicial sale. This is covered by Article 8 (*No arrest of the ship*). Finally, we will cast an eye on Article 9 (*Jurisdiction to avoid and suspend judicial sale*), which deals with the avoidance of a judicial sale and the suspension of its effects.

Article 7, Action by registry

Article 7.1 contains a list of actions to be taken by the registries of state parties. These actions are among the main objectives of the convention. Indeed, when looking at the final paragraph of the preamble to the convention, we read that the convention's purpose is inter alia to "give international effects to judicial sales of ships sold free and clear of any mortgage or hypothèque and of any charge, *including for ship registration purposes*". Article 7 could be read as containing a number of conditions for the registry in the state party concerned to take certain actions.

The first condition is that the registry should be approached by the purchaser or subsequent purchaser of the ship. The subsequent purchaser has been defined in Article 2 (*Definitions*) as the person who purchases the ship from the purchaser named in the certificate of judicial sale referred to in Article 5 (*Certificate of judicial sale*). A further condition is that the purchaser should submit the certificate of judicial sale to the registry in question. The third condition is that any action required to be taken by the registry shall be subject to the rules and regulations of the state party (registry) but always without prejudice to Article 6 (*International effects of a judicial sale*). Reference is made to these rules and regulations mainly with flag states' requirements such as a genuine link between the owner and the flag state in mind.

Subject to these conditions, the registry of a state party shall take the following actions:

- a) Delete from the register any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale. It goes without saying that this action pertains the ship's old registry, i.e. the register the ship was registered in at the time of the judicial sale.
- b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration. So, after the ship has been cleansed of all registered encumbrances in her old registry, the ship as such is also deleted from the registry.
- c) Register the ship in the name of the purchaser, provided 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. Here the ship's new registry, i.e. the purchaser's registry of choice upon acquiring the ship in a judicial sale, is concerned. In connection herewith reference can be made to the third condition referred to above and contained in the chapeau of Article 7.1, i.e. the rules and regulations of the relevant state party. A good example, as mentioned above, is the requirement of a genuine link between the ship owner and the flag state.
- d) Final action required from the registry is to update the register with "*any other relevant particulars in the certificate of judicial sale*". These may consist of any of the particulars as listed in the model certificate of judicial sale as contained in Annex II to the convention.

Article 7.2 regards the situation where the vessel has a dual registration, i.e. in her primary register and in an underlying bareboat registry. Here too, the purchaser or, as the case may be, the subsequent purchaser is to approach the registry in the state party in which the ship was granted bareboat registration, whereupon that registry shall delete the ship from the bareboat registry and issue a certificate of deletion.

It is to be noted that there's a public policy exception to the requirements of Articles 7.1 and 7.2, namely if a court in the state of the registry, whether it is the old or the new registry, determines under Article 10 (*Circumstances in which judicial sale has no international effect*) that the effect of the judicial sale under Article 6 (*International effects of a judicial sale*) would be manifestly contrary to the public policy of that State. Consequently, only such a court decision can prevent the registry from taking the action or actions required from it.

Article 7.3 and 7.4 deal with rather formal requirements in respect of the certificate of judicial sale. If the certificate is not issued in an official language of the registry, the registry may request the purchaser to produce a certified translation into such an official language (Article 7.3). The registry may also request the purchaser to produce a certified copy of the certificate (Article 7.4).

Article 8, No arrest of the ship

The provisions of Article 8 (*No arrest of the ship*) aim to prevent the arrest of a ship which has been sold in a judicial sale for claims predating the judicial sale. As for Article 7 (*Action by registry*), we can refer to the preamble of the convention, where it is clarified that one of its core objectives is to ensure adequate legal protection for purchasers of ships sold in a judicial sale. The preamble continues to state that international trade is crucial in promoting friendly relations among states and that shipping plays a crucial role in international trade and transportation, wherefore high value assets such as ships should not be immobilised and arrested for claims predating the judicial sale.

It is from this perspective that Article 8.1 provides that if an application is brought before a court in a state party to arrest a ship for a claim arising prior to a judicial sale of the ship, the court shall upon production of the certificate of judicial sale, dismiss the application.

Likewise, Article 8.2 stipulates that if a ship is arrested by order of a court in a state party for a claim arising prior to an earlier judicial sale of the ship, the court shall upon production of the certificate of judicial sale, order the release of the ship.

Just like the registry under Article 7 (*Action by registry*), the court where an application for arrest of a ship is brought or which is requested to order the release, may under this Article 8 request to produce a certified translation of the certificate of judicial sale in the event it was not issued in an official language of the court.

The public policy exception discussed in the light of Article 7 (*Action by registry*) may play here as well: the court may indeed refuse to dismiss the application for arrest and may refuse to order the release of the ship if such dismissal or order would be manifestly contrary to the public policy of the state party in which the court is located.

Article 9, Jurisdiction to avoid and suspend judicial sale

The avoidance of a judicial sale and the suspension of the effects of a judicial sale are exceptional matters and are to be interpreted and applied restrictively. *Exceptio est strictissimae interpretationis*. The overriding principle is and remains that judicial sales conducted in accordance with the provisions of this convention should produce the international effects provided for in the convention.

Jurisdiction to hear any claim or application to avoid a judicial sale or to suspend its effects, is vested exclusively in the courts of the state of judicial sale. This extends to any claim or application to challenge the issuance of the certificate of judicial sale.

Reciprocally, the courts of a state party shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another state party that confers clean title to the ship or to suspend its effects.

It is important that court decisions avoiding or suspending the effects of a judicial sale for which a certificate has been issued, should be made public, considering that third parties may be relying on the certificate as made

available by the repository, i.e. on the GSIS system of the IMO. Therefore, Article 9.3 requires that the state of the judicial sale shall require the decision of a court that avoids or suspends the effects of a judicial sale for which a certificate has been issued, should be transmitted promptly to the repository referred to in Article 11 (*Repository*) for publication.

**LETTER FROM TILMAN STEIN
OF DEUTSCHE BANK
HAMBURG, OCTOBER 2022**

Dr. Ann Fenech,
Co-Chair of the International Working Group on Judicial Sales – Comité
Maritime International (“CMI”)

125th anniversary of the CMI – International Convention
on Foreign Judicial Sales of Ships and their Recognition

Dear Dr. Fenech,
It is my pleasure to write you in above matters.

As you know, I am a senior legal counsel at Deutsche Bank AG and advising on ship financing transactions for more than 24 years. In 2018, I had the honor to participate in the panel of the Malta Colloquium on Recognition of Judicial Sale of Ships, representing a bank’s view on the initiative for an International Convention on Foreign Judicial Sales of Ships and their Recognition.

Unfortunately, I cannot attend in person the CMI Conference in Antwerp this year. Please accept my apologies and this letter as a – although small – contribution on my part.

First of all, I am honored to congratulate the CMI to its 125th anniversary. During its long history, the CMI as a non-governmental not-for-profit international organization has contributed substantially to – i.a. - the unification of maritime law and thus to the maritime industry. Since the maritime industry is the backbone of our world economy the contribution and importance of the CMI cannot be underestimated. Therefore, my sincerest congratulations.

Secondly, I wish to express my deep satisfaction with the outcome of the Malta colloquium in 2018. When I was invited by you to join the panel on 27th February 2018, I did not have to think about it long, because I quickly recognized the importance of the International Convention on Foreign Judicial Sales of Ships and their Recognition. In the world of ship finance this convention is no less than a cornerstone! Since our world has become so small, international conventions setting widely recognized rules are of great importance. What is true under a global perspective is even more true when looking at the shipping industry.

Banks are and will remain indispensable when it comes to shipping and ship finance. But banks have the set-in-stone responsibility to safeguard the funds of their owners and creditors. Since vessels are high value investment objects the reliable enforceability of security granted on vessels is of utmost importance. Therefore, a convention which seeks to harmonize judicial sales and caters for the recognition of these sales seems indispensable and in hindsight it is astonishing that it took so long for this important piece of legal work to evolve. Only if the judicial sale of vessels securing financings will be recognized worldwide, buyers will be attracted and willing to pay good prices.

This helps the financing bank, is in the interest of the defaulting owner and – not at least – has a regulatory aspect, since mortgages on vessels are permitted to be booked on the banks' loan books with an equity relieving effect. Such permission is of course highly dependent on the reliable enforceability of such mortgages.

I represent Deutsche Bank in a working group monitoring more than 20 ship registers and ship mortgage regimes all over the world. This working group consists of 10 German banks. When I sat on the 2018 colloquium panel I did so with the support of these banks. I reported on the current status of the convention in our annual meeting last month and received unanimous appreciation.

I can only sincerely congratulate the CMI for having attended to this important piece of legal work. I certainly keep my fingers crossed for the convention to be adopted in the General Assembly of the United Nations in January 2023, a smooth signing ceremony soon thereafter and that the convention will be accepted and ratified worldwide.

Truly yours

Tilman Stein
Director and Senior Legal Counsel of Deutsche Bank

CMI 125TH CONFERENCE JUDICIAL SALE OF SHIPS

SØREN LARSEN - BIMCO

Thank you very much for giving me the opportunity to say a few words.

First, I would like to express my appreciation to the CMI for inviting me – and BIMCO – to join this Conference. The CMI and BIMCO have, since long, had close ties and in many ways shared views on the importance of the unification of international maritime law. It is therefore a great pleasure to be here today to celebrate the 125 years' anniversary of the organisation.

The topic for the International Working Group meeting today is of course judicial sale of ships and I cannot help remarking how appropriate it is that this impressive anniversary coincides with what will be the end of a long road – the road that led to the Beijing draft – when the UN General Assembly considers the draft Convention for adoption at its next meeting.

As some of you may recall, BIMCO played what I would call a “not insignificant role” in what led UNCITRAL to take on the project. My colleague Søren Larsen, long-time Deputy Secretary General of BIMCO, participated in the Malta Colloquium in 2018 and the UNCITRAL meeting soon after. Here – at a critical time when support for the project was somewhat limited – he expressed BIMCO's support to the project. One thing led to the next and the baton was picked up by the ICS who appointed Peter Laurijssen of CMB, who happens to also be member of BIMCO's Documentary Committee, to take part in the negotiations on behalf of the shipping industry. Peter has done a great job and I would like to take this opportunity to also thank him for all the hard work he has done in the past years.

And this brings me to the last, and perhaps most important, point I would like to make today: The reason why we decided to support the development of an international legal framework dealing with the judicial sale of ships is that this matter goes to the very roots of BIMCO and our *raison d'être* as an organisation – and, namely, our long-held view that a truly global industry such as shipping depends on global rules.

When the matter was discussed in Malta, it was against the backdrop of some very significant cases in which judicial sales had not been recognised across borders. Cases, where shipowners – either in their capacity as buyers, sellers or creditors – had had serious problems as a result of non-recognition in one state of a judicial sale in another state. An international legislative instrument had the potential to improve the situation and promote greater legal certainty. This is how BIMCO's support came about in the first place. Coupled with the close ties we have had with the CMI over the years.

We are now reaching the finishing line on what we consider a well-drafted, broadly acceptable and legally sound international instrument. For the same

reason we hope that the UNCITRAL General Assembly will approve the draft Convention and that it will quickly gain wide acceptance – and you can count on BIMCO's support in promoting it.

Thank you again for letting me address the International Working Group today. I wish you all a successful Conference and continued celebration of the organisation's first 125 years!

WHY ICS HAS DECIDED TO SUPPORT THE CONVENTION

LEYLA PEARSON

Senior Manager Legal International Chamber of Shipping

As soon as the draft convention was taken up by UNCITRAL, ICS engagement in the discussions was actively supported by our members - the national shipowners associations. This is because ICS is the advocate for international shipowners and operators at meetings of the UN bodies that impact on shipping. BIMCO also supported ICS engagement and asked us to lead. Our position has been co-ordinated with BIMCO throughout the discussions.

As it is quite a niche area, we had to look to our members for assistance and to provide the necessary expertise. We were delighted when the Royal Belgian Shipowners Association put forward Peter Laurijssen [CMB's Legal Director]. Peter of course had been involved in the project from the early stages as a member of the CMI IWG, and has represented ICS throughout the UNCITRAL discussions.

The ICS mantra is "global rules for a global industry" and so we were always supportive in principle of the wish to promote greater legal certainty in this area. The ultimate goal being to facilitate continued trading of a ship sold by way of a judicial sale, without disruption.

We were concerned however to ensure that a fair balance was struck between all of the interests involved in a judicial sale.

Shipowners are central to judicial sales of ships in their capacities as the owner of the ship being sold, the purchaser, and often as creditors with claims against the proceeds of sale.

From the outset, the ICS position was aimed at trying to ensure that due process safeguards would be in place for the defaulting shipowner while at the same time the all important legal certainty would be achieved for the purchaser.

The ICS Maritime Law Committee has considered the final text and concluded that an appropriate balance has been achieved and that the convention should be supported by ICS and promoted in due course when it is open for ratification.

How ICS will encourage States to ratify the convention

I mentioned earlier the ICS mantra of "global rules for a global industry". ICS has long recognised the importance of unification of maritime law to provide legal certainty for shipowners and operators that are trading internationally.

ICS and CMI are partners in a long-standing “ratification campaign” that was initiated by ICS many years ago and which we think could provide a good framework for promotion of the new convention.

The ICS Maritime Law Committee has agreed that the new convention should be included in the brochure that accompanies the campaign, when it is next updated.

Once the new convention has been officially adopted and is open for ratification, ICS will be asking its members (the national shipowners associations) to urge their governments to ratify it.

This is something that national shipowners associations and national maritime law associations could take up with their governments together. Many national shipowners associations are actively involved in their national maritime law associations and it could be more powerful to work together and join forces in the promotion of the new convention.

[The convention would promote greater legal certainty by ensuring that a properly held judicial sale of a ship in a State Party, which conferred clean title to the purchaser resulting in a certificate of judicial sale being issued by the State of the judicial sale, would be given full effect in other States Parties. This would be to the benefit of all interests.]

SANCTIONS IN CONNECTION TO RUSSIA'S INVASION OF UKRAINE

KONSTANTIN KRASNOKUTSKIY

Whilst a lot of information in the English language is available on sanctions imposed on Russia, foreign parties are less informed on countersanctions enacted by the Russian government. The latter have serious implications on parties dealing with Russia.

For Russia, the underlying document for the sanctions-related matters is Decree of the Government of the Russian Federation dated 05 March 2022 No. 430. This Decree stipulated the list of the so-called “unfriendly” countries which are subject to special economic measures in the sphere of international trade (see below).

The following countries were included in this list:

AUSTRALIA	MICRONESIA	SINGAPORE
ALBANIA	MONACO	UNITED STATES
ANDORRA	NEW ZEALAND	TAIWAN
EU COUNTRIES	NORWAY	UKRAINE
ICELAND	REPUBLIC OF KOREA	MONTENEGRO
CANADA	SAN MARINO	SWITZERLAND
LICHTENSTEIN	NORTHERN MACEDONIA	JAPAN
UNITED KINGDOM (INCLUDING JERSEY AND CONTROLLED OVERSEAS TERRITORIES – ANGUILLA, BRITISH VIRGIN ISLANDS, GIBRALTAR)		

1. Sanctions in relation to settlements and certain types of transactions

Decree of the Government of Russia dated 06 March 2022 No. 295 stipulated the Rules on the issuance by the Government Commission of permits for the following transactions with the legal and natural persons from the “unfriendly” countries:

- loans and credits;
- transactions aimed at obtaining ownership of immovable property. In Russian law, marine vessels and aircraft are immovable property.
- On 21 June 2022, the Government Commission allowed the residents of Russia to buy immovable property from non-residents if the payment

is made through a special ruble account opened in a Russian bank in the name of a non-resident seller.

- foreign exchange transactions with foreign persons connected with the “unfriendly” countries (criteria of nationality, economic activity, and profits are used);
- the mentioned transactions with any other foreign entities in respect to property bought after 22 February 2022;
- foreign currency transfers by the Russian residents to their foreign accounts.

Permits can be obtained by an application to the Commission containing all the necessary details of the resident company shall be provided. This mechanism is a long and complex process as the decision of the Commission shall be taken unanimously and the details of the resident company’s business activities shall be provided.

Decree of the President of Russia dated 28 February 2022 No. 79 had established mandatory sale of earnings in foreign currency obtained by Russian companies, which was later abolished (see the Protocol of the Government Commission dated 09 June 2022 No. 61).

2. Restrictions on the exportation of goods from Russia

Decree of the President of Russia dated 8 March 2022 No. 100 authorised the Government of Russia to approve a list of goods which cannot be exported from Russia. Decree makes a reservation that citizens of any state are entitled to export any goods for their personal use.

As part of Decree No. 100 implementation, the Government of Russia in Decree dated 03 March 2022 No. 311 established an absolute prohibition on the exportation of certain categories of goods until 31 December 2023.

As amended by Decree of the Government dated 11 May 2022 No. 850, the prohibition does not apply to all types of vessels, yachts, floating structures and their components. The prohibition still applies, *inter alia*, to watercraft for which navigability is secondary to their primary function; floating docks; floating or submerged drilling or production platforms; warships and rescue vessels; floating structures intended for scrapping.

This prohibition also does not apply to certain situations, among which transit transportation of goods starting and ending outside the Russian territory, vehicles for international transportation, and others.

If certain categories of goods are exported to the Eurasian Economic Union (EAEU)¹ countries, a preliminary authorisation is required in accordance with Decree of the Government of Russia dated 09 March 2022 No. 312. The procedure for obtaining relevant permits for the export of vehicles, their parts and components is established by the Order of the Ministry of Transport of Russia No. 99 dated 29 March 2022.

¹ The EAEU currently comprises five countries: the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation. See <http://www.eaeunion.org/?lang=en#about-countries>.

There could also be difficulties in returning seagoing vessels from the Russian bareboat charter due to the restrictions on calling foreign ports for vessels that are somewhat connected with Russia or whose last / next destination is Russia.

As an implementation of Decree of the Government of Russia dated 29 March 2022 No. 506, the Ministry of Industry and Trade adopted a list of goods which can be imported into Russia by retailers without the trademark or patent owner's permission if these goods have been put on the foreign market by this owner or with his consent. The according provisions of the Civil Code of Russia restricting parallel imports will not apply to the goods from the list. The list includes, *inter alia*, marine vessels, boats, and floating structures.

3. Restrictions on calling of foreign vessels at Russian ports

Federal Law dated 14 March 2022 No. 56-FZ allowed the Government of Russia to impose restrictions on the entry of foreign vessels into Russian marine and inland water ports on a reciprocal basis. In this regard, the broadest possible understanding of a foreign vessel is used, including the vessels exploited by a person "in any way" connected with a foreign state which imposed any restrictions on the Russia-related vessels.

Decree of the Government of Russia dated 21 March 2022 No. 418 stipulated the Rules for preparing and adopting decisions on the relevant restrictions.

Nevertheless, no relevant order has yet been adopted, and the above rules appear to be "dormant" until a political decision is taken to close Russian ports for foreign ships.

4. Measures to support the transport industry

Federal Law dated 15 April 2022 No. 92-FZ amended certain laws to introduce measures to support the transport industry amid international sanctions against Russia.

Under amendments to the Federal Law dated 29 April 2008 No. 57-FZ, transportation of some cargoes by sea and inland water transport now refers to activities of strategic importance for national defence and state security. The list of according cargoes has not yet been adopted.

As a result of these amendments, some restrictive measures are applied to foreign participation in such types of activities. For example, transport organisations shall obtain additional permits to continue their activity.

Under amendments to the Federal Law dated 03 August 2018 No. 289-FZ, containers transported by all types of vessels may be used repeatedly within the period of temporary importation in Russia.

What is more, the Government of Russia is empowered to decide on how obligations under leasing agreements in respect to all types of vessels shall be fulfilled. The Ministry of Transport has prepared an according draft decree in regard to marine vessels, inland transport vessels, and vessels of mixed (river-sea) navigation in 2022. The law has been entered into force.

This Draft decree stipulates that subject to parties' agreement, the vessel

may pass into the ownership of the lessee before he makes all the payments due; in this case, the lessee is not entitled to dispose of the vessel until the full payment.

According to the explanations of the Ministry of Transport, the decree will allow lessees to avoid sanctions imposed by the “unfriendly” countries.

5. Closure of Russian registers for third parties

According to Art. 50 of the Merchant Shipping Code of Russia, information on the vessel ownership shall be provided to third parties only if permitted by the owner of the vessel. Due to the sanctions imposed on Russian shipowners, there is a tendency to conceal information in the ship registers.

Also, Russian companies may conceal information in the company registers, including for any persons from the “unfriendly” states, even the company’s shareholders (Judgement of the Commercial Court of Kaliningrad Oblast in case No. A21-12303/2021 dated 16 May 2022).

6. Ambiguous approach of the Russian courts in disputes over claims of legal entities associated with the “unfriendly” countries

There was a trend in the Russian courts refusing to protect the rights of legal entities from the “unfriendly” countries with reference to the “abuse of right”. However, at the moment we can say that such negative practice has not become widespread, and most of the claims of foreign companies are heard in Russia as before.

In the Judgements of the Commercial Court of Murmansk Oblast in cases No. A42-3901/2022 and A42-3902/2022, vessels of the entity from an “unfriendly state” were in fact nationalised through the mechanism of the arrest of the vessels and their transfer to the bailee with the right to use the ships. It is already planned to start exploitation of one of the *de facto* expropriated vessels in spring 2023.

Finally, given the previous practice of Russian courts, there is a high risk that the Russian courts will refuse to recognise and enforce foreign arbitral awards due to the “inconsistency with the Russian public order”. In this case, public order may be interpreted in terms of the need to reverse the awards made in favour of legal and natural persons from the “unfriendly” countries or somehow connected to the “unfriendly” countries.

In this regard, the Supreme Court of Russia has already stated that the mere existence of sanctions imposed on the Russian legal entity by the state of the place of arbitration indicates a violation of the principle of arbitrators’ impartiality. In this case, the Russian legal entity is entitled to ignore the arbitration clause and file a claim to the Russian court (see: the Ruling of the Judicial Chamber on Economic Disputes of the Supreme Court No. 309-ES21-6955(1-3) in case No. A60-36897/2020 dated 09 December 2021).

“COVID-19: HOW SWIFT CAN INTERNATIONAL REGULATION ON SEAFARERS’ RIGHTS RESPOND TO A GLOBAL CRISIS?”

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The subject of my speech is “*COVID-19: How swift can international regulation on seafarers’ rights respond to a global crisis?*” – I came across this topic when preparing the second edition of annotations to the German Maritime labour Act, implementing the Maritime Labour Convention in Germany. As the pandemic is an ongoing event, I asked myself whether and how international regulation is able to fight an existing crisis, instead of merely reacting to an incident that occurred in the past.

Before we delve into this topic, kindly note that throughout this speech, I am taking the position of an objective observer. After all, I am just a maritime lawyer who lacks any inside information on the political discussions that took place at the time.

It is always a good starting point to look at the bigger picture. I would like to compare five different major events, which are or are not affecting seafarers:

The time span goes back to 1989 when the tanker “*Exxon Valdez*” had an oil spill near the Alaskan coast. You will probably remember that in the aftermath of the incident – especially through the initiative of the United States – the MARPOL Convention was modified through the 1992 amendments, inter alia providing for double hulls to protect the environment. Also, the OPRC convention came into existence. This is the Convention on Oil Pollution Prevention, Response and Co-operation.

The second major event is not a one-time incident, but an ancient threat to shipping that re-surfaced at the Gulf of Aden approximately from 2005. The measures taken against piracy were UN resolutions, the Djibouti Code of Conduct and the 2018 amendments to the MLC.

COVID-19 is the third major event. I will come back to the pandemic in the third part of this speech.

The fourth major event is the grounding of the “*Ever Given*” in the Suez Canal in Egypt. Why is it mentioned here? Because it demonstrates that there are incidents which only have an effect on the world’s economy and can be regulated by private actors in the industry.

Finally, of course, the Russian-Ukrainian war today is one of the global events strongly affecting not only the economy in Europe but also seafarers.

Parallel Session V - 5.1 Fair Treatment of Seafarers

So far, the measures taken on international level were UN resolutions and, for instance, the Black Sea Grain Initiative. As of today, I am not aware of any new International Regulation protecting seafarers because of the war.

Event	„Egon Valdez“	Piracy	Covid-19	„Ever Given“	Russo-Ukrainian War
a) location b) time	a) Alaska (US) b) one-time-incident (24 March 1989)	a) multi-jurisdictional b) repeated one-time- incidents (Somalia since 2005)	a) global b) continuously (since Dec 2019)	a) Suez Canal (Egypt) b) one-time-incident (23 March 2021)	a) one country (Ukraine) b) continuously (since 24 Feb 2022)
Impact a) geographically b) temporally c) object	a) regional (US coast) b) decades c) environment	a) regional (South East Asia, West Africa, etc.) b) fluctuating (ongoing) c) (economy,) seafarers	a) global b) continuous, ongoing c) economy, seafarers	a) mainly Europe b) months c) economy	a) mainly Europe b) continuous, ongoing c) economy, seafarers
Actions taken by whom	• IMO • private actors	• UN • IMO • ILO • private actors	• UN • IMO • ILO • private actors	• IMO • private actors	• UN • IMO • ILO • private actors
International Regulation	a) MARPOL 1992 amendments: “Double Hull” b) OPRC	a) UN Resolutions b) <u>Dijebai CoC</u> c) <u>MLC 2018 amend.</u>	a) <u>UN Resolution</u> b) <u>Circ. 4204, etc.</u> c) <u>MLC 2022 amend.</u>	• n/a	a) UN Resolutions b) BSGI
Time until it came into existence / force	a) 6 March 1992 / 6 July 1993 b) 30 Nov 1990 / 13 May 1995	a) Res. 1816 (2008) of 2 June 2008 b) 29 Jan 2009 / 29 Jan 2009 c) 5 June 2018 / 26 Dec 2020	a) Res. A/Res./75/37 of 1 Dec 2020 c) 6 June 2022 / 23 Dec 2024	• n/a	a) Res. A/Res./ES-11/1 of 2 March 2022 b) 22 July 2022 / 22 July 2022

NOTE: This table was created by Arneke Sibeth Dabelstein for the sole purpose of the CMI 125th Anniversary Conference in Antwerp (18-21 Oct 2022). Date: 18 Oct 2022

Based on this comparison the first conclusion does not come as a surprise: One-time incidents with regional effects usually do not give rise to a need for international regulation of seafarers rights. Repeated one-time incidents and incidents with supranational effects affecting seafarers *may* give rise to a need for international regulation.

But how swift can international regulation respond to a major event? I will outline the instruments available based on the Maritime Labour Convention, 2006.

The MLC was adopted by the ILO (and not the IMO) in February 2006. It entered into force in 2013. Currently 101 countries have ratified the convention. As you all know, its effects go beyond this number. Vessels flying flags of non-member states are bound by it, because of the “*no more favourable treatment*” principle, which port states must apply to achieve a level playing field. The convention has 16 articles, an explanatory note, 28 regulations and a code. The code is consisting of standards and non-binding guidelines.

The MLC can always be amended based on the traditional procedure: First, the general conference of the ILO adopts an amendment to the MLC with two thirds of its delegates. The convention will enter into force once 30 members with a total share in gross world tonnage of at least 33% ratify it. Germany did not accede to the MLC, but was forced to ratify it because the EU adopted a Directive which incorporated the convention into European law. Once the threshold of 30 members with 30% tonnage has been passed, the convention will enter into force twelve months after this requirements are satisfied.

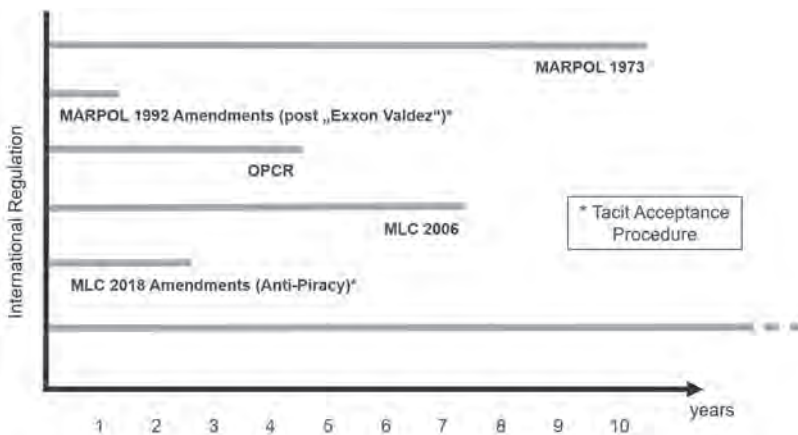
In addition the ILO adopted what is called the “*tacit acceptance procedure*” in order to allow swift amendments of the MLC. The procedure is as follows: Upon a proposal by a one of the relevant groups which is communicated to all members, the special tripartite committee will debate and decide whether the amendment is approved or not. The last time this happened was in Geneva in May 2022. Upon twelve proposals, eight amendments were adopted. Once approved, the amendment proposal is forwarded to the conference of the ILO, which then usually adopts the amendment. It is notified to all members, which are asked whether they formally disagree with it. The time for such disagreement is usually two years. However, the MLC allows narrowing down this time window to one year. Art. XV para 6 expressly states:

This (notification) period shall be two years from the date of the notification unless, at the time of approval, the Conference has set a different period, which shall be a period of at least one year.

An amendment will not be accepted only, if 40% of members disagree representing at minimum 40% of world gross tonnage. After the expiry of the notification period, the amendment will enter into force six months later.

For instance, in respect of the MLC 2018 amendments, the ILO adopted the proposals made by the special tripartite committee on 5 June 2018. The member states were notified on 26 June 2018. Two years later, on 26 June 2020, the notification period expired. Another six months later, the 2018 amendments came into effect.

The effects of the *tacit acceptance procedure* can easily be seen on the following table. It took MARPOL 1973 more than ten years to come into force, the MARPOL 1992 amendments only slightly more than one year. The OPCR convention was comparatively fast with four and a half years. The MLC entered into force seven and a half years after its adoption, the MLC 2018 amendments three times faster. The Rotterdam rules – certainly an unfair comparison – have not yet entered into force. The process is pending for almost 15 years now.



It is interesting to note that the 1992 MARPOL amendments, a convention that protects the environment, have been enacted more than one year faster than the 2018 MLC amendments. This session is part of the CMI International Working Group of Fair Treatment of Seafarers, and to me, while there are good reasons for the distinction, this does not seem “fair”, at least where the health of the seafarers is at stake.

To conclude the second part of my speech: The *tacit acceptance procedure* provides an internationally accepted legal mechanism to immensely quicken the process to amend international regulation. The ILO, for the first time, included the *tacit acceptance procedure* in the MLC. The time for amendments to the MLC is usually two years, which is at least one year longer in comparison to other IMO conventions, although the mechanism is in place to alter this.

The third part of my speech will focus on the question how and how swift international regulation to protect seafarer's rights was enacted in connection with the COVID-19 pandemic. I will not address each single item of the history of COVID-19, but will focus on the relevant steps and measures. Being a guest here in Antwerp, however, I have to point out that seemingly the International Maritime Health Association (IMHA) from this beautiful city issued the first shipping related advice on COVID-19.

Following the outbreak of COVID-19 in China, the IMO essentially provided information and guidance through Circular letter no. 4202. The Circular Letter has, in total, 43 addenda. Some of the addenda have multiple revisions.

Initially, the IMO informed the maritime industry about the development of the virus and in particular the findings of the WHO. As you will remember, the ways of infecting with the new virus, its effect on human beings, were completely unknown at the time. This uncertainty caused the national states to take national measures. One of these measures was the 14 day quarantine imposed by Japan on 5 February 2020 on the crew and passenger of the cruise vessel “*Diamond Princess*” off Yokohama. The event was displayed worldwide through the media. It became obvious that swift international guidance for the shipping industry was necessary.

Henceforth began what I would call the “guidance on managing” phase of the IMO. The Circular letter 4202 addressed various topics, for instance, (i) how to handle the outbreak of COVID-19 aboard the vessel, (ii) how to maintain maritime trade, (iii) how to perform the delivery of vessels and (iv) port state control, (v) how seafarers obtain medical certificates when they cannot see a doctor, (vi) how energy offshore works can be performed on confined spaces, (vii) how personal protective equipment must be equipped, (viii) how inspections of vessels can be performed, (ix) how seafarers can disembark without infecting other people, etc. This list is far from being complete, but it illustrates the immense efforts that the IMO and other actors in the maritime industry undertook to maintain global trade in the world through shipping.

You will also note the first references to what became the so-called “crew change crisis”. The term “crew changes” appears more often from April 2020. The crew change crisis arguably had its climax in the fourth quarter of 2020, with up to 400,000 seafarers not being repatriated.

The first legal instruments used by UN organisations were resolutions by the IMO, the UN and the ILO that aimed at declaring seafarers so-called “*key workers*” or “*essential workers*”. This was important, for example, to allow seafarers to be vaccinated more quickly and to continue to work when other workers had to be stay at home.

In March 2021, the special tripartite committee held a virtual meeting. Two resolutions were passed. However, no proposal for an amendment to the MLC was adopted. Only later, in May 2022, the special tripartite committee adopted the 2022 MLC amendments, which were then accepted by the conference of the ILO in June this year. They will enter into force in December 2024.

This last aspect is the one that puzzled me. As outlined before, the ILO conference is entitled to shorten the notification period from two years to one year, which would mean that the 2022 MLC amendments would come into effect in December 2023. It is, of course, possible that the pandemic will have ceased by then. But, as we have all experienced, there is still some uncertainty whether a new variation of the virus will spread. It is at least impossible to exclude that the MLC 2022 amendments might have an immediate effect on the health of seafarers. For me, as an outsider to political discourse, it is astonishing that the ILO conference did not make use of this instrument available to them in such situation.

I would like conclude the last part of my speech as follows: The *tacit acceptance procedure* was not used as an instrument to respond to COVID-19, because the notification period was not shortened to one year. It was cooperation among UN organisations and private associations, information and guidance on an interpreting international regulation and bringing the needs of seafarers to the attention on the highest level, which were the means to fight COVID-19.

20 October 2022

THE IMPACT OF THE RUSSIAN-UKRAINIAN ARMED CONFLICT ON THE PROTECTION OF SEAFARERS IN THE LIGHT OF INTERNATIONAL HUMANITARIAN LAW

VALERIA EBOLI*

Introduction

The protection of seafarers has been challenging more than ever in the last years. First, the Covid 19 outbreak severely affected their safety and their rights. More recently the outbreak of an equally severe situation of armed conflict in the crucial Black Sea area impacted them on a large scale as well.

In the latter case, the legal regime for their protection appears more complex due to the applicability of the specific norms arising from international humanitarian law, applicable during armed conflicts. They provide for a particular protection in relation to the specificity of the circumstance.

So the general legal framework applicable at sea in the aforementioned context will be outlined, highlighting some of the main provisions regarding the protection of merchant vessels and seafarers and giving some examples of their concrete applicability in the practice.

The general context: the Russian-Ukrainian armed conflict

As it is well known, on February 24th 2022 an international armed conflict¹ broke out between the Russian Federation and Ukraine².

Russia declared to conduct a special military operation³, while Ukraine, supported by a large part of the International community, classified such activity as an aggression⁴.

In such a framework, some military operations take place at sea too, potentially affecting the civilian activities, such as shipping, of the area.

* Views and opinions expressed are solely by the Author.

¹ For the legal classification of the situation see Michael N. Schmitt, *Classification Of The Conflict(S)*, Dec 14, 2022 <https://lieber.westpoint.edu/classification-of-the-conflicts/>; *International armed conflict in Ukraine*, <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine>.

² David R. Marples (ed.). *The war in Ukraine's Donbas : origins, contexts, and the future*, Budapest ; New York : Central European University Press, 2022.

³ Russia had 'no choice' but to launch 'special military operation' in Ukraine, Lavrov tells UN, 24 September 2022, <https://news.un.org/en/story/2022/09/1127881>; Mary Ilyushina, Putin declares 'war' – aloud – forsaking his special euphemistic operation, 22 December 2022, <https://www.washingtonpost.com/world/2022/12/22/putin-war-ukraine-special-operation/>

⁴ Resolution adopted by the General Assembly on 2 March 2022, Aggression against Ukraine, A/RES/ES-11/1, 2 March 2022, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/293/36/PDF/N2229336.pdf?OpenElement>

Valeria Eboli

For instance, ships may be under the threat of attack; shipping could be unsafe to do so due to the presence of sea mines or other hazards, seafarers affected by the conflict could be prevented from returning home or even from communicating with their families.



Source: <https://www.britannica.com/place/Black-Sea>

When an armed conflict arises, there is a specific need of protection in relation to the conduct of hostilities that put at serious risk the human activities and the life itself.

International humanitarian law (IHL) is specifically designed to govern it. IHL aims to ensure the protection and humane treatment of persons who are not, or no longer, taking a direct part in the hostilities and also the combatants through the limitation of means and methods of warfare that parties to a conflict may employ.

Whenever an armed conflict exists, IHL applies. From a legal perspective IHL applies irrespective of whether a political state of war has been formally declared or recognized⁵ or even if one of the belligerent States denies the existence of a state of war⁶. “The existence of an international armed conflict is determined, primarily by what is actually happening on the ground.”⁷ An international armed conflict is presumed to exist as soon as a State uses armed force against another State.

⁵ Nils Melzer, *International humanitarian law: a comprehensive introduction*, Geneva, ICRC, 2016, p.57

⁶ Ibidem.

⁷ Ibidem.

Additionally IHL interplays with international human rights law which is relevant as well, as it applies at all times, in peace and in war⁸. It complements and reinforces the protection afforded by International Humanitarian Law.

As far as the law of the sea is concerned, IMO conventions remain applicable too.⁹

Military Operations at sea

When military operations take place at sea there are specific rules applicable. Those protected are also at sea those not or no longer participating in the hostilities and namely civilians and civilian objects. So there are mainly two issues at stake: first, the protection of individuals, i.e. seafarers and, the protection of civilian activities: namely navigation and shipping.

The protection of civilians is one of the cornerstones of IHL. It is based on principle of distinction, according to which parties to an armed conflict must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”¹⁰

In order to understand who are the civilians at sea and which is the protection they enjoy, reference has to be made to IHL norms applicable to the so called naval warfare.

There is not yet any comprehensive treaty on the subject, but the law of naval warfare consists primarily of customary international law.¹¹

The Second Geneva Convention of 1949 for the protection of the wounded, sick, and shipwrecked, as supplemented by a few provisions of the 1977 First Additional Protocol to 1949 Geneva Conventions,” provide for some rules as well.¹²

A comprehensive international document articulating the modern law of naval warfare is the San Remo Manual on International Law Applicable to

⁸ Anyway it has to be noticed that Russia withdraw some of its human rights obligations after the outbreak of the armed conflict. Russia ceases to be party to the European Convention on Human Rights, 16 September 2022, <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights>.

⁹ IMO Extraordinary Council Session held to discuss the impacts on shipping and seafarers of the situation in the Black Sea and Sea of Azov, <https://www.imo.org/en/MediaCentre/PressBriefings/pages/ECSSstatement.aspx>.

¹⁰ AP I, Art. 48.

¹¹ Some sources are the following: Hague Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907 (entered into force 26 January 1910), Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907 (entered into force 26 January 1910), Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IX), Hague Convention (XI) relative to Certain Restrictions with regard to the Exercise of the Right to Capture in Naval War, The Hague, 18 October 1907 (entered into force 26 January 1910), Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907 (entered into force 26 January 1910). Such Conventions are deemed as correspondent to customary law. See N. Ronzitti, *Diritto internazionale dei conflitti armati*, Torino, 2021.

¹² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 3, 16 ILM 1391 (1977).

Armed Conflicts. It is not a source of law, but provide for a guidance of the existing rules, prepared by a group of experts under the auspices of the International Institute of Humanitarian Law¹³.

Traditionally, belligerent naval operations were permitted anywhere at sea except within neutral territorial seas. After the UNCLOS, marine areas subject to coastal state jurisdiction grew up, so that “the area of potentially neutral waters where belligerent naval operations would normally be prohibited has multiplied”¹⁴. According to the Sanremo Manual, “In carrying out operations in areas where neutral States enjoy sovereign rights, jurisdiction, or other rights under general international law, belligerents shall have due regard for the legitimate rights and duties of those neutral States.”¹⁵

Naval warfare is primarily concerned with ships rather than individuals. The law of naval warfare deals with individuals only insofar as they qualify as protected persons.

In naval warfare warships are deemed as combatants. As far as merchant ships are concerned, a distinction can be made between those flying the flag of the “enemy” and neutral merchant vessels¹⁶.

As a matter of principle, merchant ships not involved in the hostilities cannot be attacked.

Furthermore, shipping can be deemed as a protected civilian activity, i.e. functional to civilian life, based on the aforementioned principle of distinction.

The crews of merchant vessels, as far as are not involved in the hostilities are protected by IHL as well.

In the Russian- Ukrainian armed conflict, military operations take place at sea too. To comply with the aforementioned rules, they should be conducted having regard to the rights of neutral States and cannot take place everywhere.

Protection of Merchant Vessels and Seafarers under International Humanitarian Law

Beside the principle of distinction, according to which, military objectives only can be targeted, a general protection of merchant ships is provided by IHL.

The protection of merchant ships and crew members in the event of armed conflict is guaranteed by the Fourth Geneva Convention ‘relative to the Protection of Civilian Persons in Time of War, dated 12 August 1949, and Additional Protocol I to the Geneva Conventions, dated 8 June 1977, as well as the customary rules of international humanitarian law.

Merchant ships and their crews are not military targets. Targeting them would amount to a serious violations of IHL because they amount to deliberate

¹³ San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Louise Doswald-Beck ed., 1995).

¹⁴ J. Ashley Roach *The Law of Naval Warfare at the Turn of Two Centuries*, The American Journal of International Law, Jan., 2000, Vol. 94, No. 1 (Jan., 2000), pp. 64-77, at 67.

¹⁵ Para. 12.

¹⁶ See below.

attacks on a civilian object¹⁷. Also Indiscriminate attacks that could knowingly harm a civilian object and potentially endanger the environment within the meaning of Article 85(3)(b) of the I Additional Protocol are prohibited.

The crew members of merchant ships are civilians and are not, therefore, lawful targets of attack¹⁸.

The only exception from the prohibition on targeting merchant ships is when they are effectively contributing to military action¹⁹. They lose their protection only if they are used for military purposes, i.e. they actively participate in the hostilities or otherwise make an effective contribution to military action, e.g., carrying military materials.

So they lose their protection only if they are used for military purposes.

Detaining and capturing enemy merchant ships is permissible, but IHL requires that the private individuals who own the vessel receive compensation for the seizure.²⁰

In the framework of the ongoing armed conflict in the Black Sea, it has been reported that the military actions have sometimes involved merchant vessels flying the flag of third States, inflicting damages on shipowners and cargo owners from different countries²¹.

According to IHL, as concerns the commercial traffic in the area, attacks against neutral merchant vessels – i.e., those not flagged by either belligerent state – are prohibited.

In the ongoing armed conflict Russia has established restricted areas that affect freedom of navigation of foreign-flag shipping in both the Black Sea and the Sea of Azov.

A maritime exclusion zone (MEZ) is used “to warn vessels and aircraft to avoid an area of naval operations, which reduces the possibility that neutral vessels will be mistakenly identified as a military objective and attacked”²²

The extent, location, and duration of an MEZ and the measures used to enforce the zone should not exceed what is required for military necessity²³.

Nevertheless there is an obligation to ensure the safe passage of neutral merchant vessels through such zones.

However, in wartime, also neutral merchant vessels may be subject to visit and search in the Exclusive Economic Zone and the High Seas by belligerent states.

Safe zones at sea

A specific measure to protect persons not participating in the hostilities is the establishment of Humanitarian corridors, according to Article 70,

¹⁷ Article 85(3) (a) of AP I and Article 8(2)(b)(ii) of the Rome Statute of the International Criminal Court.

¹⁸ Article 50 of Geneva Convention IV).

¹⁹ San Remo Manual on Armed Conflicts at Sea, Paragraph 67.

²⁰ see Paragraphs 59-60 of the San Remo Manual; Article 53 of the Hague Regulations

²¹ <https://www.bloomberg.com/news/articles/2022-02-25/ships-shelled-in-black-sea-as-invasion-sparks-maritime-chaos>.

²² U.S. *Commander's Handbook on the Law of Naval Operations (NWP)*, Appendix A.

²³ Raul Pedrozo, *Maritime Exclusion Zones in Armed Conflicts*, 12 April 2022, <https://lieber.westpoint.edu/maritime-exclusion-zones-armed-conflicts/>.

Additional Protocol I to the Geneva Conventions of 12 August 1949²⁴.

Both humanitarian corridors and safe passage routes for merchant vessels should be based on an agreement between the belligerent parties. Therefore it could be questionable whether a corridor established by unilateral declaration of one of the parties only would be lawful²⁵.

As concerns the law of the sea, it is assumed that the rights of innocent passage in the territorial sea and the freedom of navigation beyond it, continue to apply even if they might be restricted for the safety of these vessels during naval warfare operations²⁶.

The establishment of humanitarian corridors could be an option to evacuate seafarers trapped in Ukrainian ports and to resume Ukrainian exports.

Anyway, such aim was better pursued through the Black Sea Grain Initiative, mainly based on maritime law.

IMO promoted such initiative to address the safety and security of seafarers and shipping and to establish a humanitarian maritime corridor to allow ships to export grain and related foodstuffs and fertilizers from Ukraine, involving representatives of the Russian Federation, Türkiye, Ukraine and the United Nations²⁷.

Impact of some military activities on the freedom of navigation

The freedom of navigation can be affected by some military activities during an armed conflict. In particular some restraints may arise from naval blockades and mining.

Naval Blockade

*A Naval Blockade may be defined as “a belligerent operation to prevent vessels and/or aircraft of all States, enemy as well as neutral, from entering or exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of an enemy State”*²⁸.

It should be declared and notified to all belligerents²⁹ and must be effective³⁰. A blockade has to be applied impartially to the vessels of all States³¹.

²⁴ See James Kraska, ‘Safe Conduct and Safe Passage’ in Max Planck Encyclopedia of Public International Law (December 2009, Oxford University Press).

²⁵ <https://www.reuters.com/world/europe/russia-ready-set-up-corridor-ships-carrying-food-leave-ukraine-ifax-2022-05-25/>.

²⁶ Wolff Heintschel von Heinegg, ‘The United Nations Convention on the Law of the Sea and Maritime Security Operations’ (2005) 48 German Yearbook of International Law 151, James Kraska, ‘Military Operations’ in D Rothwell, A Oude Elferink, KN Scott and T Stephens, *The Oxford Handbook of the Law of the Sea* (2015 OUP) Ch 38.

²⁷ <https://www.imo.org/en/MediaCentre/HotTopics/Pages/MaritimeSecurityandSafetyintheBlackSeaandSeaofAzov.aspx>.

²⁸ Handbook on the Law of Naval Operations, quoted above.

²⁹ It should be declared and notified to all belligerents (Rule 93 of the San Remo Manual). The rules of naval blockade “were applicable to blockading actions taken by States regardless of the name given to such actions.

³⁰ Rule 95 of the San Remo Manual.

³¹ Rule 100 of the San Remo Manual.

Then it must not bar access to the ports and coasts of neutral States and the blockading belligerent shall allow the passage of essential and medical supplies.

When a merchant vessel is believed on reasonable grounds to be breaching a blockade may be captured. Furthermore, merchant vessels which, after prior warning, clearly resist capture may be attacked.

It is controversial whether some measures implemented by Russia in the Sea of Azov regarding the suspension of shipping amount to a naval blockade, taking into account that the rules of naval blockade are “applicable to blockading actions taken by States regardless of the name given to such actions.

On 24 February 2022, Russia suspended commercial navigation in the Sea of Azov until further notice. The suspension of commercial navigation in the Sea of Azov was ordered by the Russian Ministry of Defence and announced by the Federal Agency for Maritime and River Transport³².

Looking at Russia’s practice in the Sea of Azov it seems that the main requirements of naval blockade (declaration, notification, impartiality and effectiveness) are met.

Naval Mines

Another belligerent activity negatively affecting the safety of seafarers and the freedom of navigation is mining.

Such practice has been largely used, as reported, in the framework of the ongoing armed conflict³³.

There is not an agreed unique international law definition of what constitutes a naval mine³⁴. However, NATO defines naval mines as ‘an explosive device laid in the water, on the seabed or in the subsoil thereof, with the intention of damaging or sinking ships or of deterring shipping from entering an area’³⁵.

³² “‘Under Article 2(3) of the 2003 Kerch Treaty, the access of neutral States’ warships and other State vessels operated for non-commercial purposes to the Sea of Azov is closed during the on-going war as it is dependent on Russia’s and Ukraine’s mutual prior permission Russia also controls the airspace above the Sea of Azov.” See Alexander Lott, *Russia’s Blockade in the Sea of Azov: A Call for Relief Shipments for Mariupol*, 14 March 2022, <https://www.ejiltalk.org/russias-blockade-in-the-sea-of-azov-a-call-for-relief-shipments-for-mariupol/> Written by

³³ <https://shipping.nato.int/nsc/operations/news/-2022/risk-of-collateral-damage-in-the-north-western-black-sea-2>.

³⁴ Generally, naval mines can be categorized into several types, Moored mines are those secured to the bottom of the seabed by an anchor, hovering beneath the surface of the sea and usually detonated on contact with a vessel.

Drifting or floating mines are described as those resting on the sea bed and operated on the basis of magnetic, electric, acoustic or pressure signatures from passing vessels; bottom mines are anchored to the bottom of the seabed, programmed to release either a floating or fired payload, based on specific targeting criteria. Remotely controlled mines are designed to be laid in target areas that are difficult to reach, including inner harbors, dockyards and upstream of rivers. Then, there are submarine launched mobile mines, and rising or rocket mines. In addition, there are pre-laid mines, which can be armed remotely or manually.

³⁵ Wolff Heintschel von Heinegg, ‘The law of armed conflict at sea’ in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflict* (OUP 1995) 445.

According to the law of naval warfare and namely the 1907 Hague Conventions VIII and the customary law rules as enshrined in the 1995 San Remo Manual there are some dispositions applicable to the use of naval mines³⁶. The parties to the conflict shall not lay mines unless effective neutralization occurs when they have become detached or control over them is otherwise lost. It is forbidden to use free-floating mines unless they are directed against a military objective; and they become harmless within an hour after loss of control over them.

Sea minelaying prior to or after an armed conflict has initiated is subject to the principles of effective surveillance, risk control and warning. In addition, feasible measures of precaution shall be taken for the safety of peaceful navigation. Therefore minelaying parties have to record minefield locations and test that mines have been programmed or tethered correctly. Also to, facilitate warning and mine clearance duties.

Mining operations in the internal waters, territorial sea or archipelagic waters of a belligerent State should provide, when the mining is first executed, for free exit of shipping of neutral States. Mining of neutral waters by a belligerent is prohibited.

Mining shall not have the practical effect of preventing passage between neutral waters and international waters. The minelaying States shall pay due regard to the legitimate uses of the high seas by, *inter alia*, providing safe alternative routes for shipping of neutral States. Transit passage through international straits and passage through waters subject to the right of archipelagic sea lanes passage shall not be impeded unless safe and convenient alternative routes are provided.³⁷

Minelaying parties have also to manage the dangers which minefields constitute for peaceful shipping. In particular the belligerent party is obliged to notify danger zones or the position of mine zones only if 'military exigencies permit'. On the precautionary measures that can be adopted by the minelaying belligerent, in principal, a belligerent is required to allow peaceful shipping to leave the sea area that is or will be mined. This may include granting safe passages or providing piloting.

After the cessation of active hostilities, parties to the conflict shall do their utmost to remove or render harmless the mines they have laid, each party removing its own mines. With regard to mines laid in the territorial seas of the enemy, each party shall notify their position and shall proceed with the least possible delay to remove the mines in its territorial sea or otherwise render the territorial sea safe for navigation.³⁸

The applicable legal regime depends on the territorial location in which naval mines are being laid³⁹. As mentioned above, specific rules signal the

³⁶ David Letts, 'Naval mines: Legal Considerations in Armed Conflict and peacetime' (2016) 98 (2) *International Review of the Red Cross*, 543-565 at 550.

³⁷ San Remo Manual, para. 85-89.

³⁸ San Remo Manual, para. 90.

³⁹ Locations may include internal waters (waters on the inner side of the baseline of the territorial sea), territorial sea (extending 12 nautical miles from the baseline), international waters (areas of the sea which are not under the jurisdiction of any country), and neutral waters

prohibition of parties to the conflict from deploying mines in neutral waters or using mines in a way that will prevent passage between neutral waters and international waters. In sea areas beyond the outer limit of the territorial sea, belligerent parties may use naval mines only if they are directed against a military objective.

In the framework of the ongoing armed conflict in the Black Sea, National Coastal Warnings have been broadcast recommending the safe routes for shipping in the Western Black Sea⁴⁰. Shipping is advised to use these routes⁴¹.

Application of the Montreux Convention

Finally the outbreak of the hostilities also impacted the freedom of navigation, allowing the applicability of the wartime provision of the Montreux Convention.

The Montreux Convention was signed in 1936 to manage the passage regime across the Turkish straits⁴².

The conventions primarily upholds the “principle of freedom of transit and navigation” through the straits, but Turkey, as “Guardian of the Straits”, has the authority to close the straits to ships from warring countries during wartime or when a war is imminent.

In time of peace, warships also enjoy passage rights through the Straits but must provide advance notice to Turkey (8 days for Black Sea States and 15 days for other States) before beginning their transit (Article 13). Submarines of non-Black Sea States, however, may not pass through the Straits (Article 12). Additionally, warships of non-riparian States may only stay in the Black Sea for 21 days (Article 18).

If an armed conflict is ongoing, a different legal regime may be activated⁴³.

If Turkey is not belligerent: merchant vessels, under any flag or with any kind of cargo, shall enjoy freedom of transit and navigation in the Straits.

If Turkey is belligerent, merchant Vessels, not belonging to a country at war with Turkey shall enjoy freedom of transit and navigation in the Straits on condition that they do not in any way assist the enemy. Such vessels shall enter the Straits by day and their transit shall be effected by the route which shall in each case be indicated by the Turkish authorities.

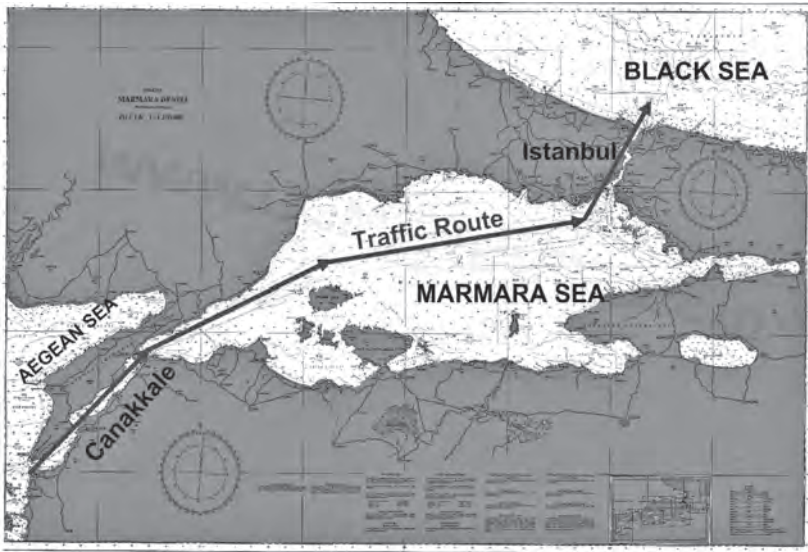
(internal waters, territorial sea, and, where applicable, the archipelagic waters, of neutral States) among others.

⁴⁰ Costal Warning NW 18/29.03.2022. BLACK SEA. ROMANIA.

⁴¹ <https://shipping.nato.int/nsc/operations/news/-2022/risk-of-collateral-damage-in-the-north-western-black-sea-2>.

⁴² 1936 CONVENTION REGARDING THE REGIME OF THE STRAITS Adopted in Montreux, Switzerland on 20 July 1936, <https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1936-Convention-Regarding-the-Regime-of-the-Straits.pdf>.

⁴³ <https://www.ejiltalk.org/can-turkey-close-the-turkish-straits-to-russian-warships/>.



Source: <https://www.navalnews.com/naval-news/2022/02/op-ed-can-turkey-close-straits-to-russian-ships/>

In time of war, if Turkey is not a belligerent, the same provisions than in peacetime apply to foreign warships, but with one exception: Turkey may prohibit the transit of warships belonging to the belligerent powers unless it is a warship returning to its home port in the Black Sea (Article 19). If Turkey is a belligerent, the passage of foreign warships is left entirely to the discretion of the Turkish Government (Article 20). Finally, if Turkey considers itself to be threatened with imminent danger of war, it may apply the same provisions as if it was a belligerent party of Article 20 (Article 21).

On 1st March 2022, Mevlut Cavusoglu, Foreign Minister of Turkey, made a statement regarding the passing regime over the straits, considered as an official declaration of the Turkish government, according to which:

When Turkey is not a belligerent in the conflict, it has the authority to restrict the passage of the warring states' warships across the straits. If the warship is returning to its base in the Black Sea, the passage is not closed. We adhere to the Montreux rules. All governments, riparian and non-riparian, were warned not to send warships across the straits.⁴⁴

He referred to Article 19 of the Montreux Convention⁴⁵, regarding

⁴⁴ <https://www.thenationalnews.com/world/2022/02/28/turkey-blocks-warships-from-bosphorus-and-dardanelle-straits/>.

⁴⁵ Article 19 "In a time of war, Turkey not being belligerent, warships shall enjoy complete freedom of transit and navigation through the Straits under the same conditions as those laid down in Articles 10 to 18 (the articles regulate tonnage limitations and passing rules).

restrictions to the belligerent parties. However the Foreign Minister Mevlüt Çavuşoğlu also indicated that Turkey had warned both riparian and non-riparian States not to pass warships through the Straits. Such declarations seems more fit with Article 21 on the basis that its own security is threatened due to the danger of war⁴⁶.

Final Remarks

In the framework of the ongoing armed conflict between Russia and Ukraine, some military operations take place at sea. So, international humanitarian law is applicable as the specific body of law governing armed conflicts for the protection of those not or no longer participating in the hostilities. Some specific provisions regard armed conflicts at sea as well.

From an IHL perspective seafarers, as civilian not actively participating in the hostilities, and merchant ships, as civilian objects not used for military purposes, enjoy a specific protection and cannot be targeted. Furthermore civilian activities, such as shipping, are protected as well.

Measures such as humanitarian corridors or safe passages are functional to ensure their protection, as well as the norms limiting and regulating the use of some means of warfare, such as the mines, that could negatively affect the safety of those transiting in the area.

The application of IHL reinforces the protection granted by other branches of law, such as human rights law and maritime law, interplaying with them.

Vessels of war belonging to belligerent Powers shall not, however, pass through the Straits except in cases arising out of the application of Article 25 of the present Convention, and in cases of assistance rendered to a State victim of aggression in virtue of a treaty of mutual assistance binding Turkey, concluded within the framework of the Covenant of the League of Nations, and registered and published in accordance with the provisions of Article 18 of the Covenant.

In the exceptional cases provided for in the preceding paragraph, the limitations laid down in Articles 10 to 18 of the present Convention shall not be applicable.

Notwithstanding the prohibition of passage laid down in paragraph 2 above, vessels of war belonging to belligerent Powers, whether they are Black Sea Powers or not, which have become separated from their bases, may return thereto.

Vessels of war belonging to belligerent Powers shall not make any capture, exercise the right of visit and search, or carry out any hostile act in the Straits."

⁴⁶ Article 21: "Should Turkey consider herself to be threatened with imminent danger of war she shall have the right to apply the provisions of Article 20 of the present Convention. Vessels which have passed through the Straits before Turkey has made use of the powers conferred upon her by the preceding paragraph, and which thus find themselves separated from their bases, may return thereto. It is, however, understood that Turkey may deny this right to vessels of war belonging to the State whose attitude has given rise to the application of the present Article. [...]"

UNIFIED INTERPRETATION

A DEFENCE OF THE INDEFENSIBLE?

KIRAN KHOSLA

ICS Principal Director, Legal

Good Afternoon, everyone,

Welcome to our session on the subject of Unified Interpretation (UI).

I am Kiran Khosla and the Legal Director of ICS. It is my great pleasure to chair our discussion today on Shipowners' right to limit liability under international conventions and the ground breaking agreement reached at the IMO in 2021 - a Unified Interpretation of the test for breaking shipowners' right to limit liability, which confirms that the shipowners' right to limit liability is virtually unbreakable.

Before introducing the panel speakers, I will give some background to what is a remarkable achievement of the IMO but which thus far has flown under the radar. It is really important that, starting today, we bring this important decision out from the plenary hall of the IMO and place it firmly on the radar of all of you, the legal practitioners, academics and judges, so that if, there is another case of pollution at sea, from ships, any one of who might be involved and will have all the tools available on the meaning and intention of the shipowners' right to limit liability.

A UI is the term that is used at the IMO to describe an Agreement as to how a convention should be interpreted. In the IMO, such UIs as have been agreed prior to this one at the IMO have all been on technical aspects of a convention and which are relatively straightforward and non-controversial. This one however is the first to have been agreed on a legal issue and one which has been controversial historically. This is why this is ground breaking.

Under the Vienna Convention on the Law of Treaties, 1969, a UI would be categorised as a subsequent Agreement to a Treaty under Article 31 (3) (a) and as such, it "shall" be taken into account when interpreting the convention.

The UIs adopted at the IMO relates to the provision in three conventions, namely, the CLC, 1992, the LLMC 1976 and the 1996 LLMC Protocol to the LLMC 1976 on shipowners' right to limit liability, and the conduct that would deny the shipowner the right to call upon it.

The 1992 Civil Liability Convention (CLC, 1992) is the first of the conventions that make up the liability and compensation regime for pollution agreed at the IMO. The other conventions include the Bunkers Convention, 2001 (BC), the Wreck Removal Convention 2008 (NWRC), and the HNS Convention as amended by the HNS Protocol 2010 (HNSC).

The main aim of the regime was prompt and adequate compensation. It achieved this through the establishment of some novel concepts that, when they were first introduced in 1969 with the first CLC, represented a radical departure from the general practice in most jurisdictions regarding the shipowner's liability for oil pollution damage.

These were:

A strict liability of the shipowner, meaning that the shipowner will be liable even when there is no fault on his part.

All claims are channelled to the registered owner who is easily identifiable, even when another party, such as the charterer, might actually be responsible.

The shipowner is obliged to insure the ship for all the liabilities under the Convention and must obtain a State-approved certificate to demonstrate that such insurance is in place.

And finally, the Convention provides for a right of claimants to pursue their claims directly against the insurer, thereby ensuring claims are compensated even if the shipowner cannot pay – a significant departure from the IG club insurers' "pay to be paid" rule.

As a quid pro quo for giving up all defences and accepting strict liability and the channeling of all liability towards him, the shipowner has a limit of liability.

The owner's right to limit liability is also set out in the 1976 LLMC (the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996). In fact, it is this convention which first developed the test for breaking the shipowners' right to limit liability and which was subsequently carried across to the later CLC, Bunkers, Wreck Removal and HNS Conventions.

The test, extracted here from the LLMC 1976, reads as follows:

Article 4. CONDUCT BARRING LIMITATION

*(shipowner) liable shall not be entitled to limit his liability if it is proved that the loss resulted from his **personal act or omission**, committed with the **intent** to cause such loss, **or recklessly AND with knowledge** that such loss would probably result.*

This limit of liability is fundamentally important to shipowners not only to balance out the increased range of liabilities which they have agreed to through the concepts of strict liability and channeling of liability *but* also to ensure that they can continue to obtain insurance at commercially available rates. As we know, insurers need to have certainty as to their ultimate financial liability if they are to be encouraged to insure the risk.

In recent years however, the shipowners' right to limit liability has been under attack

A lot of this attack is due to pressure on governments to call "polluters" of the environment to account for any damage they cause and raise questions about full accountability and why the shipowner should not compensate the full amount of the claim. There are many examples of cases that illustrate these attacks on the right to limit liability. The one that I will focus on

however is the high profile case of the *Prestige* – the oil tanker that broke up in European waters in 2002 and caused pollution on the coastline of several countries, a large part affecting the Spanish coastline and was followed by litigation against the master and the ship. In January 2016 the Spanish Supreme Court decided that the Master was guilty of the crime of *reckless damage* to the environment and that as a result of this conduct, the shipowner was not entitled to limit liability under the CLC. The decision was used by the Spanish Government to claim against the shipowner for enormous amounts in excess of the CLC limit of liability.

There were several points of concern to the industry when this decision was made known:

First, the court had decided that the *master's* conduct was the deciding factor as to whether the right to limit liability should be broken. The test however applies only to the *shipowner's* conduct.

Secondly, the decision was based on the master having caused reckless *damage* as the reason for breaking the right to limit liability, in other words, the extent of the pollution was interpreted as being reckless for the purposes of the test. The test however in the convention is not to be by reference to the **scale** of the damage but that the **conduct** that led to the damage must have been reckless and, very importantly, this conduct must be **accompanied** by knowledge as to what the consequences would be. The courts did not appear to have applied the test as it is written.

In addition, the shipowner's P&I Club insurer was also held directly liable above the CLC limit for up to US\$1 billion – which, coincidentally, happens to be the limit of cover provided by International Group clubs for oil pollution damage. The action against the insurer was contrary to the provisions in the convention which expressly provide that the *insurer* may limit their liability even if the owner is not.

At best we could perhaps explain these developments as being due to a loss of understanding over the years as to how the principles in the complex conventions are designed to operate together. At worst, they could be a demonstration of law and policy makers determined to extract the maximum financial compensation from the perceived “deep pockets” of the insurance market for their own national interests. Whatever the motives, these developments threatened to disturb the balance of interests on which the system is based. Indeed, we, as the industry paying for the large part of the claims had serious concern that a tipping point had been reached, threatening the very system designed to protect claimants.

Within ICS and within the IG, we had to decide what could we do as an Industry to protect the principle and the international system and encourage courts to apply the test uniformly and in accordance with the original intentions. To do this, we understood that we needed to address the perception that a right to limit liability was unfair, novel and outdated. Consequently we embarked on an investigation to understand the basis of the concept, starting with a detailed examination of the record of negotiations – the *travaux préparatoires* – that led to the LLMC 1976, the convention that established the test.

Our investigations confirmed that the drafters of the convention had indeed recognised the importance of insurance in the liability and compensation system and recognised that a limit of liability which was virtually unbreakable, was important to include in the conventions in order to ensure the availability of insurance and that is why the test was framed as it is – and not to allow simple negligence or even gross negligence conduct to break the right to limit liability.

As this understanding was not reflected in the *Prestige*, it was clear that it needed to be reminded to all stakeholders - states parties, and their national courts and we thought that this might be achieved through a Resolution of the IMO Assembly or, even better a Resolution of the States Parties to the conventions where this test appears.

After extensive work at the Legal Committee of the IMO, the principles underlying the test to break shipowners' right to limit liability were agreed by the States Parties of each of the three conventions where this was expressly included and were in force, in the form of a Unified Interpretation agreed. The UIs affirm that the test for breaking the right to limit liability is to be interpreted as virtually unbreakable, i.e., breakable only in very limited circumstances.

So, on that, the speakers here today will explain the detail of the UI and its significance: David Baker of the International Group of P&I Clubs, to explain the process that led to the development of the UIs and its adoption, Dr Dieter Schwampe, to explain what this UI will mean for shipowners and for practitioners and judges and governments when an attempt is made to break the shipowners' right to limit liability; and Dr Sabine Rittmeister, reporting on the work that has been done by the IWG on this subject to collect and collate the experience of national MLAs as to how the test has been applied and interpreted by their respective national courts through a CMI questionnaire.

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DAVID BAKER

So, the journey of the development of the UI wording from start to conclusion (not on the detail of the UI wording itself), how the UI came about and what was involved in its development. It will be an incredibly quick run through as the development of the UI wording was 6 years in the making, and the starting point was actually a submission to the IOPC Funds back in March 2016.

So, just a few months after the Spanish Supreme Court Ruling that has been mentioned and which gave us so much concern and you'll see that this was an International Group of P&I Clubs (IG) submission to the IOPC Funds' meetings and where the IG's initial concerns were actually two fold:

1. The adverse impact of the judgement on the recruitment of seafarers, and
2. The findings that the Club was directly liable above the owner/Club's CLC limit – and which was 22.8m euros and up to the limit of Club cover for the Prestige and which was, for OP damage, at US\$1bn.

The reason why we raised our initial concerns at this IOPC Funds' meetings and not the IMO was because (a) there was no agenda item at the IMO Legal Committee under which we could raise it at the time and (b) the Prestige was an agenda item for the IOPC Funds' Executive Committee at the time and raising it there allowed us to socialise the issue and gauge the reaction.

We then moved onto the next IOPC Funds' meeting later that year and where the IG tabled a further submission since the judgement had now been Appealed and you'll see that we had refined our concerns now to the insurance angle and inconsistency with the CLC. In relation to this submission and the previous one, I think that it is fair to say that they generated considerable discussion, and if I recall correctly, the Public Prosecutor in Spain actually turned up to the IOPC Funds meetings and we had some interesting discussions on the floor of the meetings itself as a result.

Staying in the IOPC Funds, we now move on to the first half of 2017 and it is now the IG and the ICS and we jointly submit a paper where we listed a number of incidents where rulings were considered to be inconsistent with the Conventions – not just the Prestige – and where we delved deeper into some of those provisions and how such rulings were putting the future of the Convention system in doubt. There was another lively debate at this session and, as a result, the IG, ICS, IOPC Funds' Secretariat and IMO Secretariat, along with any interested delegation, were tasked with considering the options that could be presented to address some of the concerns that the IG

and ICS had raised with regard to the application and interpretation of the Conventions.

That subsequently resulted in this submission to the October 2017 sessions of the IOPC Funds' governing bodies and that was submitted by the IOPC Funds' Secretariat. It was at this session where a number of options were considered, primarily to address the concerns stemming from the Spanish Supreme Court ruling on the Prestige.

So, at this point, some 18 months after the IG had first tabled concerns and about 20 months on from the judgement, ourselves and the ICS were happy with the progress since we had generated significant air time within the meetings of the IOPC Funds and we were now at the point where a decision was going to be taken, at least in the IOPC Funds, on moving ahead or not with our concerns.

So, the options on the table at that October 2017 IOPC Funds' meeting were to:

- amend the Conventions,
- engage in outreach to Member States and courts to assist in understanding of the Conventions, and assistance on implementation into domestic law,
- develop a non binding guidance document, or interpretive decision, of the IOPC Funds governing bodies on various provisions of the Conventions, and
- develop a Unified Interpretation of the Conventions by the States Parties, and specifically on the test for breaking owner's right to limit liability contained in LLMC and the 1992 CLC.

These options represented the outcome of discussions in advance between the IG, ICS, IOPC Funds' Secretariat and IMO Secretariat. The reason why the test for breaking owners right to limit was chosen for the UI option is because that was thought to be the single most important Article that goes to the insurability of the liabilities under the Conventions.

However, there was no consensus reached at that meeting to take the work forward and, although the IG and ICS felt otherwise, the Funds' decided that they had taken it far enough and, for the time being in the IOPC Funds anyway, that was that. I should say at this stage that some senior individuals at the time in the IOPC Funds told us that we had no chance of then taking it forward in the IMO. Them of little faith.

In terms of the options, we – IG and the ICS – were not particularly keen on amending the Conventions since that could result in opening up the Conventions for review and amendment on provisions that were much wider than those that we had touched on and beyond channelling and the test for breaking the owner's right to limit liability.

We also felt that not much would change if we followed either a wider outreach programme or a non-binding guidance document on the Conventions – of which there are already plenty – or an interpretative decision of the IOPC Funds. With all due respect to the IOPC Funds, they are not the depository of the Conventions and they are not a UN Agency.

At this stage, the UI approach was probably our favoured approach, but without too much thought at that very moment in time as to what it could

David Baker

look like. But this was the approach that were now coalescing around as our favoured option and to take forward now into the IMO. We'd socialised the issue in the IOPC Funds, that was the right thing to do at the time, we'd gauged the reaction and we were now at the stage to take forward in the IMO.

But before we did so, we knew that we had to have some idea as to what the UI could look like before we asked the IMO Legal Committee to take it forward. So, we felt that the basis of any UI needed to be a proper understanding as to what States intended the wording in the test to mean at the time it was first adopted in an IMO regime and which was the 1976 LLMC Convention.

So, almost immediately after that IOPC Funds' meeting, we tasked Colin de la Rue – whom many of you will now - with reviewing the travaux préparatoires of the 1976 LLMC Convention diplomatic conference. As a result of that research, we found that the Travaux helpfully identified that States intended that the test was to be based on certain, key principles.

Now, I'm not going to go into those principles now since they will be covered in the next presentation but, suffice at this stage to say, that we actually now had our answer as to what we wanted the UI to look like – based on what we'd identified from the Travaux it was clear to us that it should be based on the principles that we'd identified from this review of the Travaux. So we were now ready to take the proposal forward in the IMO and in the IMO Legal Committee and that we wanted a UI that was based on these principles and that set out what States intended the test to mean at the time that it was first adopted.

So, the key dates in taking the proposal forward in the IMO Legal Committee for that Committee to develop the UI and such a quick run through is really overlooking the huge amount of interaction with States and other delegations that was undertaken by the IG, ICS and other States at every step in this process to ensure that there was sufficient support all the way along and to the end point of agreement in the IMO Assembly. I'm just going to focus on the process.

So, we first had to get agreement for a new work output on the LEG agenda to develop such a UI. If we did not reach such an agreement, then we would've fallen at the first hurdle and we (IG and ICS) tabled a submission with Greece and the Marshall Islands for such a work output and thankfully LEG 106 agreed and with a time frame of 2 years for completion of the work.

So, once we'd achieved that agreement at LEG 106 in March 2019, and in order to now start the process on what the UI would look like, we presented a proposal to LEG 107 that the UI wordings should be based on what States intended the wording in the test to mean at the time that it was first adopted.

So, a submission was presented by the IG and the ICS to LEG 107 along with Canada, Greece, Italy, Malta and Poland that presented those findings from that review of the Travaux and proposed that the UI should be drafted based on those principles that we'd identified and that those principles should be the basis for the UI wordings.

LEG 107 agreed and agreed that those principles should be the foundation for the UI wordings and agreed to establish a Correspondence Group (GG) to work interessionally to draft the UI wording itself based on those findings and that CG was co-ordinated by Georgia and the draft UI wordings from

that CG were then presented to LEG 108 in July 2021. We were of course very active in that CG. Following work undertaken in the margins of the LEG 108 in a Drafting Group (DG), again co-ordinated by Georgia and again with ourselves participating, LEG 108 agreed the wordings and sent them to the IMO Assembly for final adoption in December 2021 along with the accompanying wording of the Assembly Resolutions within which the UIs were contained. Last year was an IMO Assembly year, but we wanted them to be Assembly Resolutions since the IMO Assembly is the highest governing body of the Organization and adopted by such means would give them the greatest weight and standing.

And these are the IMO Assembly Resolutions that were adopted that include the UIs for each of the Conventions. Suffice to say that the key operative paragraphs of the UI are almost identical to what we found when we reviewed the travaux that States intended the wording in the text to mean and what we proposed to the Legal Committee. All of those principles from the Travaux were absolutely included in the UI wording that was agreed.

Just one important point on the UI wording, and reference is made to the clause in the Assembly wordings that reference the Vienna Convention on the Law of Treaties. We were very keen to have reference in the Vienna Convention in the UI wording because the UIs should be seen as a subsequent agreement of the parties as per Article 31 (3) (a) of the Vienna Convention. So that reference to the Convention in the UIs is very important.

The 2nd paragraph in the slide is an ICJ ruling that we were very aware of though and which rules that resolutions of the International Whaling Commission cannot be considered as subsequent agreement or subsequent practice under the Vienna Convention if such Resolutions have been adopted without the support of all States Parties. So it was important that no State spoke out in opposition of the UIs when they were being adopted at the IMO Assembly. Thankfully, they were adopted at the IMO Assembly without any opposition and so they should be considered as a subsequent agreement of the parties to the Conventions, albeit they are framed as agreements of those States present at the time of adoption.

In summary, these UIs represent a precedent for the IMO in terms of agreeing a UI on an IMO adopted liability and compensation regime. That had not been done before at the IMO. They were almost 6 years in the making from 2016 and when the IG first raising concerns in the 1992 IOPC Fund Assembly to agreement of the UI wording in the IMO Assembly in December 2021. They represent an agreement of the State Parties to the 1992 CLC, 1976 LLMC Convention and 1996 LLMC Protocol present at the time of the IMO Assembly meeting when they were adopted. They will hopefully be taken as guidance for courts, States, insurers and shipowners in future cases when the owner's right to limit is tested, but the Vienna Convention is very important, and it is now very important that the UIs are widely promoted and well known amongst the legal industry.

UNIFIED INTERPRETATION – REPORT ON THE RESULTS OF THE CMI IWG’S QUESTIONNAIRE

SUMMARY OF THE PRESENTATION HELD AT THE CMI CONFERENCE IN ANTWERP ON 20TH OCTOBER 2022

DR. SABINE RITTMEISTER

In October 2019 the co-chairs of the IWG on Unified Interpretation (UI), Prof. Dr. Dieter Schwampe and John Markianos-Daniolos have asked Vassilis Mavrakis and myself as members of the IWG to draft a questionnaire which was to be sent out to the National Maritime Law Associations (NMLA’s). The purpose of the questionnaire was to obtain an overview of the legal situation in member states in relation to limitation of liability for maritime claims and claims for oil pollution. The IWG wanted to find out in what way the relevant provisions which allow the “breaking of limitation” are phrased and interpreted in the relevant jurisdiction. It was of particular interest to collect information on jurisprudence dealing with the relevant provisions on “breaking of limitation”. In this way the goal was to allow better insight in reasons for diverse interpretation of uniform rules in national jurisprudence.

The Questionnaire consists of eight parts, whereby Part I deals with preliminary questions such as the ratification status in relation to the relevant conventions and the method of incorporation into domestic legislation. The core of the questionnaire is contained in Part II and Part III. I will focus on these parts for the purpose of this presentation, namely on the attribution of the fault to the person liable and on the degree of fault. The burden of proof is addressed in Part VI and Part VII and VIII contain reference to other related Conventions and equivalent provisions in national jurisdiction.

I would first like to summarize the results of the Questionnaire in a short statistical report. The questionnaire was circulated to the NMLA’s by CMI’s President at the time Christopher O. Davis on 19th February 2020. The IWG received 15 replies altogether, namely 8 replies from European NMLA’s, 4 replies from South and Central American NMLA’s, two replies from Asian NMLA’s and one reply from a North American NMLA. From the 15 countries participating 13 countries have ratified the CLC 69 and 14 countries have ratified CLC 92. As regards the LLMC 9 countries have ratified the LLMC 76 and 7 have adopted the 1996 protocol. For the LLMC it should be made clear that with 7 countries having signed the most recent version, namely the 1996 protocol and two countries remaining with the version of 76, we have 6 out of 15 participating countries which are not party to the convention. From these countries three have adopted rules of LLMC 76 wholly or partly into their domestic legislation.

In terms of content an analysis of the answers received revealed that generally only very few cases on limitation of maritime claims have been published and even more rarely cases are known where breaching the limit was successful. So could we say that “all is well”? No, on the contrary: it became apparent from the replies that uncertainties about the outcome of court proceedings dealing with limitation are widespread. From almost all replies received it can be seen that it is very difficult to describe a coherent line of reasoning but that the courts rather reserve their right to decide on a “case-by-case basis”. It was observed that quite often references were made by the courts to identical wording in other transport law conventions. In this context Art. 25 Warsaw Convention plays an important part because it was the first international transport law convention which introduced the standard of “Wilful Misconduct or Recklessness”. However, when referring to this provision it was not made clear enough that it is distinct from Art. 4 LLMC in that under the Warsaw Convention fault on the part of agents and servants is attributable to the carrier. Other findings from the replies received are that only very rarely did national courts consider or make reference to the “motives of the legislator”, namely the “travaux préparatoires”. Neither did the courts take notice or refer to court decisions in other member states as should be done when interpreting international uniform law. Instead it was reported that courts often took recourse to domestic law and national legal concepts and an “autonomous interpretation” did not take place.

When we evaluated the replies in relation to questions dealing with “Attribution to the Person Liable” we found out that there appears to be a common consensus among the countries participating that the fault of servants or agents cannot be (straightly) attributed to the owner but that a personal act or omission of the person liable must be established. However, there remain a lot of open questions and problematic issues. The Conventions in question, CLC and LLMC, do not contain a provision which sets out the conditions which persons are to be held as “alter ego” of a company/corporation. In a few jurisdictions, e.g. in Germany and Turkey, such rules have been introduced by national legislation. There appears to be general consensus that a fault on the part of members of the board, executive bodies and members of the management with representative authority can be attributed to the company / corporation. From the French NMLA it was reported that the question of attribution of fault is left at the court’s discretion. There was also general agreement that a fault committed by the Master, the crew or third parties could not be directly attributable to the person liable. However, we could identify a number of problematic issues where the attribution of fault on the part of the Master / crew was approved such as organizational fault on the part of the company which led to the respective behaviour of the Master / crew, non-compliance with mandatory safety rules or knowledge of deficiencies or dangerous practices on board. Another issue which was raised was how far the duties of board members reach with regard to control of Master and crew. It appears that there is a lot of room for arguments in favour of “breaking the limits” among the national courts.

With regard to the “Degree of Fault” necessary to break limitation the general result could be found that most countries accept that “recklessness”

requires a higher degree of fault than “gross negligence”. However, the definition of this term often remains unclear. It appears from the replies received that some reasons for divergencies in interpretation can be identified as follows: the concept of “Wilful misconduct / recklessness” is unknown in civil law countries and there is a tendency to turn to established principles of national law. Even problems of language / translation may play a negative role, we found mixture with concepts of criminal law and reference to “old” case law where a different standard of fault was pertinent (“actual fault and privity”). We found that there appears to be at least some agreement that “recklessness” must be seen as a “*sui generis* type of fault somewhere between *dolus eventualis* and gross negligence”. Another aspect which needs to be highlighted is that there appears to be lacking awareness among the national courts that “recklessness” must be combined with “knowledge that damage will probably occur”.

The conclusions which must be drawn from the results of the questionnaire confirm the relevance of Unified Interpretation which has meanwhile been put into operation: the awareness for “virtual unbreakability” as an overriding principle must be strengthened. We found that the differentiation between “recklessness” and “gross negligence” are generally accepted but there remain considerable uncertainties. Similarly, the requirement of a personal act of the shipowner is generally accepted but the danger of erosion of this principle is pervasive. The nexus between loss of insurance cover and loss of the right to limit has not been taken into consideration so far. We can summarize that providing guidelines for Unified Interpretation is a useful and necessary tool to promote harmonisation of national jurisprudence.

MARITIME ARBITRATION: DILEMMAS, PROSPECTS AND CHALLENGES LESSONS FROM CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA

EVA LITINA*

Ladies and Gentlemen,

It is a privilege to be invited at the CMI Antwerp Conference 2022 to give a synopsis of my essay, which received the 2020 Comité Maritime International Young Person's Essay Prize (yCMI Essay Prize).

The topic on which I would like to speak this afternoon is one that is particularly close to my heart as an academic who wrote a PhD thesis on maritime arbitration. While I shall focus primarily on arbitration in contracts for the carriage of goods by sea, many of the observations made apply also to arbitration in other types of maritime contracts.

I should like to start, if I may, with an introduction to the shipping industry's strong preference for arbitration and the most prominent maritime arbitration centers.

THE SHIPPING INDUSTRY'S PREFERENCE FOR ARBITRATION

The shipping industry has traditionally resorted to arbitration for dispute resolution. Arbitration is stipulated in widely used standard form contracts that regulate principal maritime events, including shipbuilding, carriage of goods by sea, maritime insurance, and salvage.

Maritime contracts usually involve disputes of substantial sums between experienced parties motivated to keep sailing, or else they do not make money. The choice to arbitrate is driven by its procedural advantages, concretely:

- the global enforceability of arbitral awards;
- the neutrality of the forum;
- the ability to choose specialized arbitrators; and
- the efficiency, cost, and confidentiality of the proceedings.

The desire for confidentiality, efficiency, and flexibility leads the maritime industry to prefer ad hoc arbitration. Ad hoc arbitration is conducted without the supervision of an institution or appointing authority. The shipping sector being one of the most ardent supporters of ad hoc arbitration, prominent

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maritime arbitration centers, such as the London Maritime Arbitrators Association (LMAA), New York Society of Maritime Arbitrators (SMA), the Singapore Chamber of Maritime Arbitration (SCMA), and the Hong Kong Maritime Arbitration Group (HKMAG) are keen to stress that they are not administering bodies.

The study of maritime arbitration is complicated by its ad hoc structure missing data regarding numbers and types of cases, and lack of published awards from which the industry may more thoroughly grasp the arbitral process. Neither global statistics regarding the number of maritime arbitrations nor criteria to determine what should be counted are available. The information we do have available includes estimates on the appointments of arbitrators and the number of awards issued annually per the rules of each arbitration association.

THE MOST PROMINENT MARITIME ARBITRATION CENTERS

According to these estimates, London handles eighty percent of the world's maritime arbitration work. New York is presumed to be the second-largest maritime arbitration provider, while Singapore and Hong Kong have entered the competition for maritime arbitration business. This table sets out available statistics for maritime arbitration associations.

Table 1. *Table of Available Statistics for Maritime Arbitration Associations*

LMAA		SMA	SCMA				HKMAG
<i>Appointments</i>	<i>Awards</i>	<i>Estimation of Cases</i>	<i>Case References</i>				<i>Appointments</i>
2021		No official statistics	2018	2019	2020	2021	2018
2777	531	100	56	41	43	37	63

THE INTERNATIONAL LEGAL REGIME

I will touch briefly on the international legal regime of arbitration in contracts for the carriage of goods by sea. The New York Convention and the UNCITRAL Model Law cover arbitration in contracts for the carriage of goods by sea. Some international maritime conventions contain specific provisions on arbitration. For example, the Hamburg Rules and Rotterdam Rules specifically address arbitration, whereas the older Hague Rules and Hague-Visby Rules do not.

Separate rules apply to arbitration in charterparties versus bills of lading because international conventions exclude charterparties expressly. Without an international convention that applies specifically to chartering, standard form contracts dominate the industry. The standard charterparty forms are not rigid; their terms are broad and flexible to enable the addition of clauses required by the charterer, determined by the capacity of the ship, or dictated by the market conditions during negotiations.

All standard form charterparty contracts contain jurisdiction or arbitration clauses that specify the forum and the law under which disputes will be resolved. This table summarizes the preferences in 64 standard form charterparties that have been studied.

Table 2. Table of Preferences in 64 Standard Form Charterparties

Preference	Number of Charterparties	Percentage
Arbitration	60 out of 64	93.75%
London	46 out of 60	76.67%
New York	33 out of 60	55%
Singapore	6 out of 60	10%
Other	6 out of 60	10%

Apart from standard forms, BIMCO also publishes special clauses that can be incorporated by the parties to any charterparty or agreement. One of the most important special standard clauses is the arbitration clause, which is regularly reviewed and updated. The BIMCO Law and Arbitration Clause 2020 names four arbitration venues - London, New York, Singapore and Hong Kong covering the main commercial regions of Europe, America and Asia.

CONCLUSIONS AND WAY FORWARD

In summary, maritime arbitration involves the interaction between international and national laws. The broad sources of law include international conventions, local laws, trade usage, and standard form contracts.

Against this background, I should like to take a quick look at the current state of maritime arbitration. Given the extensive use of standard form contracts, the first question is whether the current regime is efficient. In the absence of a uniform substantive regime governing contracts for the carriage of goods by sea or a uniform regime on maritime arbitration, a further crucial question is whether such law would be necessary and/or desirable.

The CMI began a project to investigate its role in maritime arbitration. A work in progress, the project examines important issues in arbitration including:

- a comparative analysis of the arbitration rules and practices;
- a study of the recognition and enforcement issues in the main arbitral seats; and
- a discussion as to whether arbitration is a valid option for the resolution of maritime disputes in countries where the court system appears unsatisfactory.

The CMI also queries whether it should develop its own model rules on maritime arbitration.

In essence, the shipping industry favors the current flexible regime of arbitration and party autonomy. Self-regulation via standard forms is both successful and efficient, so an international convention or model law regulating maritime arbitration is undesirable. In fact, the experience of the Rotterdam Rules confirms the difficulties in regulating jurisdiction and arbitration.

Eva Litina

Apart from the reluctance of the shipping industry, a further complex issue in the adoption of an international legal regime is that it would introduce new and untested rules and concepts. Since new issues will need to be clarified in case law and judges in different jurisdictions lack a common point of reference, increased uncertainty would lead parties to opt out of the international uniform regime and choose instead a specific legal order to govern their transactions.

Any new regime or model rules for maritime arbitration should take into consideration the specific needs of the shipping industry. Lack of support within the industry and the major maritime arbitration centers would render an attempt unsuccessful.

However, there are still steps to be taken towards greater transparency in maritime arbitration. While my essay sheds light on some of the issues facing maritime arbitration, further research is necessary with the view to increase the available information and knowledge on maritime arbitration, as well as its international visibility. The CMI can play a leading role in such an effort in the future.

Thank you.

THE NEED FOR REGIONAL AGREEMENTS AND UNIFIED MARITIME LEGISLATIONS IN THE NATURAL GAS-RICH EAST MEDITERRANEAN SUBREGION

AMJED ABU LAFI*

In his speech, titled “The Need for Regional Agreements and Unified Maritime Legislations in the Natural Gas-Rich East Mediterranean Subregion” Mr. Abu Lafi discussed the overwhelming situation in the East Mediterranean subregion, where (9) countries, speak (5) different languages, share overlapping sovereign rights over a maritime area that features over 75 trillion cubic feet of natural gas, tens of pipelines and cables, in the presence of one of the most active and crowded navigational areas in the world, the Suez Canal. Yet there are zero undisputed maritime boundary agreement and not a single unified maritime legislation.

Although the countries sharing the coast on the East Mediterranean subregion has a mutual interest in developing and advancing different sectors including marine environment, safety of navigation and security at the sea; only two regional multilateral agreements are in place, the first is the 1976 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, which sets responsibilities and obligations in respect of marine environment and prevention of pollution in the Mediterranean Sea.

The Second agreement is the newly founded East Med Gas Forum (EMGF), founded in 2020 to develop and facilitate oil and natural gas market in the region in cooperation between the countries of the region and with other relevant actors.

Besides the abovementioned agreement, there is a serious lack of cooperation between the countries of the region in regard to the adoption of unified maritime legislations, although many of them are parties to most of the International Maritime Organization’s treaties, which does it fact encourages and requires regional cooperation in adopting similar or unified maritime legislations.

Mr. Abu Lafi added that the important role delivered by the East Mediterranean subregion in respect to gas exports, being an active navigational area, and the conservation of the different marine ecosystems of the Mediterranean Sea emphasizes on the importance of regional cooperation in different aspects including security at sea, maritime safety,

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Amjed Abu Lafi

shipping, and marine scientific research, in which the countries of the subregion should work on different maritime aspects such as Joint advocacy and social awareness activities and joint efforts to facilitate ports, shipping and maritime areas, and efforts toward adopting unified maritime laws.

Mr. Abu Lafi further discussed the impact of the political issues in the subregion on the maritime sector, which is crystalized in the lack of any undisputed maritime boundary therein, and concluded that the ongoing political issues in the subregion is the biggest challenge facing regional cooperation.

Mr. Abu Lafi emphasized that the East Mediterranean subregion have great potential for development, however it is subject to the political willingness of the political leaderships of the countries of the regions.

“Joint Development Zones” is the secret solution, said Mr. Abu Lafi. Adding that the different experiences around the world in which the disputed countries agreed to establish joint maritime economic zones show that it has a very high potential of success. Therefore, Mr. Abu Lafi recommended the countries of the East Mediterranean region to learn from the good practices and to examine the possibility of creating bilateral, trilateral or even quadrilateral joint maritime development zone, which will definitely serve the mutual interests of the subregion, instead of continuing with unilateral claims, which are usually not aligned with the international law of the sea.

Mr. Abu Lafi also referred to CMI’s historical and ongoing achievement in this regard, as many existing international treaties and model maritime legislations are in fact the fruit of CMI efforts and projects, in this respect, Mr. Abu Lafi recommended the countries of the subregion to learn from the good practice and outcomes that CMI had throughout the last decade in order to develop unified regional maritime legislations and agreements.

At the end of his speech, Mr. Abu Lafi concluded that Mediterraneans live by one sea, share one coast, and has one ultimate goal which is to conserve the Mediterranean Sea marine environment and to develop its natural resources, and in order to achieve it in there is the need for one unified legislative framework.

TWO YEARS POST COVID-19: LEGAL ANALYSIS OF THE INDUSTRY'S RESPONSE TO THE PLIGHT OF SEAFARERS

ALEXANDR BOICHUK

Long before human rights protection began to take shape as a moral imperative guiding all States, it was recognized that seafarers required special protection due to the hardship and danger which were staples of the seafaring profession. It is an undeniable truth that maritime working environment is a high-risk working environment where majority of seafarers worldwide are constantly exposed to a multitude of work-related diseases and accidents. Work at sea is extremely dangerous and it is for this reason that seafarers require a specialised labour regime. In the words of Author Roger Blanpain, “good employment conditions on board the ship matching or exceeding the conditions in land employment are an essential feature for attracting and retaining qualified seafarers” which ultimately improve the quality of shipping industry. Seafarers

The ILO, since its inception 1919, realized that uniqueness of seafarers. Thus, only a year after its existence, it adopted the National Seamen's Code Recommendation, 1920. Since then, ILO has adopted numerous conventions and recommendations to ensure decent working and living conditions to seafarers while at sea and port thereby emphasizing on a specific approach to living and working conditions onboard. A single instrument was adopted at the 94th (Maritime) session of the ILC, the MLC 2006. The Convention aims at using international labour standards to establish decent work and fair competition and to help to achieve “fair globalization”.

Upon deciding on the topic of the dissertation at the IMO international maritime law institute – IMLI, I took a decision to work on the ensuing unprecedented crisis plaguing seafarers at the time of the unfolding pandemic, especially following the theme of the world maritime day of 2021 which was ‘Seafarers: At the Core of Shipping's Future’. In launching the theme, the IMO Secretary General Mr. Kitac Lim noted that

At IMO, seafarers have always been at the centre of all our work - be it in the area of safety, maritime security, or environmental protection. However, this year, we want to shine a light on the significance of the human element to the safety of life on board ships and the importance of ensuring an appropriately trained and qualified future workforce, ready to meet the challenges and opportunities of digitalization and automation. We will also place a special focus on seafarers' well-being, an area highlighted by the plight of seafarers during the COVID-pandemic.'

Thus, my research was centred on the effects of COVID-19 on the seafarers. The aim of the dissertation was to examine the adequacy and effectiveness of the international regulatory framework on maritime labour, and in particular to assess the effectiveness of the legal regime in the light of the Covid-19 pandemic. The research project was initiated by outlining the importance of the maritime industry worldwide and continued with the discussion of the role of the seafarers within the said industry. The aim was to highlight the seafarer's crucial role within the maritime trade worldwide. Since Covid-19 also had a direct and vital impact on the port operations, the paper also addressed the unprecedented situation and in particular analyzing emergency international efforts to mitigate the impact on the seafarers.

An attempt to outline the specific rights protected by Title 2 of the MLC dealing with the conditions of employment of the seafarer affected by the pandemic and explore the challenges resulting from the COVID-19 outbreak, was the most challenging part of the work. Such analyses prompted a number of recommendations that could help the seafarers to exercise their fundamental rights even if the events similar to those of 2020 should recur in the future.

The outbreak caused countries throughout the world to enact partial or entire lockdowns in an attempt to restrict and minimize the virus's spread. Such procedures had great impact on the seafarers. The inability to disembark was causing adverse effect on seafarers' mental health. Furthermore, the severity of the fear of transmission sometimes resulted in despair, anxiety, and insomnia. Like other industries, the maritime industry was not prepared to address the unprecedented impact of the pandemic on all aspects of the seafarer's welfare both aboard and on shore. Due to these only a mere twenty-five (25) per cent of ordinary crew changes took place in the first few months of 2020.

During the first trimester of the pandemic, IMO released over 20 circular letters addressing pandemic concerns and advising the MS on how to manage specific difficulties. These included collaborative declarations with other UN bodies as well as shipping industry guidelines. It also established a SCAT with the goal of assisting specific situations and providing counselling or therapy to seafarers in distress. Furthermore, the team secured the global distribution of all required instructions and information.

These circulars addressed the humanitarian crisis and denial of seafarer's rights, including repatriation, maximum period of service on board, access to medical care ashore, shore leave and access to welfare facilities. In all of these, the MLC served as a reference point and assisted the maritime authorities. Furthermore, the Secretary-General, approved a set of protocols created by a diverse group of global business organizations representing various sectors of the maritime transportation industry. The guidelines contained extensive measures and practices to ensure that ship crew changes will take place safely during the pandemic.

In December 2020, the ILO Committee of Experts on the Application of Conventions and Recommendations, adopted a document entitled 'General observation on matters arising from the application of the MLC, 2006, during the COVID-19 pandemic'. The Committee voiced their concern in

relation to the devastating effects that restrictions, as imposed by the States, had on the rights of the seafarers as enshrined in the MLC. The Committee also took notice of the comments made by the ITF and the ICS, both of which were received in October 2020 and in which it was claimed that MS have not complied with the MLC's fundamental obligations, particularly those relating to reciprocal cooperation, the protection of access to medical care, and the repatriation of seafarers.

To further advance and safeguard seafarers' welfare, the Neptune Declaration on Seafarer Wellbeing and Crew Change (the Declaration) was created. It was designed to address the crew change crisis, which left over 400,000 seafarers stranded on ships beyond the expiry of their contracts, because of travel restrictions imposed by the majority of States. The signatories acknowledged the significant efforts of all international stakeholders while also recognizing that much work remained to be done, particularly given the continued hardships that a substantial number of seafarers continue to experience with regard to leave and repatriation.

Considering the lessons learned and the vulnerability of the pre COVID legal framework the following recommendations may find themselves useful to the international industry.

A variety of substantive and procedural reforms are necessary to strengthen the legal framework protecting the rights of seafarers across the world and to prevent any future destructive effects they had already experienced. In terms of substantive, criminalizing the intent of abandoning the seafarers will allow MS to discourage the shipowners from doing so and prevent the crime before it is even attempted. Preventive measures and severe penal sanctions for attempted crime would result in increased enforcement.

When it comes to procedural reforms, MS should create an 'emergency crisis fund' designated to benefit those seafarers who find themselves deprived of their basic rights and suffer economic consequences. Another fund should be established for sailors who are unable to join the ship, replace the crew, and provide for their families due to a *force majeure* circumstance.

Port States should also provide fully equipped 'in port' quarantine facilities to support crew changes in a safe and consistent manner. The sector may also benefit from special floating quarantine chambers. A dedicated database with live information on the spread of diseases and availability of quarantine chambers, accessible to all ship masters, will also need to be developed. It will allow the master to assess the risks before approaching a port.

While the pandemic's hazards have not been eliminated, the deployment of specialized actions to counteract the consequences has been a positive development. Nonetheless, the author believes there is still potential for improvements. The international community should continue to work together to improve political and economic conditions so that improved facilities and infrastructure can be developed to protect the lives and well-being of seafarers and maintain the efficient functioning of global maritime trade. Finally, public and private stakeholders must continue to collaborate

Alexandr Boichuk

to implement appropriate labor standards and address seafarers' health, safety, security, welfare, and other concerns. The human rights of seafarers must be prioritized at all times.

THE PRACTICAL, LEGAL AND INSURANCE SIDE OF REMOTELY CONTROLLED SHIPPING

KRISTOF OLYSLAGER* - LOUIS-ROBERT COOL**

The world is more and more looking at the possibilities of remotely controlled and autonomous shipping. Many believe this is a project which is developing and will only deploy in the future, but in Belgium we already have a fleet of 12 inland barges which operate without Captain onboard. Seafar provides software which makes it possible to sail with barges from a Shore Control Center. Today we focus on inland barges as Belgium and our neighbouring countries have a wide network of rivers and the cost efficiency to take away the Captain is very interesting. Also this sector faces a lot of older Captains and less young ones to start in the business. We will also focus on the legal aspects as no vessels without a Captain onboard are allowed on all inland waterways (and international waters). Finally how does the insurance market look at this? Who is liable if no Captain in onboard or how do you guarantee the same degree of safety? We will look at the developments and discuss the different types of insurances and what we believe is the best option to insure such vessels.

Worldwide we already have more than 1.000 Maritime Autonomous Ships operated by more than 53 organisations. In 2020 we only had 7 organisations working on autonomous shipping, compared to 53 organisations in 2022 is clearly showing the interest and evolution in the market. Autonomous shipping in this context can be fully autonomous, remote-controlled, unmanned, track-pilots, etc.

As mentioned we focus in Belgium today on inland shipping. The crew shortage known in the inland market is having an impact on different aspects. This leads to a limit on the growth of fleets, a limit on the earning potentials and limits the quality and safety of the industry. Investments in the industry are needed to renew the fleets, to keep the vessels technical ready and to extend time to receive a positive return on investment. Working with the technology of autonomous vessels also helps out on safety as 80% of all accidents know a form of human error. Overworked crew results easily in unsafe operations.

Seafar provides shipowners with a solution having a Captain onshore who operates the barges from an office and can control up to 5 barges at the same time. The barges sail autonomously and Captains intervene in specific manoeuvres and berthing operations. The system is installed onboard

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and integrates with all onboard systems. The hardware and software are engineered by Seafar. The system can be installed on existing vessels or on newbuilds.

Seafar currently operates 12 vessels on the Flemish waterways, ranging from 38m (400T) up to 110m (3.000T) barges.

In Flanders the legislator has started to identify the gaps in current legislation in order to meet the new requirements for autonomous shipping. They have then provided test areas for organisations such as Seafar to test the new software in real life. Now they are working on adjusting the law and legislation to end up in a situation where autonomous shipping can exist in a legal framework. The Netherlands, Germany and France are also working on the same topics but are not yet as far developed as Belgium.

Looking at insurances, also for Underwriters this is a new business which needs their evaluation on the risk. Will the technology be safer as human errors are excluded more or should we consider some growing pains in the software? The degree of automation will also be relevant for an Underwriter. From a risk perspective it is important whether decisions will be fully made by humans or computers, or something in between.

An Underwriter today would like to have at least the same degree of safety and security onboard of the vessels. Ships should be able to manage their voyage plans and update them in real time, ships should be able to avoid collisions with obstacles and traffic and remain a sufficient level of manoeuvrability in various weather conditions. Beside the practical aspect they can only provide an insurance cover if vessels are operating in compliance with all international and national regulations. What we also see as a request is that operators should remain to take over control of the vessel at any time.

Of course not all Underwriters are keen to start covering these kind of vessels as there is no history data that shows these technologies to be working and effectively generating less claims. We do need to find the progressive Underwriters who are willing to step in this adventure.

The main issue we are discussing in terms of insurance is the liability. Who will be liable in case the software contains errors and an incident occurs. According to our approach, the Owner of the vessel remains responsible for the vessel and will take out a 'regular' Hull & Machinery and P&I insurance. With remote controlled shipping, such as Seafar, the onshore Captain will remain under the control and responsibility of the Shipowner. A navigation error from the onshore Captain will in that respect be treated exactly the same as if he was sitting onboard of the ship. In Belgian regulation the Onshore Control Centre is seen as part of the vessel. This means that liabilities do not change because the simple fact that the Captain is not onboard of the vessel.

Beside this the organisations such as Seafar will have their own extension on the Owners P&I cover for all incidents where the software is the cause of an incident. In case it is not a navigational error of the Captain but it is the software that is failing, the Shipowner will most likely not accept the liability for same. Therefore we have designed some kind of extension on the P&I cover of the Owner that will cover all incidents in case the software failure is the cause of the incident. It is important that the liabilities are

well described between the Owner and provider of the system in a contract between both parties. This contract with a clear line where all liabilities lie will form the basis for Underwriters to provide a cover.

With the necessary open discussion we were able to place cover for such type of new vessels and note more and more interest in the insurance market.

DEVELOPMENT AND DEMONSTRATION OF AUTONOMOUS SHIPS IN JAPAN

HIDEYUKI ANDO*

1. Introduction of the DFFAS Project

Today I would like to introduce a development and demonstration of autonomous ship project in Japan. We formed the DFFAS (Designing the Future of Fully Autonomous Ships) consortium to develop and demonstrate a fully autonomous ship, and with funding from the Nippon Foundation's unmanned autonomous ship program MEGURI2040. The consortium worked on the development and demonstration of an autonomous ship over two years from February 2020 to May 2022.

The Nippon Foundation's MEGURI2040 program aimed to develop technologies for unmanned autonomous ships at the present time and to identify future technological development issues as well as social issues such as legislation, infrastructure, and human resource development, in order to achieve the long-term goal of realizing a society in 2040 with autonomous ships in operation. Under the MEGURI 2040 program, five consortia, including DFFAS, developed and demonstrated the technology.

Technological innovations and amendments to laws and regulations are essential for the realization of autonomous ships, and realistically, these are likely to be phased in in the future. In the first stage of the progression to automated operations, the current watch and duty system will remain unchanged, but the computer-based support for ship handling operations will become more sophisticated. In the next stage, the number of watchkeepers will be reduced to one person on duty with computer support (Condition B-1). Furthermore, technological advances and legislative changes will lead to a phase where computers will operate the ship and a person will be on watch and duty only when necessary (Conditional B-0). The progress we envision in automated operation technology for general merchant vessels is only at the conditional B-0 level, and we do not envision fully unmanned operation. On the other hand, we believe that there will be examples of small vessels and non-merchant vessels moving to the stage of fully autonomous operation in environments where short passages and high-speed communications are guaranteed.

As mentioned above, MEGURI2040 aims to develop and demonstrate fully autonomous technologies and to identify the technical and social issues that lead to this goal, and the DFFAS project worked on development and demonstration based on this background and philosophy.

* MTI, NYK Group.

The DFFAS consortium consists of 30 companies, more than 60 if subcontractors and other partners are included. the DFFAS project aimed to successfully demonstrate an autonomous ship operation retrofit on the 749 GT container ship Suzaku. Another goal was to learn how to manage a project to develop a complex control system by integrating systems provided by many companies.

2. System overview

The DFFAS system for autonomous ship operations developed in the DFFAS project consists largely of an automated navigation system on board the vessel, a land-based support system called the Fleet Operation Centre (FOC) and a communication system connecting the vessel and land. The FOC support system on land consists of a monitoring system for normal operations, Integrated Monitoring Block, and Emergency Response Block for emergency response.

Although the DFFAS system design utilizes conventional ship handling and navigational instrumentation technologies, it was necessary to redesign the system from the conceptual level in order to achieve the mission of a fully autonomous automatic vessel. This required the collaboration of experts with in-depth knowledge in two areas: domain experts such as ship captains and chief engineers who are familiar with ship handling, and navigational instrument engineers from navigational instrument manufacturers who are familiar with navigational instruments. In designing the automated ship handling system, we introduced model-based systems engineering (MBSE), a design method that has been used in the development of products with a high system ratio in the aerospace and automotive fields.

In DFFAS autonomous navigation systems, computers take on human cognitive tasks such as situational awareness, decision making, and actions that are normally performed by humans on board. DFFAS is a system that uses a computer to perform the cognitive tasks that are normally performed by humans on board, such as situational awareness, decision-making, and action. The DFFAS assigns the role of the FOC onshore for long-term tasks where accurate information is available, and the role of the FOC onboard for maneuvering tasks where more accurate information is available onboard, such as recognizing other vessels and avoiding a course. The table below shows the composition of the cognitive tasks in the DFFAS, the task executor (computer or person), and the location where they are performed.

Ando Hideyuki

Table 3.1: Task category, executor and location

Task		Executor	Location
Situation awareness (Detection)	Long Term Object & Event Detection (LOED)	Machine, Human	Shore
	Short Term Object & Event Detection (SOED)	Machine	On board
Decision making (Integration/Analysis/Planning)	L-Event Response & Path Planning (LERPP)	Machine Human (including/restriction, approval)	Shore
	S-Event Response & Path Planning (SERPP)	Machine	On board Shore (status: AM/RFB)
		Human	Shore (status: AM/RFB)
	CIM	Machine	On board
		Human (operation for system status)	Shore
Execution (Control/Actuation)	DTC and propulsion	Machine	On board
(Independent) Fallback		Machine	On board

There are then five subsystems that make up the overall DFFAS system

- Ship maneuvering System
- Propulsion System
- Communication System
- Fleet Operation Centre (FOC) System
- Centralized Information Management (CIM) System

Of the above, CIM System is the first system designed and developed by DFFAS to obtain status information from each subsystem and determine whether the autonomous ship handling system as a whole is working well, whether any subsystems are faulty and affecting the overall system, and the status of the overall system. The system is used to determine the status of the overall system. In the case of conventional vessels, the subsystems are independent of each other and weakly interconnected, and the main actor who coordinates the subsystems is the ship's crew, but the integration of the subsystems is essential for fully autonomous navigation.

The CIM system collects information on the status of the individual subsystems, integrates them and determines the status of the overall system. The status of the overall system is determined as any of the following status,

- Normal ... System is running without any intervention by crew or fallback from shore;
- Active Monitoring ... System is running under the verification by operator at shore;
- Remote Fallback ... System is running under fallback operations by operator at shore;
- Independent Fallback ... System is running under fallback operations by systems on vessel.

The following section describes the flow of a voyage using the DFFAS system. Prior to departure, the captain of the onshore Fleet Operations Center (FOC), with the support of the system, collects and verifies the information required for the voyage in advance, checks the safety of the route plan proposed by the system, revises it if necessary and obtains approval, and forwards the voyage plan to the onboard system. Once the autonomous voyage has started, the system proceeds with the voyage according to the voyage plan, with the CIM constantly monitoring the status of each subsystem and integrating them to monitor the status of the overall system and transition it to the appropriate status, while continuing the voyage until the end of the voyage, which is an operation. The captain of the FOC on land takes the necessary action according to the status of the overall system as determined by the CIM.

3. System design and development process

As mentioned earlier, the development of the DFFAS system was carried out using the V&V process, a system development method used in the design, development and manufacture of products with a high system ratio, such as in the aerospace and automotive sectors.

The first step in the design and development of a system is to create a document called the Concept of Operations (ConOps), which defines how and by whom the technology will be used in operations from the user's perspective. This defines not only the technology to be developed, but also the concept of how the technology will be used by users and the organization. Next, based on this ConOps, the functional requirements for the system are identified, using a risk analysis method called STPA (Systems Theoretic Process Analysis), which focuses on the signal exchange between the modules that make up the system, and how a failure in one module will affect the other modules. The risk management plan to reduce the impact is then considered and reflected in the system design. Risk analysis at the equipment level is carried out using a method known as FMEA (Failure Mode and Effects Analysis), and risk management in the event of failures in individual pieces of equipment is reflected in the design of the equipment system.

The risk analysis in DFFAS system design uses the concept of Safety Constraints (SCs) to specify nine SCs and a risk management method called bow-tie to ensure that the system threats identified in the STPA do not lead to a breach of each safety constraint. The system is then secured with defensive walls to ensure the necessary safety. The defense walls are called non-functional requirements, such as functional requirements and training requirements for the system.

Simulation-based testing (simulation-based testing) is used to check that the developed system is implemented in accordance with the designed functional and performance requirements. Simulation-based testing is a method for checking and approving whether a control system, such as an automatic navigation system, meets the functional and performance requirements. By using highly reproducible simulations, various sea conditions are reproduced in the simulation to reproduce ship motions, such

as motions and maneuverability, and to check the operation of the control system. In order to improve the reproducibility, motion performance tests using a model of the target vessel are carried out in advance in tank tests and wind tunnels, and are reflected in the simulation model.

In DFFAS, the core of the automated vessel was composed of systems from five different companies, but whether they can work together to achieve the required overall operation and whether the transfer between systems is smooth must be confirmed by testing under a variety of conditions. Using simulations on land to check the system before making adjustments at sea is a very important means of ensuring efficient system development and eliminating system failures.

In the development of the DFFAS system, too, during a two-month period from June to August 2022, the systems were collected at the FOC on land, before they were mounted on board, and connected to a simulator to test the entire system in normal and abnormal conditions. As a result, 30 problems related to system integration that could not be identified during the development of each company were identified, including problems related to system mismatch. The voyage between Tokyo Bay and Ise Bay, scheduled for the main production, was also tested in a virtual space on the simulator.

4. Demonstration

The demonstration voyage took place from 26-27 February 2022 on the outward route from Tokyo Bay to Ise Bay, and from 28 February to 1 March on the return route, also from Tokyo Bay to Ise Bay. The voyages were conducted under the current regulations, and although the vessels were navigated automatically by an autonomous navigation system, the voyages were conducted with the captain and a crew that met the legally mandated number of crew members on board.

Of the entire 424 nautical mile voyage, 98.5% was successfully automated. The remaining 1.5%, for example, was due to the fact that on the return voyage, when the vessel passed through the Irago Strait and entered Ise Bay on Saturday morning, there were many fishing vessels in the route and the system was switched to human operation. In the current system design concept, the route is planned with waypoints and avoidance maneuvering is performed by waypoint correction, but the detailed maneuvering to avoid the fishing boats requires direct steering instead of waypoint operation, and in this case, the fallback operations are to be performed by manual steering, and the change to manual steering was made within the expected range.

5. Summary

- With the support of the Nippon Foundation, the NYK Group implemented the DFFAS (Designing the Future of Fully Autonomous Ships) Project in collaboration with over 60 partners.
- During the 2022 demonstration voyage, the world's first demonstration voyage of fully autonomous operation on long-distance routes including congested routes was carried out. The success rate of the automated voyage was 98.5%.

- Through our development and demonstration experience in the DFFAS project, we became convinced that open system architectures and open processes are necessary in ensuring the safety of complex systems such as automated flight systems. We have identified that systems engineering approaches such as V&V processes, risk assessment and simulation testing play an important role here.
- We need to increase transparency in the design and development of automated navigation systems. This will help clarify the relevance of automatic navigation systems to IMO regulations, classification rules/guidelines and technical standards, and aid certification and approval. We believe that this transparency helps to build consensus with relevant stakeholders and is necessary for the social implementation of automated ships.

PART III

Status of Conventions

(Guidance as to where information can be obtained)

STATUS OF SIGNATURES, RATIFICATIONS, ACCEPTANCES, APPROVALS, ACCESSIONS, RESERVATIONS AND NOTIFICATIONS OF SUCCESSION WITH REGARD TO MARITIME LAW CONVENTIONS

Since 1951 CMI has published information about the status of maritime law conventions in its CMI Bulletins, and later in its CMI Yearbooks. The information was initially limited to the Brussels' conventions which were the result of the work of CMI itself. But over time information about maritime law conventions produced by IMO and other organizations was also published by CMI. For its information CMI relied on the kind co-operation with the Ministry of Foreign Affairs of Belgium (the depositary of the Brussels' conventions), and the secretariats of the relevant international organizations.

Over the years the Belgian Ministry and the international organizations have proceeded to publish information on the status of conventions on the internet. These internet publications are updated as soon as new information becomes available. Therefore, spending a lot of time on the gathering of the same information for an annual publication in a paper yearbook would now seem to serve a very limited purpose. It was therefore decided to stop publishing the status of conventions in the CMI Yearbook and switch to publication on the CMI website. In order to prevent the unnecessary duplication of information already publicly available (and kept up to date) on the websites of the Belgian Ministry of Foreign Affairs and the international organizations, CMI now simply provides a list of the relevant maritime law conventions with links to the websites of convention depositaries and international organizations. References to national treaty databases which provide trustworthy information on the status of multilateral conventions are also included.

The conventions are listed under six headings:

- Status of Brussels (CMI) Maritime Law Conventions
- Status of IMO Maritime Law Conventions
- Status of UN and UN/IMO Maritime Law Conventions
- Status of UNESCO Maritime Law Conventions
- Status of UNIDROIT Maritime Law Conventions
- Status of Antarctic Maritime Law Conventions

*Status of Signatures, Ratifications, Acceptances, Approvals, Accessions, Reservations
and Notifications of Succession with regard to Maritime Law Conventions*

The conventions are listed within these categories in chronological order, but keeping protocols to conventions grouped together with the original convention.

It should be noted that the information provided on the websites referred to may vary in detail and accuracy. Just as in the past, CMI cannot guarantee that all the information is complete and correct. In the end it is advisable to contact the official depositary of each convention. Experience has shown that even then the information provided may be subject to debate.

Taco van der Valk
5 January 2023

Status of Brussels (CMI) Maritime Law Conventions

International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, Brussels, 23 September 1910

Entry into force: 1 March 1913

- the depositary, the Belgian Government:
<https://diplomatie.belgium.be/sites/default/files/documents/CDM1.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003382>

Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, Brussels, 23 September 1910

Entry into force: 1 March 1913

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20A\)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20A)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf)

Protocol to amend the Convention for the Unification of Certain Rules of law relating to Assistance and Salvage at Sea Signed at Brussels on 23rd September 1910, Brussels, 27 May 1967

Entry into force: 15 August 1977

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20B\)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM2.%20B)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20%5B...%5D.pdf)

International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels, Brussels, 25 August 1924

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM3.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280167705>

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Brussels, 25 August 1924

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20A\)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20A)%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf)
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801d0f51>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/004127>

Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25th August 1924, Brussels, 23 February 1968

Entry into force: 23 June 1977

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20B\)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20B)%20Protocole%20de%20modification%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%20%5B...%5D.pdf)
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea4ab>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003112>

Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 as amended by the Protocol of 23 February 1968, Brussels, 21 December 1979

Entry into force: 14 February 1984

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20C\)%20Protocole%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%2021%20d%C3%A9cembre%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM4.%20C)%20Protocole%2C%20sign%C3%A9%20%C3%A0%20Bruxelles%20le%2021%20d%C3%A9cembre%20%5B...%5D.pdf)
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d54ea>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/000840>

International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 10 April 1926

Entry into force: 2 June 1931

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM5.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20relatives.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=080000028016775a>

International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 10 April 1926

Entry into force: 8 January 1937

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM6.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20concernant%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166914>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003839>

Additional Protocol to the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, Brussels, 24 May 1934

Entry into force: 8 January 1937

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM6.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20concernant%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280166914>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/005942>

International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, Brussels, 10 May 1952

Entry into force: 14 September 1955

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM7.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801338d5>

International Convention for the Unification of Certain Rules Relating to Penal jurisdiction in matters of collision and other incidents of navigation, Brussels, 10 May 1952

Entry into force: 20 November 1955

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM8.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801338c3&clang=_en

International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952

Entry into force: 24 February 1956

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM9.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=08000002801338ba>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/007235>

International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 10 October 1957

Entry into force: 31 May 1968

- the depositary, the Belgian Government:
- [https://diplomatie.belgium.be/sites/default/files/documents/CDM10.%20A\)%20Convention%20internationale%20sur%20la%20limitation%20de%20la%20responsabilit%C3%A9%20%5B...%5D.pdf](https://diplomatie.belgium.be/sites/default/files/documents/CDM10.%20A)%20Convention%20internationale%20sur%20la%20limitation%20de%20la%20responsabilit%C3%A9%20%5B...%5D.pdf)
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea54a>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/006826>

Protocol amending the International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships dated 10 October 1957, Brussels, 21 December 1979

Entry into force: 6 October 1984

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/Etats%20li%C3%A9s1979.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800d549d>

International Convention relating to Stowaways, Brussels, 10 October 1957

Entry into force: not yet in force

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM11.%20Convention%20internationale%20sur%20les%20passagers%20clandestins%2C%20%5B...%5D.pdf>

International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea, Brussels, 29 April 1961

Entry into force: 4 June 1965

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM12.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20r%C3%A8gles%20en%20%5B...%5D.pdf>
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ea435>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/009010>

International Convention on the Liability of Operators of Nuclear Ships, (Brussels, 25 May 1962

Entry into force: not yet in force

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM13.%20Convention%20relative%20a%20la%20responsabilit%C3%A9%20des%20exploitants%20de%20%5B...%5D.pdf>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/009108>

International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM14.%20Convention%20internationale%20pour%20l'unification%20de%20%5B...%5D.pdf>

Convention relating to Registration of Rights in respect of Vessels under Construction, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM15.%20Convention%20internationale%20relative%20%C3%A0%20l'inscription%20%5B...%5D.pdf>

International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, Brussels, 27 May 1967

Entry into force: not yet in force

- the depositary, the Belgian Government:
- <https://diplomatie.belgium.be/sites/default/files/documents/CDM16.%20Convention%20internationale%20pour%20l'unification%20de%20certaines%20%5B...%5D.pdf>

Status of IMO Maritime Law Conventions

International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969

Entry into force: 19 June 1975_

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801083db&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003096>

Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 19 November 1976

Entry into force: 8 April 1981_

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800e815e&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Treaty/Details/001655>

Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 25 May 1984

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/000115>

Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, London, 27 November 1992

Entry into force: 30 May 1996

- the depositary, the (Secretary General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a5777&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Treaty/Details/005146>

International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, Brussels, 29 November 1969

Entry into force: 6 May 1975

- the depositary, the (Secretary General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002801089a9&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003095>

Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, London, 2 November 1973

Entry into force: 30 March 1983

- the depositary, the (Secretary General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ddf24&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002394>

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971

Entry into force: 16 October 1978

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f5af6&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002837>

Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 19 November 1976

Entry into force: 22 November 1994

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800ad4bc&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/001657>

Protocol of 1984 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 25 May 1984

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/000116>

Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, London, 27 November 1992

Entry into force: 30 May 1995

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the depositary, the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a599a&clang=en>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/012374>

Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, London, 16 May 2003

Entry into force: 3 March 2005

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/010844>

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Brussels, 17 December 1971

Entry into force: 15 July 1975

- the depositary, the International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=0800000280107d4b>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002836>

Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, Athens, 13 December 1974

Entry into force: 28 April 1987

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cdbb3>

Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 19 November 1976

Entry into force: 30 April 1989

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 29 March 1990

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>

Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, London, 1 November 2002

Entry into force: 23 April 2014

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/011547>

Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976

Entry into force: 1 December 1986

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f9404>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/001656>

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976, London, 2 May 1996

Entry into force: 13 May 2004

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/007428>

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, Rome, 10 March 1988

Entry into force: 1 March 1992

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b9bd7&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002231>

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988, Rome, 10 March 1988

Entry into force: 1 March 1992

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800b9af3&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002232>

Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005

Entry into force: 28 July 2010

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/011471>

Protocol of 2005 to the Protocol for the Suppression on Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, London 14 October 2005

Entry into force: 28 July 2010

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/011470>

International Convention on Salvage, 1989, London, 28 April 1989

Entry into force: 14 July 1996

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800a58b3>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/003805>

International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, London, 30 November 1990

Entry into force: 13 May 1995

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- the United Nations Treaty Collection: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800aada6&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/004459>

Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000, London, 15 March 2000

Entry into force: 14 June 2007

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/009370>

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, London, 3 May 1996

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/007429>

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, London 30 April 2010

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/012292>

International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, London, 23 March 2001

Entry into force: 21 November 2011

- the depositary, the (Secretary-General of the) International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/011005>

Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007

Entry into force: 14 April 2015

- the depositary, the International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/009962>

Status of UN and UN/IMO Maritime Law Conventions

United Nations Convention on a Code of Conduct for Liner Conference, Geneva, 6 April 1974

Entry into force: 6 October 1983

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003a445&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/002264>

United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978

Entry into force: 1 November 1992

- the depositary, the (Secretary-General of the) United Nations: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280042179>

United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280025033&clang=_en

United Nations Convention on the Law of the Sea, Montego-Bay, 10 December 1982

Entry into force: 16 November 1994

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280043ad5&clang=_en
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/000493>

United Nations Convention on Conditions for Registration of Ships, Geneva, 7 February 1986

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004c485>

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, Vienna, 19 April 1991

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004b4e0&clang=_en

International Convention on Maritime Liens and Mortgages, 1993, Geneva, 6 May 1993

Entry into force: 5 September 2004

- the depositary, the (Secretary-General of the) United Nations: <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004a70a>

International Convention on Arrest of Ships, 1999, Geneva, 12 March 1999

Entry into force: 14 September 2011

- the depositary, the (Secretary-General of the) United Nations: <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004ce27>
- the International Maritime Organization: <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx>

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea, New York, 11 December 2008

Entry into force: not yet in force

- the depositary, the (Secretary-General of the) United Nations: <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028021e615>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/010533>

Status of UNESCO Maritime Law Conventions**UNESCO Convention on the Protection of Underwater Cultural Heritage, Paris, 2 November 2001**

Entry into force: 2 January 2009

- the depositary, the (Director-General of the) United Nations Educational, Scientific, Cultural Organization (UNESCO):
- http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/010501>

Status of UNIDROIT Maritime Law Conventions**UNIDROIT Convention on International Financial Leasing, Ottawa, 28 May 1988**

Entry into force: 1 May 1995

- the depositary, the Government of Canada: -
- the originating organization, the International Institute for the Unification of Private Law (UNIDROIT):
- <https://www.unidroit.org/instruments/leasing/convention/status/>

Status of Antarctic Maritime Law Conventions

Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty: Liability Arising From Environmental Emergencies, Stockholm, 14 June 2005

Entry into force: not yet in force

- the depositary, the Government of the United States:
- <https://www.state.gov/annex-vi-antarctic-treaty/>
- Netherlands Treaty Database (in English) (*Verdragenbank*): <https://verdragenbank.overheid.nl/en/Verdrag/Details/010766>

CONFERENCES OF THE COMITÉ MARITIME INTERNATIONAL

I. BRUSSELS – 1897

President:

Mr. Auguste BEERNAERT.

Subjects:

Organization of the International
Maritime Committee - Collision
-Shipowners' Liability.

II. ANTWERP – 1898

President:

Mr. Auguste BEERNAERT.

Subjects:

Liability of Owners of sea-going
vessels.

III. LONDON – 1899

President:

Sir Walter PHILLIMORE.

Subjects:

Collisions in which both ships are
to blame - Shipowners' liability.

IV. PARIS – 1900

President:

Mr. LYON-CAEN.

Subjects:

Assistance, salvage and duty to
tender assistance - Jurisdiction in
collision matters.

V. HAMBURG – 1902

President:

Dr. Friedrich SIEVEKING.

Subjects:

International Code on Collision
and Salvage at Sea - Jurisdiction in
collision matters - Conflict of laws
as to owner-ship of vessels.

VI. AMSTERDAM - 1904

President:

Mr. E.N. RAHUSEN.

Subjects:

Conflicts of law in the matter of
Mortgages and Liens on ships -
Jurisdiction in collision matters -
Limitation of Shipowners' Liability.

VII. LIVERPOOL - 1905

President:

Sir William R. KENNEDY.

Subjects:

Limitation of Shipowners' Liability
- Conflict of Laws as to Maritime
Mortgages and Liens - Brussels
Diplomatic Conference.

VIII. VENICE – 1907

President:

Mr. Alberto MARGHERI.

Subjects:

Limitation of Shipowners' Liability
- Maritime Mortgages and Liens -
Conflict of law as to Freight.

Conferences of the Comité Maritime International

IX. BREMEN – 1909

President:

Dr. Friedrich SIEVEKING.

Subjects:

Conflict of laws as to Freight
 -Compensation in respect of
 personal injuries - Publication of
 Maritime Mortgages and Liens.

X. PARIS – 1911

President:

Mr. Paul GOVARE.

Subjects:

Limitation of Shipowners' Liability
 in the event of loss of life or
 personal injury - Freight.

XI. COPENHAGEN – 1913

President:

Dr. J.H. KOCH.

Subjects:

London declaration 1909 - Safety
 of Navigation - International Code
 of Affreightment - Insurance of
 enemy property.

XII. ANTWERP – 1921

President:

Mr. Louis FRANCK.

Subjects:

International Conventions relating
 to Collision and Salvage at sea.
 - Limitation of Shipowners'
 Liability -Maritime Mortgages and
 Liens -Code of Affreightment -
 Exonerating clauses.

XIII LONDON – 1922

President:

Sir Henry DUKE.

Subjects:

Immunity of State-owned ships

- Maritime Mortgage and Liens.
 - Exonerating clauses in Bills of
 lading.

XIV. GOTHENBURG – 1923

President:

Mr. Efel LÖFGREN.

Subjects:

Compulsory insurance of
 passengers -Immunity of State
 owned ships -International Code
 of Affreightment - International
 Convention on Bills of Lading.

XV. GENOA – 1925

President:

Dr. Francesco BERLINGIERI.

Subjects:

Compulsory Insurance of
 passengers - Immunity of State
 owned ships - International Code
 of Affreightment - Maritime
 Mortgages and Liens.

XVI. AMSTERDAM – 1927

President:

Mr. B.C.J. LODER.

Subjects:

Compulsory insurance of
 passengers - Letters of indemnity
 - Ratification of the Brussels
 Conventions.

XVII. ANTWERP – 1930

President:

Mr. Louis FRANCK.

Subjects:

Ratification of the Brussels
 Conventions - Compulsory
 insurance of passengers -
 Jurisdiction and penal sanctions in
 matters of collision at sea.

Conferences of the Comité Maritime International

XVIII. OSLO – 1933

President:

Mr. Edvin ALTEN.

Subjects:

Ratification of the Brussels Conventions -Civil and penal jurisdiction in matters of collision on the high seas - Provisional arrest of ships - Limitation of Shipowners' Liability.

XIX. PARIS – 1937

President:

Mr. Georges RIPERT.

Subjects:

Ratification of the Brussels Conventions -Civil and penal jurisdiction in the event of collision at sea - Arrest of ships - Commentary on the Brussels Conventions - Assistance and Salvage of and by Aircraft at sea.

XX. ANTWERP – 1947

President:

Mr. Albert LILAR.

Subjects:

Ratification of the Brussels Conventions, more especially of the Convention on immunity of State-owned ships - Revision of the Convention on Limitation of the Liability of Owners of sea-going vessels and of the Convention on Bills of Lading - Examination of the three draft conventions adopted at the Paris Conference 1937 - Assistance and Salvage of and by Aircraft at sea - York and Antwerp Rules; rate of interest.

XXI. AMSTERDAM – 1948

President:

Prof. J. OFFERHAUS

Subjects:

Ratification of the Brussels International Convention - Revision of the York-Antwerp Rules 1924 - Limitation of Shipowners' Liability (Gold Clauses) -Combined Through Bills of Lading -Revision of the draft Convention on arrest of ships - Draft of creation of an International Court for Navigation by Sea and by Air.

XXII. NAPLES – 1951

President:

Mr. Amedeo GIANNINI.

Subjects:

Brussels International Conventions - Draft convention relating to Provisional Arrest of Ships - Limitation of the liability of the Owners of Sea-going Vessels and Bills of Lading (Revision of the Gold clauses) - Revision of the Conventions of Maritime Hypothèques and Mortgages - Liability of Carriers by Sea towards Passengers - Penal Jurisdiction in matters of collision at Sea.

XXIII. MADRID – 1955

President:

Mr. Albert LILAR.

Subjects: Limitation of Shipowners' Liability -Liability of Sea Carriers towards passengers - Stowaways - Marginal clauses and letters of indemnity.

Conferences of the Comité Maritime International

XXIV. RIJEKA – 1959

President:

Mr. Albert LILAR

Subjects:

Liability of operators of nuclear ships - Revision of Article X of the International Convention for the Unification of certain Rules of law relating to Bills of Lading - Letters of Indemnity and Marginal clauses. Revision of Article XIV of the International Convention for the Unification of certain rules of Law relating to assistance and salvage at sea - International Statute of Ships in Foreign ports - Registry of operations of ships.

XXV. ATHENS – 1962

President:

Mr. Albert LILAR

Subjects:

Damages in Matters of Collision - Letters of Indemnity - International Statute of Ships in Foreign Ports - Registry of Ships - Coordination of the Convention of Limitation and on Mortgages - Demurrage and Despatch Money - Liability of Carriers of Luggage.

XXVI. STOCKHOLM – 1963

President:

Mr. Albert LILAR

Subjects:

Bills of Lading - Passenger Luggage - Ships under construction.

XXVII. NEW YORK – 1965

President:

Mr. Albert LILAR

Subjects:

Revision of the Convention on Maritime Liens and Mortgages.

XXVIII. TOKYO – 1969

President:

Mr. Albert LILAR

Subjects:

“Torrey Canyon” - Combined Transports - Coordination of International Convention relating to Carriage by Sea of Passengers and their Luggage.

XXIX. ANTWERP – 1972

President:

Mr. Albert LILAR

Subjects:

Revision of the Constitution of the International Maritime Committee.

XXX. HAMBURG – 1974

President:

Mr. Albert LILAR

Subjects:

Revisions of the York/Antwerp Rules 1950 - Limitation of the Liability of the Owners of Seagoing vessels - The Hague Rules.

Conferences of the Comité Maritime International

XXXI. RIO DE JANEIRO - 1977

President:

Prof. Francesco BERLINGIERI

Subjects:

Draft Convention on Jurisdiction, Choice of law and Recognition and enforcement of Judgements in Collision matters. Draft Convention on Off-Shore Mobile Craft.

XXXII. MONTREAL – 1981

President:

Prof. Francesco BERLINGIERI

Subjects:

Convention for the unification of certain rules of law relating to assistance and salvage at sea - Carriage of hazardous and noxious substances by sea.

XXXIII. LISBON- 1985

President:

Prof. Francesco BERLINGIERI

Subjects:

Convention on Maritime Liens and Mortgages - Convention on Arrest of Ships.

XXXIV. PARIS – 1990

President:

Prof. Francesco BERLINGIERI

Subjects:

Uniformity of the Law of Carriage of Goods by Sea in the 1990's - CMI Uniform Rules for Sea Waybills - CMI Rules for Electronic Bills of Lading -Revision of Rule VI of the York-Antwerp Rules 1974.

XXXV. SYDNEY – 1994

President:

Prof. Allan PHILIP

Subjects:

Review of the Law of General Average and York-Antwerp Rules 1974 (as amended 1990) - Draft Convention on Off-Shore Mobile Craft - Assessment of Claims for Pollution Damage - Special Sessions: Third Party Liability -Classification Societies - Marine Insurance: Is the doctrine of Utmost Good Faith out of date?

XXXVI. ANTWERP – 1997
CENTENARY CONFERENCE

President:

Prof. Allan PHILIP

Subjects:

Off-Shore Mobile Craft - Towards a Maritime Liability Convention - EDI -Collision and Salvage - Wreck Removal Convention - Maritime Liens and Mortgages, Arrest of Ships -Classification Societies - Carriage of Goods by Sea - The Future of CMI.

XXXVII. SINGAPORE – 2001

President:

Patrick GRIGGS

Subjects:

Issues of Transport Law - Issues of Marine Insurance - General Average -Implementation of Conventions - Piracy -Passengers Carried by Sea.

Conferences of the Comité Maritime International

XXXVIII. VANCOUVER – 2004

President:

Patrick GRIGGS

Subjects:

Transport Law - General Average
 - Places of Refuge for Ships in
 Distress - Pollution of the Marine
 Environment - Maritime Security
 - Marine Insurance - Bareboat
 Chartered Vessels - Implementation
 of the Salvage Convention.

XXXIX. ATHENS 2008

President:

Jean-Serge Rohart

Subjects:

Places of Refuge – Procedural
 Rules Relating to Limitation
 of Liability in Maritime Law –
 UNCITRAL Draft Convention
 on Contracts for the International
 Carriage of Goods Wholly or Partly
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 Judicial Sale of Ships – Charterer's
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 Charterer's Right to Limit Liability
 – Wreck Removal Convention 2007
 – Draft Convention on Recycling
 of Ships

XL. BEIJING 2012

President:

Karl-Johan Gombrii

Subjects:

Judicial Sales of Ships – Salvage
 Convention 1989 – Rotterdam
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 2004 – Offshore Activity – Fair
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 Arrest of Ships and Judicial Sales
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XLI. HAMBURG 2014

President:

Stuart Hetherington

Subjects:

Judicial Sales of Ships – York
 Antwerp Rules 2004 – Ships in
 hot water: Ship Financing and
 Restructuring; Cross Border
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 classification societies; Wrongful
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Conferences of the Comité Maritime International

XLII. NEW YORK 2016

President:

Stuart Hetherington

Subjects:

General Average – Costa Concordia
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– Lex Maritima – Ship financing
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Wrongful Arrest

XLIII. ANTWERP 2022

President:

Christopher O. Davis

Subjects:

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Interpretation - MASS

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