United Nations Commission on International Trade Law

Working Group VI (Judicial Sale of Ships)

following the Thirty-seventh session

Vienna (online), 14–18 December 2020[1]

and in anticipation of the Thirty-eighth session

Vienna (online) 19-23 April 2021

1. The system of arrest and if necessary sale of ships has been in place in many countries for centuries. It is necessary of course because ships are very mobile. In order for the system to have any value, sale prices to be achieved on a judicial sale must be at a sufficiently commercial level to make the procedure attractive to those wishing to use it. Achieving a commercial price is essential in order for the remedy to be effective. That is a primary objective.
2. None of this has to do with either the merits of the claim or the distribution of the proceeds. The work of the proposed convention is quite narrow but important.
3. The simple mechanism proposed by the draft should not require any significant changes to the procedures or rules or laws operating to effect sales in any signatory state because the whole idea is that, providing the ship is within the jurisdiction and the sale is effected in accordance with the laws of the particular state, other signatory states will recognise the lawfulness of the sale.
4. The treaty should say little about notice requirements of the sale as that should be left to the arresting state. The maintaining of a central repository of certificates preferably through IMO which has operated in this sphere for a long time will add to certainty. Any person, and certainly every creditor will be able to find out immediately whether a vessel he is interested in is about to be sold.
5. There is judicial comity in recognition of procedures adopted by courts in other signatory states. In other words, the receiving state of a sold ship would not second-guess whether the procedure for the sale of the ship had been carried out correctly other than in the rare exceptional cases of fraud or the other exceptions under the

[1] *A report from Justice Neil McKerracher, Federal Court of Australia*

proposed instrument. That third factor of importance recognizes each signatory state's right to conduct its judicial affairs as it sees fit.

6. A great attraction of the draft in its present form is its simplicity. Another major attraction is that it does not interfere too greatly, if at all, with the method of judicial sales in each respective state. Mutual respect is given to the rights of signatory states to continue to carry out judicial sales in the way they choose and for other states to respect that right.

7. There is notice, sale in accordance with local rules, a certificate of such sale lodged in a repository and the judicial sale then has binding effect for all signatory states. The reciprocal recognition will ensure that people will pay commercial prices for ships thus sold. This will benefit all who have an interest in the ship. Expensive fights about the efficacy of a sale and where the ship is flagged will be eradicated.

8. There should be a simple version of the notice provision which respects existing rights of the selling state. This was achieved.

9. The Federal Court of Australia, Law Asia and the International Association of Judges (IAJ) have continued to support the work and proposals of the Comité Maritime International (CMI) which enjoys strong support from all mainstream shipping countries and shipping industry bodies. The list of participants is below (at [21]-[24]).

10. All of the positions advanced by CMI were accepted by the Working Group at UNCITRAL in December 2020. Most importantly Convention status will be achieved for the instrument rather than a model law status. All the delegations who spoke including the EU, except IRAN opted for a Convention. Iran too had been the only delegation who in Vienna last December supported the Model Law idea. In addition there was much tidying up and deliberations on many matters.

11. As far as Geographic Scope is concerned there was much support for the idea that the Convention would only apply to State parties, however there would be nothing to stop state parties from recognising the Judicial sales of non-state parties and the Secretariat was asked to come up with the appropriate wording.

12. The International Maritime Organization (IMO) is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships. IMO has accepted in principle (as has the working group) that it will be the repository for certificates of sale. The repository

would effectively receive copies of the notices of the judicial sales and would receive copies of the certificates of judicial sales. This idea of the repository means that every person interested in a particular vessel and wanting to know if such a vessel is ending up in a judicial sale would have access to this information at the press of a button.

13. Throughout the week issues arose unexpectedly, some that went to the core of the goal of achieving a free and unencumbered title to the bona fide purchaser and how that can be totally defeated if the notice provisions are not properly interpreted in a fair and objectively correct manner. There were several conferences over the content of articles 'overnight' by WhatsApp and email (bearing in mind that in Australia our participation was at night time due to Vienna being 10 hours behind AEST with delegations) to make sure that on the following morning when the recommendations were made and the ideas carried. The fact that we were not all in the same room with time to huddle and discuss things in coffee breaks made it all the more important to have a strategy going forward.

14. A number of important articles have been cleaned up. There is more to do and there are still several issues which we have left in the capable hands of the Secretariat to come up with drafting alternatives, however we have overcome a number of very important difficulties and the next (3rd) draft will be a much more cleaned up version with many less square brackets (which are used for issues still to be decided).

15. In total, the Working Group effectively dealt with:

    a. Article 1,
    b. parts of Article 2 – the Definitions (but we did not deal with this article completely and needs to be revisited),
    c. Articles 3 – Scope of Application,
    d. Article 4 – Notice of Judicial sale,
    e. Article 5 – Certificate of Judicial Sale,
    f. Article 6 – International Effect of Judicial Sale,
    g. Article 7 - Action by Registrar,
    h. Article 8 – No Arrest of the Ship,
    i. Article 9 – Jurisdiction to avoid and suspend judicial sale,
    j. Article 10 – Circumstances in which judicial sale has no international effect,
    k. Article 12 – Repository, and

l. Article 14 – Relations with other international instruments.

16. There may be more commentary to come before this April session on the Secretariat's latest attempts to explain the proposed amendments.

17. To quote from Ann Fenech of CMI

> 'I am very happy to report that the CMI position was always supported by many delegations. My interventions and Alex's interventions for Switzerland worked hand in glove, and I do not think we could have co-ordinated our interventions better given we were thousands of miles apart! What I consider "extraneous" delegations supporting the CMI position included Singapore and the EU. Our position also seems to have struck a chord with the representative from the Dominican Republic who kept taking the floor and supporting our various positions! Other important delegations supported the CMI position however we have CMI persons to thank for this such as Frank Nolan who spoke for the United States together with another representative, Tomotaka who spoke for Japan, John O'Connor who spoke for Canada together with another Canadian representative, Henry Li who spoke for China. Marked progress was registered in the working relationship with the EU. I was exchanging several messages with the EU representative during the various sessions which worked very well. The EU delegate spoke for and on behalf of the EU with regard to those issues on which there was a common position. However member states were left to comment as they wished and this led to contributions made by Croatia, Germany, Belgium, France, Malta, Italy and Spain. Here we had numerous CMI persons heading their countries delegations, Petar Kragic for Croatia, Jan Erik Poetscke for Germany and Manuel Alba for Spain. On the NGO side we had Peter Laurijssen for ICS and BIMCO, Margo Harris who spoke for Law Asia, Justice Neil McKerracher for the International Association of Judges, and Harmen Hoek for the IBA. All made very important interventions supporting the position of the CMI.'

(I would add that Australia was also represented by Ms Sarah Grant of the AGD and spoke in support of CMI.)

18. At the beginning of the week's meeting the Chair indicated that it was her impression that thanks to the progress that had been made so far, it was more than likely that we

would have a final draft in 2021 which would be circulated to the various governments and then presented to the UN General Assembly in the 2nd half of 2022. This seems achievable.

19. The next Working Group meeting, the 38th, is scheduled to take place in New York between the 19th and 23rd April and the 39th meeting in Vienna will be held between the 22nd and the 26th of November. Whether or not the session will take place in New York because of COVID is not clear, however if it does not then the Secretariat will be embarking on what it called "Informal" consultations. These will probably be on line meetings to pick up on the various paragraphs which the Working Group had asked the Secretariat to redraft.

SYNOPSIS OF MORE DETAILED REPORT FROM SECRETARIAT

20. At its thirty seventh 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 third session (Vienna, 8 19 July 2019). This was the third session at which the topic had been considered.

21. 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, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Libya, Malaysia, Mexico, Pakistan, 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.

22. The session was attended by observers from the following States: Angola, Bolivia (Plurinational State of), Bulgaria, Cyprus, Denmark, Egypt, El Salvador, Eswatini, Greece, Guatemala, Liberia, Luxembourg, Madagascar, Malta, Netherlands, Nicaragua, Portugal, Saudi Arabia, Slovenia and Sudan.

23. The session was attended by observers from the Holy See and the European Union (EU).

24. 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: Andean Community (CAN);

c. Non-governmental organizations: Baltic and International Maritime Council (BIMCO), Comité Maritime International (CMI), Instituto Iberoamericano de Derecho Marítimo (IIDM), International and Comparative Law Research Center (ICLRC), International Association of Judges (IAJ), International Bar Association (IBA), International Chamber of Shipping (ICS), International Transport Workers' Federation (ITF), International Union of Marine Insurance (IUMI), Law Association for Asia and the Pacific (LAWASIA), Moot Alumni Association (MAA) and New York City Bar (NYCBAR).

25. A view was expressed that, given the progress that it had made in its last two sessions, the Working Group should be in a position to complete a final draft of the instrument in 2021, which would then be circulated to governments for comments before being submitted to the Commission for approval and transmittal to the General Assembly for adoption in the second half of 2022. It was also noted that, in view of the widely supported working assumption that the instrument would eventually take the form of a convention, it would not be helpful for the Working Group to advance the draft instrument before the next session by way of informal consultations.

26. The Working Group agreed to proceed with an article-by-article consideration of the second revision, mindful of the overarching issues highlighted in the accompanying note and the comments reflected in the synthesis. It agreed to defer consideration of the definitions in article 2 until after consideration of the other substantive provisions in articles 1 to 14, noting that certain definitions might need to be considered in conjunction with those other provisions. Before turning to article 1, the Working Group was invited to express views on the form of the instrument and its geographic scope.

Convention?

27. The Working Group considered whether the instrument should take the form of a convention. While one delegation expressed doubts as to the need for a convention the prevailing view was that only a binding international instrument, whereby States

would undertake to recognize the acquisition of clean title and oblige the registrar to deregister the ship at the election of the purchaser, could ensure the required degree of uniformity, transparency and legal certainty. Only a convention could guarantee the international effects of judicial sales and sufficiently protect potential purchasers. This, in turn, would improve the terms of sale, leading to a sale price that better reflected the value of the ship and eventually greater proceeds for distribution among creditors.

Geographic scope

28. The Working Group considered whether, in the form of a convention, the instrument should apply to judicial sales conducted in a non-State party. It was decided that the recognition regime under an eventual convention should only apply between States parties.

Article 1. Purpose

29. The Working Group agreed to retain article 1 and to redraft it along the following lines: *"This Convention governs the effects, in a State Party, of the judicial sale of a ship conducted in another State Party."*

Article 3. Scope of application

30. Support was expressed for retaining the two limitations on scope set out in article 3(1).

31. Diverging views were expressed as to the meaning of words "at the time of the [judicial] sale" in article 3(1)(a). In some States, the ship might be allowed by the court to continue sailing pending the actual judicial sale. One view was that the ship needed to be physically located in the territory of the State of judicial sale from the start to the end of the judicial sale procedure. Another view was that the ship only needed to be physically located in the territory at the end of the procedure, particularly given that, under the law of some States, the procedure leading to the judicial sale could be started before the ship entered the territory of the State. It was added that, in any case, the words in article 3(1)(a) needed to be understood in the context of the definition of "judicial sale" in article 2(c) and the notice requirements in article 4.

32. It was proposed that the words should be placed in square brackets to indicate the need for further consideration. Another proposal was to specify that the time of sale was the moment at which the purchaser acquired the right to purchase the ship, which

might entail defining the term “sale”. Yet another proposal was to remove the words entirely.

33. After discussion, there was general agreement in the Working Group that the words in article 3(1)(a) **required the physical presence of the ship at the final stage** of the procedure when the ship was actually awarded to the successful purchaser. The Working Group noted, however, that it would be difficult to define that moment with greater specificity, given the differences among States in the procedure leading to a judicial sale. Considering that the definition in article 2(c)(i) could already prove sufficient, the Working Group decided not to amend article 3(1)(a), but instead to address the concerns expressed in the explanatory notes to the eventual convention.

Physical presence “within the jurisdiction”

34. It was observed that the reference in article 3(1)(a) of the English version to a ship being “within the jurisdiction” of a State could be understood as referring to the jurisdiction of a flag State under the United Nations Convention on the Law of the Sea (1982), which could, in certain circumstances, be exercised extraterritorially. It was noted that the reference to “territory” in other language versions of the draft might be preferable to avoid misunderstanding.

Definition of “ship”

35. Noting that article 3(1) limited the scope of the instrument to the judicial sale of a “ship”, the Working Group turned its attention to the definition of “ship” in article 2(i). It was recognized that that definition was broad and could be interpreted to include pleasure craft and inland navigation vessels. Support was expressed for retaining the definition of “ship” in its present form. It was proposed that, if the definition were to include inland navigation vessels, a provision could be inserted allowing a State party to reserve the right to exclude the application of the convention to inland navigation vessels. In response, it was felt that, at this stage, it would be premature for the Working Group to consider such a provision.

36. The view was expressed that the inclusion of inland navigation vessels within scope was not a concern per se, but rather the inclusion of vessels that were not registered in a public registry. It was added that attempting to differentiate seagoing vessels and inland navigation vessels would be challenging and not appropriate for the kind of

instrument that the Working Group was developing. It was proposed that this concern could be addressed by amending the definition of "ship" by inserting the word "registered" before "ship" and before "vessel". Broad support was expressed for that proposal.

37. While a proposal was made to delete article 14(2), the prevailing view was that article 14(2) was a useful provision for those States that were party to Protocol No. 2 to the Convention on the Registration of Inland Navigation Vessels (1965),
which dealt with the judicial sale of inland navigation vessels. The Working Group agreed that article 14(2) should be retained in its present form.

Definition of "judicial sale" and article 3(2)(a)

38. There was broad agreement that article 3(2)(a) should be deleted and that the exclusion of sales following seizure by tax, customs and other law enforcement authorities should be addressed in the definition of "judicial sale" in article 2(c). At the same time, it was cautioned that the instrument should avoid addressing matters of substantive scope in the definitions provision.

39. It was proposed that the term "public authority" in subparagraph (i) should be clarified. The view was expressed that a judicial sale conducted by a public authority should only fall within the definition if the authority was exercising judicial power or if it was acting under the supervision of a court. It was felt that a requirement that the public authority be empowered under the law of the State of judicial sale to conduct the sale would not be sufficient. Another proposal put forward was to require a sale conducted by a public authority to be approved by a court. Bearing in mind that subparagraph (ii) of the definition already limited judicial sales to those for which the proceeds were made available to creditors, the Working Group decided that the term "public authority" did not require any further clarification.

The Working Group agreed (a) to amend the definition by inserting, after the word "that", the words "is registered in a registry that is open to public inspection and", (b) to put those words in square brackets, and (c) to revert to the matter at a later stage.

Clean title

40. Noting that article 3(1)(b) limited the application of the draft convention to judicial sales that conferred clean title, the Working Group considered (a) the definition of "clean title" and (b) its role in defining the scope of application.

(a) Definition

41. At the outset, the Working Group noted that there was no substantive difference between the two alternative options presented for the definition of "clean title" in article 2(b). Some preference was expressed for the first option as it spelt out clearly all elements of the notion of "clean title". It was added that, if the first option were to be retained, it should be amended to specify that the rights and interests were "proprietary" in nature. That amendment would mean that *jus in re aliena* (i.e., rights in a thing belonging to another), which would include maritime liens and other rights within the meaning of "charge" as defined in article 2(a), were not part of the "rights and interests in the ship" that were extinguished by the acquisition of clean title.

42. The Working Group agreed that there might be a need to consider further adjustments to the definition of "charge" in article 2(a).

Role of clean title in defining the scope of application

43. In some States it was known at the start of a judicial sale procedure that the sale would result in the conferral of clean title on the purchaser; in other States that was not always the case. If the eventual convention applied only to a judicial sale that conferred clean title to the ship, it would be difficult for those other States to discharge their obligations under article 4, which required notice to be given "prior to a judicial sale". The Working Group engaged in a detailed discussion of that issue, during which a variety of views and proposals were put forward. The Working Group agreed to retain article 3(1)(b) in its present form and to revisit its drafting at a later stage. It was further agreed that, for the time being, the Working Group would proceed on the common understanding that the draft convention applied to judicial sales conducted in States where the law empowered the court to confer clean title (see A/CN.9/1007, para. 43), regardless of the eventual outcome of a concrete case, and that this "abstract" approach to the role of clean title in defining the scope of application should be borne in mind when considering the remaining provisions of the second revision.

Exclusion of State-owned ships

44. It was observed that the definition of "ship" in the second revision effectively excluded State-owned ships as such ships would not be "the subject of an arrest of similar measure capable of leading to a judicial sale". If article 3(2)(b) were to be retained, it should be amended to specify the relevant time. In this regard, it was proposed that the words "for the time being" should be replaced with "at the time of judicial sale". The Working Group agreed to retain article 3(2)(b) and to amend it as proposed.

Preservation of *in personam* claims, etc.

45. The Working Group considered whether article 6(2) should be moved to article 3. Diverging views were expressed. One view was that article 6(2) should remain in its current position as it addressed matters that were related more than anything to the effects of the judicial sale. Another view was that article 6(2)(a) could be moved. Yet another view was that article 6(2) was concerned with identifying matters that were not governed by the draft convention and thus should be set out in a separate provision. It was highlighted that article 6(2) conveyed an important message and therefore that its placement in the draft convention needed to be considered carefully.

46. After discussion, the Working Group agreed on the content of article 6(2) and decided to confirm, at a later stage, its proper placement in the draft convention, whether immediately following article 3 or at a latter part of the text

Article 4. Notice of judicial sale

Function of the notice requirements

47. The view was reiterated that the notice requirements should serve only as a condition for issuing the certificate of judicial sale, such that a failure to comply with article 4 would not result in a failure of the State of judicial sale to discharge its obligations under an eventual convention, but rather the non-issuance of the certificate of judicial sale under article 5. In response, it was observed that the notice requirements should also serve as a condition for giving international effect to the judicial sale, such that a failure to comply with article would result in the sale not producing international effects under article 6. The view was expressed that the notice requirements could serve as guidance for the State of judicial sale if the convention were to establish a

well-resourced centralized online repository that could handle all notices of judicial sale. In response, it was argued that the notice requirements should be mandatory rather than serve as guidance, and that it was premature for the Working Group to consider the impact of the centralized online repository on the notice requirements.

Persons to be notified (article 4(1))

48. The Working Group considered whether items should be added to, or removed from, the list of persons to be notified in article 4(1). The point was made that the list should be guided by reference to the interest that a particular class of persons had in the judicial sale itself, as opposed to the distribution of the proceeds of sale. On that approach, it was proposed that holders of maritime liens should be removed from the list. The prevailing view, however, was that that class of persons should not be removed.

49. Noting that maritime liens were only one type of unregistered charge under the definition of "charge" in article 2(a), the proposal was recalled to add all holders of unregistered charges to the list.

50. It was noted that judicial sales were commonly conducted in circumstances in which the shipowner was insolvent. It was therefore proposed that the insolvency representative appointed in the relevant insolvency proceedings should be added to the list. In response, it was noted that such addition would be unnecessary since the insolvency administrator would typically be entrusted with the management of the insolvent debtor's affairs and would therefore already fall within the meaning of "owner of the ship" or "bareboat charterer" for the purposes of paragraphs (d) and (e) of article 4(1). Moreover, domestic insolvency law would ordinarily establish rules for the notification of the insolvency representative, which would be picked up by the provision in article 4(2) for the notice to be given "in accordance with the law of the State of judicial sale".

51. The point was made that the courts in some jurisdictions did not have procedures in place to receive ad hoc notices from holders of maritime liens. In those jurisdictions, the courts would only take cognizance of the maritime lien if it were asserted in a claim against the ship. Several proposals were put forward to accommodate those practices, including a proposal to replace the proviso in article 4(1)(c) with the words "provided

that the regulations and procedures of the court or other authority ordering the judicial sale provide for the notification of maritime liens and that notice has been received of the claim secured by the maritime lien".

52. It was also observed that, it some States, the registries in which mortgages were registered did not provide for the registration of charges. It was added that other registries with no connection either to ships or to courts of judicial sale might be maintained by local authorities within the State that accepted the registration of charges, and that it would be difficult to implement article 4(1)(b) with respect to those charges. Accordingly, it was proposed to amend the proviso in article 4(1)(b) with the words "provided that: (i) such instrument is registered in the registry of ships in which the ship is registered, or equivalent registry; and (ii) the law of the State of the registry provides that such instruments are open to public inspection, and that extracts from the registry and copies of such instruments are obtainable from the registrar". In response, it was noted that the term "equivalent registry" should be understood to include registries of security interests which were separate from ship registries and in which ship mortgages and charges were registered.

53. It was noted that article 11(3) of the International Convention on Maritime Liens and Mortgages (1993) provided for the notice to be given to persons listed in article 11(1) "if known". It was proposed that a similar qualification should be incorporated into article 4(1).

Application of the law of the State of judicial sale (article 4(2))

54. The Working Group confirmed its understanding that article 4(1) established minimum standards for notification. It was also recalled that article 4(2) represented a compromise agreed by the Working Group at its thirty sixth session that the timing and manner of service should be left to the domestic law of the State of judicial sale.

55. The Working Group was reminded that the interaction between the draft convention and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) ("Service Convention") would need to be carefully considered. A concern was expressed that the current reference in article 4(2) to the law of the State of judicial sale could lead to the application of the Service Convention. Specifically, it was noted that, if the draft convention did not specify the means for

transmitting the notice of judicial sale, there was a risk that the "give way" clause in article 25 of the Service Convention – which provided that the Service Convention did not derogate from conventions containing provisions on "matters governed by" the Service Convention – would not be triggered, and that the domestic law of the State of judicial sale would require recourse to the channels of transmission provided under the Service Convention. It was added that recourse to those channels could lead to notification times that were not suited to the time frames that the judicial sale procedure required. In response, it was clarified that footnote 57 of the second revision, which provided guidance notes on the means for transmitting the notice, would be retained as an integral part of the model notice form set out in Appendix I to the draft convention, and therefore that the draft convention would effectively trigger article 25 of the Service Convention.

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

56. Article 4(3)(a) referred to two methods of notification:

(1) publication of the notice "by press announcement"; and (2) publication in "other publications". A question was raised as to whether the proviso in article 4(3)(a) – that the publication be "required by the law of the State of judicial sale" – applied to both methods or only to the second method. Different views were expressed on the interpretation of article 4(3)(a). There was general agreement within the Working Group that, if the proviso applied to both methods, article 4(3)(a) would be redundant, as notification by those methods would already be required by the law of the State of judicial sale pursuant to article 4(2). However, the view was expressed that it would be useful for article 4(3)(a) to be retained if the proviso applied only to the second method. In response, some concern was expressed for including a stand alone requirement to publish the notice by press announcement given the decreased circulation of traditional forms of media and the tendency towards electronic notification, adding that the draft convention needed to be futureproof. It was observed that article 4(3)(a) was contained in the original Beijing Draft and had remained unchanged in substance through two revisions without any objections being raised in the

Working Group to its retention. The Working Group agreed to retain article 4(3)(a) for the time being but to amend it to clarify that the proviso only applied to the second method (i.e., publication of the notice in "other publications").

Other matters

57. The Working Group was reminded of a proposal for the draft convention to address language requirements for the notice of judicial sale). The Working Group decided to discuss that issue in conjunction with the establishment of the centralized online repository. The view was expressed that compliance with the form requirements of the receiving State regarding notification could also be required.

Article 5. Certificate of judicial sale

Conditions for issuance (article 5(1))

58. The chapeau of article 5(1) prescribed four conditions for issuing the certificate of judicial sale, namely: (a) that the sale be conducted in accordance with the law of the State of judicial sale, (b) that the sale be conducted in accordance with the notice requirements in article 4, (c) that the certificate be issued at the request of the purchaser, and (d) that the certificate be issued in accordance with the regulations and procedures of the issuing authority. It was noted that the application of article 5(1) was also controlled by article 3(1)(b) and thus limited to judicial sales conferring clean title, and the "abstract" approach to the role of clean title in defining the scope of application.

59. There was a proposal to insert an additional condition that the certificate only be issued if the judicial sale was no longer subject to appeal (A/CN.9/WG.VI/WP.88, para. 55). While there was broad support for the notion that the draft convention assumed the finality of the judicial sale as the basis for issuing the certificate, it was reiterated that the notion of "appeal" was not clear. In practical terms, the issue of lack of finality was unlikely to arise if the court or other authority supervising the judicial sale was also the issuing authority for the certificate, as it would normally have to be satisfied of the completion of the procedure. An alternative proposal to address the issue, particularly if the two authorities were not the same, could be to reformulate article 5(1) so as to provide that the purchaser requesting the issuance of a certificate recording the

matters listed in article 5(1) was required to produce documentation establishing the finality of the judicial sale. It was explained that a similar provision was contained in article 12(1)(d) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) as a requirement for seeking recognition or applying for the enforcement of a foreign judgment. At the same time, it was acknowledged that the draft convention was not concerned with the recognition and enforcement of judgments, and that the request for a certificate would be made in the same State as the judicial sale was conducted, albeit to different authority to the one which supervised the judicial sale. After discussion, the Working Group agreed to ask the Secretariat to propose drafting options for each proposal.

60. A proposal was also put forward to insert an additional condition that the certificate only be issued if the ship was physically within the jurisdiction of the State of judicial sale at the time of the sale. It was added that, as a result of that insertion, the matters being certified – as listed in subparagraphs (a) to (c) of article 5(1) – would also serve as conditions for issuing the certificate. The Working Group agreed in principle with matching those matters to the conditions for issuance, and asked the Secretariat to propose text to give effect to that approach.

Matters being certified (article 5(1)(a)–(c))

61. The Working Group acknowledged the value of the certificate of judicial sale in securing the international effects of a judicial sale conferring clean title. While one delegation queried the need for the certificate to record the matters listed in article 5(1), there was broad agreement within the Working Group to retain those provisions as they were crucial for enhancing the legal protection of the purchaser. It was noted that, pursuant to article 5(5), the certificate enjoyed conclusive effect, which would in turn relieve foreign registrars and other authorities from having to scrutinize the matters recorded therein, which involved determinations of both law and fact.

Contents of the certificate (article 5(2))

62. Two proposals were put forward: (1) to leave subparagraph (c) in its present form without clarification, thus leaving it to the issuing authority to determine the place and date of the judicial sale by reference to the law of the State of judicial sale; (2) to amend the subparagraph by inserting a reference to the court or other public authority that

approved the sale and a reference to the date on which the sale was approved (e.g. when the court deemed the sale to be completed and effective). After discussion, a prevailing view emerged in favour of the second proposal.

63. The Working Group agreed to amend subparagraph (d) of article 5(2) by replacing "port of registry" with "registry of ships or equivalent registry in which the ship is registered" . The Working Group also agreed to delete subparagraph (h). While one delegation maintained that specifying the purchase price might be useful, the view was reiterated that the purchase price did not always reflect the full consideration provided by the purchaser and was therefore apt to mislead as to the value of the ship.

Evidentiary value of the certificate (article 5(5))

64. The Working Group agreed to amend article 5(5) by deleting the text in square brackets as the proviso was unnecessary and, in any case, that the conclusive effect of the certificate was subject to articles 9 and 10.

Effect of the certificate (article 5(6))

65. Production of the certificate of judicial sale triggered several provisions of the draft convention, notably the obligation of registrars to take action under article 7. While there was some support for deleting article 5(6) on the basis that the avoidance of the certificate was addressed in other provisions of the draft convention, the prevailing view was that it provided clarity and should be retained. Broad support was expressed for reformulating article 5(6) to clarify that a certificate would be effective unless the judicial sale was avoided by a court in the State of judicial sale. A suggestion to insert a cross reference to article 9 was not taken up. After discussion, the Working Group decided to retain article 5(6) and asked the Secretariat to propose text to reformulate the provision along the lines discussed.

Repository

66. The Working Group took note of the work carried out by the Secretariat to explore options for hosting a centralized online repository of notices and certificates of judicial sale as an additional module within IMO's Global Integrated Shipping Information System (GISIS). The IMO secretariat had proceeded on the basis that the repository would perform a "passive" function of publishing notice and certificates.

67. Several preliminary views were exchanged on the operation of the repository under the draft convention. It was stated that the transmission of the notice of judicial sale to the repository for publication should not replace the actual delivery of the notice to each person listed in article 4(1), although it was indicated that it might obviate the need for the stand alone requirement in article 4(3)(a) to publish the notice by press announcement. It was also stated 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 should perform purely an informative function, and therefore that the publication of notices and certificates should have no particular legal effect. It was cautioned that the draft convention should avoid imposing a duty on the repository to ensure the accuracy or completeness of published information, or imposing liability for a failure to publish.

68. It was suggested that the costs of operating the repository would need to be explored, although it was acknowledged that leveraging off an existing platform could help to reduce those costs. It was added that the ability of the repository to support notices and certificates in multiple languages would also need to be explored. It was indicated that an online repository could offer the opportunity to digitize notices and certificates, and allow the data from those instruments to be extracted, organized and presented in an accessible manner.

Articles 6 and 10. International effects of a judicial sale

1. Conditions for giving international effect (article 6(1))

69. It was observed that subparagraphs (a) and (b) of article 6(1) prescribed three conditions for giving international effect to a judicial sale, namely: (a) that the ship was physically within the jurisdiction of the State of judicial sale at the time of the sale; (b) that the judicial sale was conducted in accordance with the law of the State of judicial sale; and (c) that the judicial sale was conducted in accordance with the notice requirements contained in the draft instrument. The view was expressed that those conditions involved matters that were important to the convention regime. At the same time, it was observed that condition (a) already served to define the scope of application of the draft convention and was therefore superfluous. It was also observed

that conditions (b) and (c) involved matters that fell within the exclusive jurisdiction of the courts of the State of judicial sale under article 9 and should therefore not be scrutinized by a State other than the State of judicial sale. The point was made that condition (c) did not, of itself, establish a ground for avoiding or suspending a judicial sale, which remained a matter for the domestic law of the State of judicial sale. After discussion, the Working Group agreed to delete subparagraphs (a) and (b).

70. Some proposals were put forward to establish alternative conditions for giving international effect. One proposal was to provide that the judicial sale had international effect unless and until the judicial sale had been avoided under article 9 or a ground for refusal had been applied under article 10. Another proposal, which received some support, was to link international effect to the production of the certificate of judicial sale. It was suggested that the proposal could be implemented by picking up the language of article 5(5) to establish an obligation on States parties to recognise a certificate issued under article 5(1) as providing conclusive evidence of the matters recorded in the certificate, including that the purchaser had acquired clean title to the ship (article 5(1)(c)). The Working Group asked the Secretariat to propose drafting for this alternative formulation for article 6(1).

2. Accepted grounds for refusing to give international effect (article 10(1))

71. The Working Group proceeded with consideration of the three grounds for refusal listed in article 10(1). There was broad agreement that the ground in subparagraph (a) (that the ship was not physically within the jurisdiction of the State of judicial sale at the time of the sale) was superfluous as it already served to define the scope of application of the draft convention. At the same time, it was suggested that the ground might still be useful if an erroneously issued certificate was produced. Some support was expressed for retaining the ground in subparagraph (b) (that the sale was procured by fraud committed by the purchaser) with a proposal put forward to expand the ground to cover fraud committed in procuring the certificate of judicial sale. Conversely, it was said that the ground was unnecessary. In this regard, the view was reiterated that fraud would trigger the public policy ground in subparagraph (c) and would also trigger a ground for avoiding the judicial sale in the State of judicial sale under article 9(1). It was further reiterated that fraud might be difficult to establish in

a State other than the State of judicial sale for want of evidence. After discussion, the Working Group agreed to delete subparagraphs (a) and (b).

72. As for the public policy ground, a proposal was put forward to delete the term "manifestly". The Working Group recalled its earlier discussions about the meaning of that term and was reminded that the term had recently been used in formulating the public policy ground in article 7(1)(c) of the Judgments Convention. At the same time, the point was reemphasized that the draft convention was not concerned with the recognition and enforcement of judgments, and that there might be good reasons to depart from that formulation. It was also reasoned that, if public policy were the only ground for refusal in the draft convention, the threshold for invoking that ground should be lowered. It was noted that this would strike a balance between protecting the judicial sale from unwarranted interference and promoting the eventual convention among States that might otherwise be hesitant to join the convention if the public policy ground were too narrow. After discussion, the Working Group decided to retain subparagraph (c) in its present form for the time being.

Standing to invoke grounds for refusal (article 10(2))

73. The point was made that reducing the grounds for refusal to the public policy ground reduced the importance of limiting standing to invoke those grounds. Broad support was expressed for the view that standing should be left to the law of the State addressed. The Working Group decided to delete article 10(2) and to amend the chapeau of article 10(1) accordingly.

Article 7. Action by registrar

74. A preliminary question was put to the Working Group about the connection between giving effect to a judicial sale in article 6(1) and taking action under article 7. It was explained that the registration or deregistration of the ship required by article 7 was one manifestation of the international effect of the judicial sale under the draft convention.

Registration and deregistration (article 7(1))

(a) Identification of registrar

75. It was recalled that the action required by article 7 might fall within the competence of more than one registrar in a particular State. It was added that it might also fall within the competence of an authority other than a registrar. It was therefore proposed that article 7(1) should be amended to refer to "competent authorities". The Working Group agreed to redraft the provision to clarify that it applied to action by multiple registrars and multiple other competent authorities.

(b) "Regulations and procedures"

76. It was explained that the requirement to act in accordance with "regulations and procedures" had been inserted to give effect to the agreement of the Working Group not to supersede domestic law and procedure relating to the registration of ships. Concern was expressed that the term might not cover legal requirements relating to the payment of fees or eligibility to be registered as owner. It was proposed to replace the term with a reference to the domestic law of the State addressed.

77. After discussion, the Working Group decided to replace the term "regulations and procedures" with a more general reference to domestic law requirements. At the same time, the Working Group agreed that it could consider at a later stage the desirability of an additional provision to the effect that observance by the registrar of the registration requirements referred to in article 7(1) would not affect the conferral of clean title on the purchaser.

(c) Application by purchaser

78. It was observed that, in practice, the purchaser would apply to register or deregister the ship. A proposal was put forward to specify in the chapeau of article 7(1) that the registrar should act on the application of the purchaser. In response, it was noted that the chapeau should make it clear that the application of the purchaser and the production of the certificate of judicial sale were not two separate procedures but rather that the purchaser was required to produce the certificate in its application. The Working Group agreed to amend the chapeau of article 7(1) accordingly. It also asked the Secretariat to review the appropriateness of references in the text to action "upon production" of the certificate. It was also proposed to replace the word "direction" in the chapeau of article 7(1)(b) with "application". It was noted that, by introducing a requirement for the registrar to act on the application of the purchaser, the chapeau

of article 7(1)(b) could be deleted. The Working Group agreed to amend article 7(1)(b) accordingly.

(d) Additional action by registrar

79. A proposal was put forward to insert a provision requiring the registrar to update the register with all other particulars in the certificate. The Working Group agreed to that proposal.

Grounds for refusal (article 7(5))

80. The Working Group was reminded that article 7(5) implemented a proposal to "link and adapt" the grounds for refusal to the obligation to register or deregister in article 7 and to apply the full "suite" of grounds. Recalling its decision to retain only the public policy ground in article 10(1), the Working Group agreed to delete subparagraphs (a) and (b) in article 7(5).

81. The view was reiterated that registrars were not well placed to apply the public policy ground, although it was pointed out that article 7(5) did not require the registrar to determine whether the ground applied but rather to observe a determination of a competent court that the ground applied. It was also observed that article 7(5)(c) focused the public policy enquiry on the action by the registrar, whereas article 10(1)(c) focused the enquiry on the effect of the judicial sale in a State addressed. It was suggested that the difference in focus might be problematic. It was proposed that article 7(5) should be deleted entirely, or at least amended to refer to a determination by a competent court under article 10(1). An alternative proposal was put forward to reframe article 7(5) to refer not only to the application of a ground for refusal under article 10, but also to the avoidance of the sale under article 9.

82. After discussion, the Working Group agreed to retain article 7(5) but to amend it to refer to a determination under article 10(1). It was added that, while the amended provision might not add much in substance, it could still be a helpful signpost for registrars faced with the production of a certificate of judicial sale and a decision of a competent court refusing to give effect of the judicial sale. The Working Group also agreed to delete the reference to article 6.

Certified copies and translations of the certificate (article 7(4) and (5))

83. The Working Group agreed to consider copies and translations in conjunction with article 11.

Article 8. No arrest of the ship

1. Arrest and release (article 8(1) and (2))

84. It was noted that the original Beijing Draft dealt with applications to arrest and applications to release in a single paragraph, while the second revision split those provisions into separate paragraphs. A proposal was put forward to simplify the drafting by prohibiting the arrest of the ship, as that would also mandate the release of an arrested ship. However, it was felt that expressly addressing both scenarios was helpful.

85. A concern was expressed that the word "claim" in article 8(1) and (2) could be interpreted so as to prohibit the seizure of a ship in connection with law enforcement activities. A question was also raised as to the meaning of "similar measure" in article 8(1) and (2). The Working Group did not consider those issues further.

2. Grounds for refusal (article 8(4))

86. Recalling the discussion of article 7(5)(c) (see para. [10] above), it was observed that article 8(4) focused the public policy enquiry on the arrest of the ship, whereas article 10(1)(c) focused the enquiry on the effect of the judicial sale in a State addressed. It was proposed that article 8(4) should be deleted entirely. In response, it was noted that it was useful to adapt the public policy ground to the specific scenarios in article 8, and it was therefore suggested to retain article 8(4).

87. An alternative proposal was put forward to reframe article 8(4) to refer not only to the application of the public policy ground, but also to the avoidance of the sale under article 9. In response, it was cautioned that, since article 8(4) was addressed to a State other than the State of judicial sale, an express reference to avoidance in the State of judicial sale might prompt complex arguments relating to the recognition of foreign judgments.

88. After discussion, the Working Group decided to retain article 8(4) in its present form, subject to some simplification of the drafting, such as deleting the reference to article 6 and the words "to a court of a State party other than the State of judicial sale".

Article 9. Jurisdiction to avoid and suspend judicial sale

1. Terminology

89. The Working Group was reminded of the view that avoiding a judicial sale rendered the sale null and void (A/CN.9/1007, para. 68). It was noted that the term “avoid” in the English version of the text might not be understood in English-speaking States where other terms such as “set aside” were more commonly used. It was highlighted that the term “avoid” was used in UNCITRAL texts in reference to the effects of transactions (e.g., sales), whereas the term “set aside” was used in reference to the effects of arbitral awards and judgments. It was added that the use of the term “avoid” would be preferable to emphasize that the draft convention was not concerned with the recognition of foreign judgments. The Working Group decided to retain the term “avoid” for the time being.

2. International effect of avoidance

90. The Working Group considered whether article 9(3) should refer to an avoided judicial sale “not hav[ing]” effect or to it “ceas[ing] to have” effect. The view was expressed that the effects of avoidance should be applied prospectively to avoid reversing actions taken upon production of the certificate of judicial sale, notably the deregistration of the ship and deletion of mortgages. It was added that the second option better catered for that approach. In response, it was noted that article 9 was not designed to address all aspects of the avoidance of a judicial sale, and that it was not appropriate for the convention to deal with the issue. It was added that, in any event, it was unlikely that a judicial sale would be avoided after action had been taken to update the register. Broad support was expressed for the matter ultimately being resolved by reference to the law of the State of judicial sale. In that regard, preference was given to the first option as it was sufficiently inclusive of both prospective avoidance and avoidance ab initio. It was added that this could be further clarified in the drafting of article 9(3). The Working Group agreed that the issue could be revisited at a later stage.

3. Other issues

91. No proposals were put forward to amend article 9(1) or (2). A question was raised as to whether a refusal by the courts of the State of judicial sale to exercise jurisdiction under article 9(1) could trigger the public policy ground in article 10, although the Working Group did not discuss the question. Support was expressed for referring to

“authorities” in addition to “courts” in article 9(1) if, in some States, competence to hear challenges to a judicial sale was vested in authorities other than courts .