



## COMITE MARITIME INTERNATIONAL

### *Meeting Notes for the 38<sup>th</sup> Session of UNCITRAL Working Group V1 Judicial Sales*

*Vienna 19<sup>th</sup> - 26<sup>th</sup> April 2021*

8<sup>th</sup> April 2021

#### *Scope*

The CMI IWG on the international effects of judicial sales has considered the Annotated Third Revision of the Beijing Draft as circulated by the UNCITRAL Secretariat in the document bearing identification number A/CN.9/WG.V1/WP.90. The IWG has also considered the Report of Working Group V1 (Judicial Sale of Ships) on the work of its thirty-seventh session (Vienna, 14-18 December 2020) document bearing identification number A/CN.9/1047/Rev1

As it had done following the publication of the First Revision and the Second Revision of the Beijing Draft, the IWG has considered that it could be of benefit to annotate and share some preliminary considerations through these meeting notes in preparation for the 38th Session of UNICTRAL Working Group V1 on Judicial sales in Vienna between the 19<sup>th</sup> and the 23 April 2021 and also as a response to the request by the Secretariat for views from delegations of Working Group V1.

By way of general comment, the CMI would like to congratulate the Secretariat for the sterling work it has done in the preparation of the 3<sup>rd</sup> Revision of the Beijing Draft, in the extremely useful footnotes evidencing the depth and degree of effort put into the 3rd Revision reflecting the very detailed discussions during the 37<sup>th</sup> meeting of the Working Group V1, held remotely by means of the online platform Interprefy. other than the presence of the Secretariat in the Vienna Convention Centre,

Given that the hours available are reduced to a one, two hour session per day during the scheduled week we are very happy to agree to the Chair's proposal of 23 March 2021 that the deliberations of the Working Group focus on:

- (a) Articles 3 (1) (b)<sup>1</sup> and Article 6 of the third revision;
- (b) Articles 5 and 11 of the third revision;
- (c) Article 9 which was not considered in the 37<sup>th</sup> session
- (d) The definition of "charge" and other definitions in Article 2, also not considered in the last session.

(a) **Clean Title Sales Articles 3(1)(b) and Article 6**

**Article 3 (1) (b)**

It was assumed by CMI that the area which the Chair probably wished the Working Group to focus on is 3 (1 )(b).

Article 3 (1) (b) states: ***“Under the law of the State, the judicial sale confers clean title to the ship on the purchaser.”***

The CMI recalls that there was much debate during the 36<sup>th</sup> session with a view to finding a solution for the challenge provided by some jurisdictions who conducted some judicial sales which could lead to the free an unencumbered title not being passed on to the purchaser and others in which case certain burdens or debts, survived the judicial sale.

It was therefore concluded that it would be in the interest of the Convention to try to eliminate any stumbling blocks which would effectively prohibit States from becoming State parties to the Convention and establish legal certainty that a Certificate of Judicial Sale according to article 5 is only issued where a clean title to the ship is conferred.

As a result it was agreed that the Convention would only apply to those judicial sales which conveyed a clean title and would not apply to those judicial sales which for whatever reason existed under the law of a particular State party and did not convey a clean title.

Consequently in the opinion of the CMI the wording of article 3 (1) (b) is very clear and is not in need of any further clarification. The law speaks in terms of ***“the”*** judicial sale. In other words it is referring to, when under the law of the State in which the judicial sale is being conducted, ***“the”*** particular sale” confers

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<sup>1</sup> The reference was corrected from Art 3 (1) (a) to Article 3(1)(b) upon consultation with the Secretariat.

clean title to the ship. If the particular sale does not confer a clean title then that sale is outside the scope of the Convention and no Certificate of Judicial Sale according to article 5 is issued.

This wording is also consistent with Article 5 (1) ( c ), which provides that the Certificate must record that “*the purchaser acquired clean title to the ship*”. The certificate in appendix II confirms that to be the position (c).

To conclude on this point, the CMI is of the view that the wording of article 3 (1) (b) should remain exactly as it is, however should it be deemed preferable by the working group, the CMI would be happy to agree to an appropriate Explanatory Note clarifying that the convention applies to judicial sales concluded in States where the court confers clean title. This would also clarify that the Convention should allow States to ratify the Convention even if under their law certain situations could lead to a sale where some charges or encumbrances would survive, with the consequence that such sales would not be "Convention Sales" and would not be sold with the benefit of a Certificate.

### Article 6

In the CMI Notes on the 2<sup>nd</sup> Revision of the Beijing Draft, for the Vienna 2020 Session, we had stated the following in relation to Article 6 as it then stood:

***“The content of article 6 (1) (without the proviso) is the very raison d’etre of the Convention.”***

The CMI had expressed the view that given that article 3 (1) (a) now makes it clear that the Convention applies only to a judicial sale of a ship if the ship was physically within the territory of the State of judicial sale at the time of the Sale and given the specific requirement for the physical presence of the ship in the State of judicial sale for the issuing of the certificate of judicial sale as per article 5 (1) (b), there was no need or place for paragraph 1 (a) contained in square brackets in this Article as per the 2<sup>nd</sup> Annotated Revision.

Similarly since Article 4 provides very clear notice provisions and since in terms of Article 5 no certificate of judicial sale can or will be issued without the notice provisions of article 4 being observed AND unless the sale is conducted in accordance with the law of the State of judicial sale, and unless the vessel was physically within the jurisdiction of the State of judicial sale at the time of the sale there was no need or place for paragraph (b) contained in square brackets in this Article 6 as per the 2<sup>nd</sup> Annotated Revision.

CMI expressed the view then, that it was therefore in full agreement with the recommendation of the Secretariat in footnote 29 that these were issues which should be verified as existing by the State of Judicial sale and are confirmed as

existing on the issuing of the certificate of judicial sale – thus paragraphs (a) and (b) were redundant and should be omitted.

The 37<sup>th</sup> session in fact agreed to the deletion of 6 (1) (a) and 6 (1) (b) except for the proviso regarding the notice requirement.

CMI has now considered the amended wording to Article 6 as well as the proposed new wording of Article 6 in the form of the Alternative formulation for article 6 as proposed by the Secretariat.

### **Amended Article 6.**

The CMI is against the retention of the proviso to the existing Article 6 for the reasons explained above in that notices must be given in accordance with article 4 and no Certificate will be issued unless the notices in article 4 are observed.

In addition, the CMI is of the view that in the event that this proviso is retained, it will cause various problems, such as:

- it will be used unhesitatingly by unscrupulous and unjustified claimants in putting illegitimate pressure on bona fide purchasers of vessels in judicial sales. These things have happened and will continue to happen and the precise deliverable of this draft Convention is to ensure that a judicial sale is given its proper effects in the countries of other state parties. The proviso will effectively allow such persons to arrest a vessel well after the judicial sale of a vessel, and “plead” that the notice requirements of article 4 have not been honoured even when this may be totally untrue or totally irrelevant for such claimant because he would have been personally notified. Such a claimant will not have to prove anything at the early stages but merely make an “allegation” and by citing article 6 of the Convention. This would be sufficient to interrupt the vessel’s voyage, allow an arrest and the innocent purchaser would have to put up security and then have to litigate the effectively illegal arrest, in what could be an interminable saga.
- the situation that would be created by this amendment in Article 6 would worsen the situation compared to the situation today without a Convention, as with this amendment, it could be suggested that the State in which an Article 6 situation would arise would now *have* to hear a “notice argument”.
- The Working Group agreed to maintain the “public policy” as the only ground for refusing to give immediate effects to the judicial sale.

- This proviso would also defeat the object of ensuring that it is the court of judicial sale that has exclusive jurisdiction over the matter.

CMI is of the view that Article 6 without the proviso is sufficient because in terms of Article 5 no certificate of Judicial sale will be issued unless it records that the ship was indeed sold in accordance with the law of the State of Judicial sale and the notice requirements in article 4, as stated in the Certificate in appendix II.

### **Alternative formulation for Article 6**

However if the preference of the Working Group is such that it prefers Article 6 to have a direct reference to the certificate of judicial sale, whilst the CMI is very grateful to the Secretariat for providing an alternative formulation, it is of the view that it would be a shame to get rid of the very clear and unequivocal wording of the first part of the existing Article 6 which captures very directly the entire thrust of the “*International Effects of Judicial Sale.*”

With a view to offering a solution which would effectively retain the first part of Clause 6 the CMI would like to suggest the introduction of the words “***for which a certificate of judicial sale has been issued***” after the words “***State Party***” in the first line so that Article 6 reads as follows:

*“ A judicial sale to which this Convention applies that is conducted in one state Party, ***for which a certificate of judicial sale has been issued in accordance with Article 5,*** shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.”*

CMI is of the view that this amendment will satisfy the concerns expressed by some delegations during the 37<sup>th</sup> session to condition the international effect of the judicial sale to the production of the certificate in Article 5.

### **(b) Provisions relating to the certificate of judicial sale (Articles 5 and 11)**

#### **Article 5 (1)**

In our last set of CMI Notes prior to the 37<sup>th</sup> session we had expressed the view that during the deliberations in Vienna at the 36<sup>th</sup> meeting, there were several references throughout the meeting of the possible complications that can arise in the event that the Judicial sale is challenged after a Certificate of Judicial sale is issued.

This was discussed in detail during the 37<sup>th</sup> session and it was left to the Secretariat to formulate appropriate wording. It is the view of the CMI that the wording offered in alternative B should reach the objective desired and consequently CMI is happy to support the wording in square brackets B.

**Article 5 (4)**

The CMI notes a recommendation of the Secretariat to omit paragraph 4 currently within square brackets. The CMI agrees with this recommendation and does not see any need for such a paragraph.

**Article 5 (7)**

This provision provides a logical follow up to Article 5 (5) and CMI agrees with its inclusion as suggested by the Secretariat

**Article 11:**

CMI recalls a discussion on whether it would be more appropriate for Article 11 dealing with additional provisions relating to the certificate of judicial sale to move closer to Article 5 on the Certificate of Judicial Sale or to even be part of Article 5. CMI agrees that it is logical for the content of Article 11 to follow the content of Article 5.

**( c ) Provisions of Article 9 “Jurisdiction to avoid and suspend a judicial sale”**

Article 9 (3) provides alternative wording in square brackets and we are asked to consider which wording between “not have” or “cease to have” is more appropriate.

CMI recalls the discussion and concerns raised at the 37<sup>th</sup> session and is of the view that the recommendation of the Secretariat made in footnote 38 is a most acceptable solution. Should the suggestion of the Secretariat be accepted, Article 9 (3) would read as follows:

***“A judicial sale of a ship shall have the effect provided in Article 6 in a State Party unless 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.”***

**(d) Definition of Charge and other definitions in Article 2**

**“Charge”**

CMI is satisfied that the definition of “charge” is complete. CMI recalls a discussion during the 37<sup>th</sup> session on whether such a definition would include the interests of a bare boat charterer. In view of the fact that charge includes “right of use,” and “right of retention” CMI is of the view that no further elaboration is necessary.

In foot note 3, the Secretariat draws our attention to the fact that the Working Group may wish to consider the meaning of the term “*registered charge.*”

CMI has considered this by reference to Article 4 (1) (b) and Article 7 (1) (a). In its view, the context of Article 4 (1) (b) makes it clear that the reference to “registered” necessarily means a charge which is registered in the vessel’s registry given that Article 4 (1) (b) speaks about: “*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 ....*” It is the CMI’s view that no further definition of “registered charge” is required.

**“Maritime Lien”**

The CMI has considered the existing definition to “Maritime Lien” in the 3<sup>rd</sup> annotated revision, which remains the same as suggested in the 2<sup>nd</sup> annotated revision and agrees with it.

**“Mortgage”**

The CMI notes that in the 1926 MLM Convention, the 1976 MLM Convention and the 1993 MLM Convention, the term “mortgage” is defined to refer to mortgages or registerable charges of the same nature which are effected and registered on the ship in accordance with the law of the State in which the ship is registered, i.e. the applicable law of the mortgage is the law of the flag State.

It may be confusing to introduce in this convention, an alternative applicable law.

The CMI therefore proposes that sub-paragraph (ii) of this definition is reworded as follows:

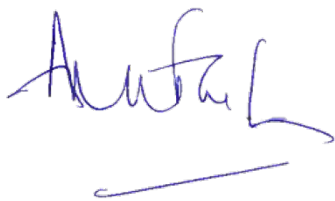
***“(ii) Recognized as such by the law of the State in whose registry of ships or equivalent registry the ship is registered”***

**“Purchaser”**

CMI is of the view that there is no need for a definition to the word “Purchaser”, however in the event that the Working group considers this necessary then CMI agrees with this definition.

**“Ship”**

Given the discussions at the 37<sup>th</sup> session, the CMI is in agreement with the additional words within the square brackets



Ann Fenech  
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