United Nations A/CN.9/1047/Rev.1

General Assembly

Distr.: General
29 December 2020

Original: English

United Nations Commission on International Trade Law
Fifty-fourth session
28 June–16 July 2021

Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-seventh session (Vienna, 14–18 December 2020)

Contents

V.21-00589 (E) 030221 040221

I. Introduction

1. 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 resumed fifty-third session (Vienna, 14–18 September 2020).[1] This was the third session at which the topic was considered. Further information on the earlier work of the Working Group on the topic may be found in A/CN.9/WG.VI/WP.86/Rev.1, paragraphs 4–6.

II. Organization of the session

2. The thirty-seventh session of the Working Group was held in Vienna from 14 to 18 December 2020. The session was held in accordance with the decision on the format, officers and methods of work of the UNCITRAL working groups during the coronavirus disease (COVID-19) pandemic, as adopted by States members on 19 August 2020 and contained in A/CN.9/1038. 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, 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.

4. 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.

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

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*: Andean Community (CAN);

(c) *Non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), 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) and New York City Bar (NYCBAR).

7. In accordance with the decision adopted by States members of UNCITRAL (see para. 2 above), 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.86/Rev.1);

(b) An annotated second revision of the Beijing Draft[2] prepared by the Secretariat to incorporate the discussions and decisions of the Working Group at its thirty-sixth session (A/CN.9/WG.VI/WP.87) ("second revision");

(c) A note prepared by the Secretariat to accompany the second revision highlighting some overarching issues for consideration (A/CN.9/WG.VI/WP.87/Add.1) ("accompanying note");

(d) A note prepared by the Secretariat synthesizing comments submitted by States and international organizations on the second revision and the accompanying note in response to an invitation of the Secretariat to facilitate the progress of work during the COVID-19 pandemic (A/CN.9/WG.VI/WP.88) ("synthesis").

9. The Working Group adopted the following agenda:

1. Opening of the session.
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 found in chapter IV below.

11. While acknowledging the challenges of maintaining the progress of its work during the COVID-19 pandemic, 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 (A/CN.9/1007, para. 99; see also paras. 14–15 below), it would not be helpful for the Working Group to advance the draft instrument before the next session by way of informal consultations. It was added that it might nevertheless be helpful for certain outstanding issues to be discussed among delegations, particularly if the COVID-19 pandemic were to present difficulties for holding the next session.

12. The Working Group was reminded that, in accordance with the decision adopted by States members of UNCITRAL (see para. 2 above), the Chairperson and Rapporteur would prepare a summary reflecting the deliberations and any conclusions reached during the session. Having reviewed the draft summary circulated by the Chairperson and the Rapporteur, the Working Group agreed to adopt it for transmission to the Commission as its own report.

IV. Future instrument on the judicial sale of ships

13. 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 and proposals 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

[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.

turning to article 1, the Working Group was invited to express views on the form of the instrument and its geographic scope.

A. Form of the instrument

14. 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 (recalling similar views expressed in A/75/17, para. 47), 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. It was reiterated that 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.

15. Noting that the Beijing Draft was originally conceived as a convention, the Working Group agreed to continue working on the assumption that the future instrument on judicial sale of ships would take the form of a convention.

B. Geographic scope

16. The Working Group considered whether, in the form of a convention, the instrument should apply to judicial sales conducted in a non-State party. Doubts were expressed about applying the recognition regime to such sales, with a preference expressed for a "closed" regime, in the sense that the recognition regime under the convention only applied between States parties.

17. A view was expressed that the draft convention should give States the option to declare that they would apply the convention to judicial sales conducted in a non-State party. The prevailing view, however, was that a State party would, in any event, retain the ability to treat such sales outside the convention regime in substantially the same manner under its domestic law. While noting that the practicalities of recognizing sales outside the convention regime could benefit from further discussion, it was pointed out that the second revision created no obstacles in that regard.

18. After discussion, the Working Group decided that the recognition regime under an eventual convention should only apply between States parties.

C. Article 1. Purpose

19. Support was expressed for retaining a stand-alone purpose provision. The Working Group was reminded of the observation that the purpose of the draft convention was not merely to set forth the "conditions" under which a judicial sale conducted in one State party had effects in another State party (A/CN.9/WG.VI/WP.88, para. 21). It was added that the wording of the provision should avoid any implication that a State party was not able to recognize judicial sales outside the convention regime or that the convention governed the procedure for judicial sales.

20. 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."

D. Article 3. Scope of application

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

1. Time of the judicial sale

22. Diverging views were expressed as to the meaning of words "at the time of the [judicial] sale" in article 3(1)(a). It was noted that, 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.

23. 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. As an alternative solution for the moment at which the physical presence of the ship should be required, it was proposed by one delegation that a condition should be inserted in article 3 that the ship be physically present "at the time at which the judicial sale proceedings are instituted before the court".

24. 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) could already prove sufficient, the Working Group decided not to amend article 3(1)(a). It was suggested that the concerns could be addressed in any explanatory notes that might be drafted to accompany the eventual convention.

2. Physical presence "within the jurisdiction"

25. 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),[3] which could, in certain circumstances, be exercised extraterritorially, and that the word "physically" would not restrict the application of the flag State jurisdiction beyond the territory, including the territorial sea, of such a State (see A/CN.9/1007, para. 50). It was noted that the reference to "territory" in other language versions of the draft might be preferable to avoid misunderstanding.

3. Definition of "ship"

26. 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 (see A/CN.9/1007, para. 29) and inland navigation vessels (ibid., para. 30). Support was expressed for retaining the definition of "ship" in its present form.

27. 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

[3] United Nations, *Treaty Series*, vol. 1833, No. 31363.

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.

28. The view was expressed that the inclusion of inland navigation vessels within scope was not a concern in itself, 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". It was noted that the draft convention was solely concerned with ships that were capable of registration and of being encumbered by registrable charges or mortgages. At the same time, it was noted that a reference to "registered" ships might give rise to questions as to the appropriate nature of such a registry (e.g. private or public), which could lead to unnecessary complications in the interpretation of the definition. It was added that the draft convention already made reference to "registration" and "deregistration" and that, as a matter of interpretation, any issue that might arise in relation to unregistered ships could be addressed within the existing definition. After discussion, 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.

4. Preserving the application of the Geneva Convention and its Protocol No. 2

29. 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),[4] which dealt with the judicial sale of inland navigation vessels (see A/CN.9/WG.VI/WP.87/Add.1, para. 7). The Working Group agreed that article 14(2) should be retained in its present form.

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

30. 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) (see para. 34 below). At the same time, it was cautioned that the instrument should avoid addressing matters of substantive scope in the definitions provision.

31. The Working Group was reminded of the proposal to amend subparagraph (i) of the definition of "judicial sale" to refer to judicial sales being "confirmed" by a court or other public authority (A/CN.9/WG.VI/WP.88, para. 28). No views were expressed during the session on that proposal.

32. 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. No concrete drafting proposal was submitted at the time. Another proposal put forward was to require a sale conducted by a public authority to be approved by a court. In response, it was noted that the identity of the authority conducting the sale was not so much a concern as the distribution of the proceeds of the sale to creditors. 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 for the time being.

[4] Ibid., vol. 1281, No. 21114.

33. A question was raised as to the meaning of the words "or any other way provided for by the law of the State of judicial sale" in subparagraph (i). It was explained that those words were drawn from the definition in the original Beijing Draft, where they referred to the ways by which the ship was sold other than by public auction or private treaty (not the ways by which the sale was conducted other than by order or approval of a court or other public authority). A question was raised as to whether, in practice, ships were ever sold other than by public auction or private treaty. While it was noted that, in some States, the procedure for the sale of wrecks (which include ships that are sunken or stranded, or that may be expected to sink or to strand) connected to the establishment of the Nairobi International Convention on the Removal of Wrecks (2007)[5] might offer an example of a different procedure, it was equally noted that wrecks would fall outside the scope of the instrument. After discussion, the Working Group agreed to delete the words.

34. It was noted that the requirement in subparagraph (ii) of the definition of "judicial sale" that the proceeds of sale be made available to creditors sufficiently addressed the concerns that article 3(2)(a) sought to address. It was added that, in some States, the law provided for a judicial sale involving the conferral of clean title and the distribution of proceeds to creditors to be conducted after the seizure of a ship by tax or customs authorities, and that such sales should not be excluded from scope.

35. It was proposed that the term "creditor" in subparagraph (ii) should be clarified. It was also proposed to amend the definition to require the judicial sale to be conducted for the purposes of recovering a civil or commercial claim. In response to both proposals, it was cautioned that the instrument should not exclude sales merely because a public authority, such as a port authority, was a creditor. After discussion, the Working Group agreed that the definition of "judicial sale" should not be qualified either by reference to the types of creditor or the types of claim that gave rise to the judicial sale.

6. Clean title

36. 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

37. 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 spelled out clearly all elements of the notion of "clean title". It was added that, if the first option were 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.

38. The prevailing view within the Working Group favoured the second option, which was felt to be clearer, more concise, and better aligned with the terminology used in the draft convention. However, bearing in mind the comments made in connection with the first option, the Working Group agreed that there might be a need to consider further adjustments to the definition of "charge" in article 2(a).

(b) Role of clean title in defining the scope of application

39. The Working Group was informed that, while 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. It was added that, if the eventual convention applied only to a judicial sale that conferred clean title to

[5] IMO, document LEG/CONF.16/19.

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.

40. Pursuant to one view, the existing text of article 3(1)(b) and the chapeau of article 4(1) posed no practical problems.

41. A second view considered that the notice requirements should apply regardless of whether, at the relevant time, it was known that the sale would result in the conferral of clean title. It was proposed that this could be clarified by amending the chapeau of article 4(1) to provide that the requirement to give notice applied whether or not the judicial sale conferred clean title. Some concerns were expressed about the desirability and workability of that amendment.

42. According to a third view, the notice requirements should serve not as a stand-alone requirement but only as a condition for issuing the certificate of judicial sale. It was proposed that article 4 could be reformulated accordingly. It was emphasized that such a proposal was not designed to minimize the importance of the notice requirements for the convention regime.

43. A fourth view held that the conferral of clean title should serve as a condition for giving a judicial sale international effects rather than to define the scope of application. Accordingly, it was proposed that clean title should be dealt with in article 6(1) rather than in article 3(1)(b). In response, the prevailing view was that clean title should continue to define the scope of application.

44. After discussion, 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.

45. A question was raised as to whether article 3(1)(b) required a State – other than the State of judicial sale, in which the international effects of a judicial sale were sought to be produced – to enquire whether, under the law of the State of judicial sale, the sale conferred clean title. In response, there was broad agreement that the certificate of judicial sale issued under article 5, which was required to contain a statement that the judicial sale conferred clean title, and which was given conclusive effect, would obviate the need for such an enquiry.

7. Exclusion of State-owned ships

46. 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 or other similar measure capable of leading to a judicial sale". It was therefore proposed that article 3(2)(b) should be omitted. In response, it was said that, in any case, it would still be helpful to deal with the exclusion of State-owned ships in the scope provision. It was added that, if article 3(2)(b) were retained, it should be amended to specify the relevant time. In that 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.

8. Preservation of *in personam* claims, etc.

47. 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.

48. 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 in a latter part of the text.

E. Article 4. Notice of judicial sale

1. Function of the notice requirements

49. The view was reiterated (see para. 42 above) 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 4 would result in the sale not producing international effects under article 6 (see also para. 82 below).

50. 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 (discussed in paras. 76–81 below) on the notice requirements.

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

51. 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 (see A/CN.9/1007, para. 55). 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. The point was also made that each class of persons should be defined in a simple and clear manner so as to minimize the risk of challenge from a dissatisfied creditor acting in bad faith.

52. Noting that maritime liens were only one type of unregistered charge under the definition of “charge” in article 2(a), the Working Group was reminded of the proposal to add all holders of unregistered charges to the list (A/CN.9/WG.VI/WP.88, para. 45). There was no further support for that proposal.

53. 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 requirement in article 4(2) for the notice to be given “in accordance with the law of the State of judicial sale”.

54. 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 or against the proceeds of a judicial sale. 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". A further proposal put forward was to require all holders of any maritime lien to make their claims known to the court or other authority ordering the judicial sale. Broad support was expressed for the latter proposal and the Working Group decided to request the Secretariat to redraft article 4(1)(c) along the following lines:

> "All holders of any maritime lien, provided that they have made their claims known to the court or other authority ordering the judicial sale."

55. It was also observed that some States maintained separate registries of security interests for movable property, which might register charges, but not mortgages, against ships. It was observed that, since those registries had no connection either to ship registries or to courts of judicial sale of ships, 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, a view was expressed 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. It was also noted that article 4(4)(b) already contemplated that charges might be registered in registries other than the registry of ships. After discussion, the Working Group decided to retain article 4(1)(b) in its present form. It was noted that article 4(4) itself did not provide a solution to the difficulties identified regarding the implementation of article 4(1)(b).

56. It was noted that article 11(3) of the International Convention on Maritime Liens and Mortgages (1993)[6] 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).

3. Optional notification of registrars

57. The Working Group was reminded of the proposal to restructure article 4(1) to make it optional for the notice of judicial sale to be given to the ship registrar and any bareboat charter-in registrar (A/CN.9/WG.VI/WP.88, para. 47). It was reasoned that ship registrars did not have any property interests in the ship being sold and might not appear in the proceedings. It was added that those registrars might not have procedures in place to receive and process notices of judicial sale and might not be willing therefore to receive them.

58. In response, it was argued that the ship registrar should be notified in all cases. It was added that the notice would alert the registrar to possible future action with respect to the ship under article 7. The Working Group agreed to retain the present structure of article 4(1).

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

59. The Working Group confirmed its understanding that article 4(1) established minimum standards for notification (A/CN.9/1007, para. 55). It was also recalled that article 4(2) represented a compromise agreed by the Working Group at its thirty-sixth

[6] United Nations, *Treaty Series*, vol. 2276, No. 40538.

session that the timing and manner of service should be left to the domestic law of the State of judicial sale (A/CN.9/1007, para. 66).

60. 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)[7] ("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 eventual 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" it – 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 (see A/CN.9/WG.VI/WP.85, para. 29). 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 (see A/CN.9/1007, para. 65). 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 eventual convention would effectively trigger article 25 of the Service Convention.

61. A question was raised as to the relationship between article 4(2), which applied the law of the State of judicial sale to the giving of the notice, and article 4(1), which required the notice to be given to each person listed therein. In that regard, the Working Group confirmed its understanding that the State of judicial sale should always strive for actual delivery of the notice to each person, failing which it could resort, in accordance with its law, to any secondary means by which the person would be deemed to have been notified, such as public announcement. It was highlighted that the convention regime would not work if actual delivery of the notice were required in all cases and that States already had in place mechanisms to address evasive addressees. The Working Group acknowledged, however, that the relationship between article 4(1) and article 4(2) could be further clarified.

62. While the Working Group was invited to elaborate on notice periods, the Working Group confirmed its decision to defer to the law of the State of judicial sale (A/CN.9/1007, para. 66).

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

63. It was noted that 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. The point was also made that press announcements in the State of judicial sale (i.e. in the "local" press) were of limited effectiveness for notifying creditors in practice, and that the requirement in article 4(3)(a) provided a potential loophole for challenge from a dissatisfied creditor acting in bad faith. Accordingly, it was proposed that

[7] Ibid., vol. 658, No. 9432.

article 4(3)(a) should be deleted entirely. 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").

6. Other matters

64. The Working Group was reminded of a proposal for the draft convention to address language requirements for transmission of the notice of judicial sale (A/CN.9/WG.VI/WP.88, para. 50). The Working Group decided to discuss that issue in conjunction with the establishment of the centralized online repository (see paras. 76–81 below). The view was expressed that compliance with the form requirements of the receiving State regarding notification could also be required.

F. Article 5. Certificate of judicial sale

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

65. It was recalled that 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 was recalled (see para. 44 above).

66. The Working Group was reminded of 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 (A/CN.9/973, para. 62) and could cover a variety of forms of redress, many of which might remain available to an aggrieved party for months or even years after the judicial sale. At the same time, the distinction between challenging the judicial sale and challenging the distribution of the proceeds of sale was reiterated (A/CN.9/973, para. 56), with the view added that, at least in one jurisdiction, challenges to a judicial sale that had been confirmed by the court were exceedingly rare. The view was also expressed that finality could be ensured by deferring to the practice and procedure of the issuing authority under the law of the State of judicial sale without the need to insert the proposed additional condition. In a similar vein, it was recalled that the Working Group had previously heard a proposal to condition the issuance of the certificate on the expiry of an appeal period, and that the prevailing view at the time had been to leave the matter to the law of the State of judicial sale (A/CN.9/1007, para. 90).

67. It was noted that, 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)[8] ("Judgments Convention") as a

[8] Kingdom of the Netherlands, *Treaty Series*, 2019, No. 13672.

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 a different authority to the one which supervised the judicial sale.

68. After discussion, the Working Group agreed to ask the Secretariat to propose drafting options for each proposal.

69. 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.

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

70. 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.

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

71. A question was raised as to the meaning of the “place and date of the judicial sale” in subparagraph (c) of article 5(2). With regard to the “place” of judicial sale, it was noted that subparagraph (a) already required the certificate to specify the State of judicial sale, and the value of specifying a location within that State for the purposes of the draft convention was questioned. As an alternative, it was proposed that the certificate should specify the court or other public authority which approved the sale. With regard to the “date” of the judicial sale, the Working Group recalled its earlier discussions about the time of judicial sale in the context of article 3(1)(a) (see paras. 22–24 above) and again noted the difficulty in defining the time of completion of the sale, which depended on the law of the State of judicial sale. 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 according to domestic law). After discussion, a prevailing view emerged in favour of the second proposal.

72. 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” (see A/CN.9/WG.VI/WP.88, para. 57). 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 (A/CN.9/WG.VI/WP.88, para. 58) and was therefore apt to mislead as to the value of the ship.

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

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

5. Effect of the certificate (article 5(6))

74. It was recalled that the 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 was of practical value concerning the work of the registrar 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. It was also proposed that the repository should be informed of the validity of the certificate after the avoidance of the judicial sale. 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.

6. Incorporation of article 11

75. The Working Group was reminded that article 11 contained additional provisions on the certificate of judicial sale, and a proposal was put forward to incorporate those provisions into article 5. At the same time, the technical nature of those provisions was emphasized. After discussion, the Working Group agreed to revisit the placement of article 11 at a later stage.

G. Article 12. Repository

76. 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) (A/CN.9/WG.VI/WP.87/Add.1, paras. 10–16). It was explained that preliminary discussions with the IMO secretariat had proceeded on the basis that the repository would perform a "passive" function of publishing notice and certificates.

77. The Working Group heard that, at its recently held 107th session, the IMO Legal Committee had taken note of those preliminary discussions and invited the IMO secretariat to make the necessary arrangements to host the repository as an additional GISIS module and to report back to the IMO Legal Committee at its next session, which was scheduled for July 2021. It was indicated that the assumption by IMO of the repository function under the draft convention would require the approval of the IMO Legal Committee, which would then need to be endorsed by the IMO Council.

78. The Working Group expressed its appreciation to the IMO secretariat for its cooperation in exploring the issue so far. The Working Group agreed that there could be significant value in establishing a centralized online repository and that IMO was an appropriate host for the repository, noting the visibility of GISIS among stakeholders in the maritime industry.

79. 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)[9] and the Protocol thereto on Matters Specific to Aircraft Equipment,[10] 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. Reference was made to resolution A.1029(26) of the IMO Assembly adopted on 26 November 2009 on GISIS.[11]

80. It was suggested that the costs of operating the repository would need to be explored, although it was acknowledged that leveraging 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.

81. The Working Group asked the Secretariat to continue working with the IMO secretariat on the basis that the repository would perform a "passive" function and to map out the proposed arrangement with IMO in further detail, including with regard to matters of cost, language and functionality, for consideration by the Working Group at a later stage.

H. Articles 6 and 10. International effects of a judicial sale

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

82. 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 in article 4. 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 conditions (a) and (b).

83. 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 recognize 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 that alternative formulation for article 6(1). The Working Group recalled its earlier deliberations and conclusions regarding article 6(2) (see paras. 47 and 48 above).

[9] United Nations, *Treaty Series*, vol. 2307, No. 41143.
[10] Ibid., vol. 2367, No. 41143.
[11] IMO, document A 26/Res.1029 (26 November 2009).

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

84. The Working Group proceeded with consideration of the three grounds for refusal listed in article 10(1).

85. 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 that regard, the view was reiterated that fraud would trigger the public policy ground in subparagraph (c) (A/CN.9/1007, para. 86) 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 (A/CN.9/1007, para. 81). After discussion, the Working Group agreed to delete subparagraphs (a) and (b).

86. 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 (A/CN.9/973, para. 62; A/CN.9/1007, para. 84) 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 re-emphasized 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 reasoned that, if public policy were the only ground for refusal in the draft convention, the threshold for invoking the 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.

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

87. 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.

4. Combining articles 6 and 10

88. Some support was expressed for a proposal to combine article 6 and article 10 as separate paragraphs in a single article. Alternatively, a proposal was put forward to amend the chapeau of article 10(1) to refer to the effects of the judicial sale "under this convention". Neither proposal was taken up.

I. Article 7. Action by registrar

89. 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.

1. Registration and deregistration (article 7(1))

(a) Identification of registrar

90. It was recalled that the action required by article 7 might fall within the competence of more than one registrar in a particular State (A/CN.9/1007, para. 97). 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"

91. 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 (A/CN.9/1007, para. 97). 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.

92. In response, concern was raised that such a reference might allow requirements to be applied that could undermine the convention regime, such as a requirement to pay out unsatisfied creditors or to settle unpaid taxes levied against the former owner. It was noted that such requirements could not be inconsistent with the obligation under article 6 to recognize the clean title of the purchaser. At the same time, it was common practice for registries to recover unpaid tonnage taxes, and that prohibiting that practice might make the eventual convention less attractive to States with large registries. As a compromise, it was proposed that the term "registration requirements" should be used and that an additional provision should be inserted to clarify that the observance of those requirements was without prejudice to the clean title enjoyed by the purchaser.

93. 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

94. 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.

95. 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

96. 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.

2. Grounds for refusal (article 7(5))

97. 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 (A/CN.9/1007, para. 89). Recalling its decision to retain only the public policy ground in article 10(1) (see paras. 85–86 above), the Working Group agreed to delete subparagraphs (a) and (b) in article 7(5).

98. The view was reiterated that registrars were not well placed to apply the public policy ground (A/CN.9/1007, para. 89), 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 the 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.

99. 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.

100. A question was raised whether a "determination" by a competent court extended to protective measures ordered by the court pending final determination, such as an interim injunction ordering the registrar not to register or deregister the ship. Different views were exchanged on the merits of such an extension, with the Working Group agreeing to consider the question further at a later stage. The attention of the Working Group was drawn to the question as to how the registrar should respond if the ship were subject to certificates from multiple judicial sales (A/CN.9/WG.VI/WP.88, para. 69), although the Working Group did not consider the issue further.

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

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

J. Article 8. No arrest of the ship

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

102. 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.

103. 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))

104. Recalling the discussion of article 7(5)(c) (see para. 98 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 the 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).

105. 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.

106. 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".

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

1. Terminology

107. 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

108. 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 that might have already been 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

109. 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 issue. Support was expressed for referring to "authorities" in addition to "courts" in article 9(1) if indeed, in some States, competence to hear challenges to a judicial sale were vested in authorities other than courts (A/CN.9/973, para. 51).