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Compilation of comments on the draft convention on the international effects of judicial sales of ships

Note by the Secretariat

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I. Introduction

1. This document reproduces comments received from Governments and international organizations on the draft convention on the international effects of judicial sales, as contained in the annex to A/CN.9/1108. The comments are reproduced in the order in which they were received.
2. For consistency and to facilitate their consideration by the Commission, the comments have been edited and reformatted. In particular:
 - (a) Suggested additions in the comments are underlined, while suggested deletions appear as strikethrough text;
 - (b) References to particular paragraphs of the preamble of the draft convention have been modified so that the opening line (“[t]he States Parties to this Convention”) is not counted as the first paragraph.
3. Linguistic changes to ensure consistency between the various language versions of the draft convention have not been reproduced. Such suggestions will be considered in finalizing the text in the six official languages of the United Nations.

I. Governments

A. Ireland

[Original: English]
[5 May 2022]

While recognizing that the new obligations will only apply to Ireland if it becomes a party to the Convention, Ireland acknowledges the benefits of a further unification of maritime law. It is also acknowledged that the purpose of this international convention is to provide the legal framework under which the free and unencumbered title in a vessel purchased in a judicial sale would be recognized by States parties. This would assist in ensuring increased certainty and transparency for international trade to operate efficiently and effectively.

In principle, Ireland supports any international agreement which has this objective. Ireland acknowledges the extensive work of the Secretariat, delegations and NGOs who have participated in the drafting process.

B. Canada

[Original: English]
[6 May 2022]

Preamble, second paragraph

The word “both” should be placed after “in” because “both” should not be placed before a preposition (“in”) in the absence of a second proposition. The words “as well as” should be replaced by “and”. The word “and” is needed before the penultimate item in the list that is introduced by “Mindful of”. The word “a” should be inserted between “as” and “means”.

“Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used ~~both~~ in both seagoing and inland navigation, ~~as well as~~ and of the function of judicial sales as a means to enforce maritime claims,”

Preamble, fourth paragraph, article 6, article 9

We suggest using the singular form for “effect”. The singular is used for “effect” in the body of article 6 as well as in the title and body of article 10.

Preamble, fourth paragraph

We propose removing the reference to “unencumbered of pre-existing liens” and add a reference to “clear of any mortgage or hypothèque” as set out below. This would align the preamble with the definition of “clean title” and avoid introducing the word “unencumbered” which does not appear elsewhere in the instrument. In addition, the reference to “liens” is not needed since it is a type of charge (see definition of “charge”) and the word “charge” appears in the fourth paragraph.

“Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective sales to interested parties and give international effects to judicial sales of ships sold free and clear of any mortgage or hypothèque ~~unencumbered of pre-existing liens~~ and of any charges, including for ship registration purposes,”

Article 4(4)

The words “to this Convention” should be deleted to harmonize with article 5(2) where there is no such wording after the reference to Appendix II.

Article 9(3)

The comma after “effects of a judicial sale” could be deleted to make it clear that the “for which a certificate has been issued...” wording is not parenthetical/descriptive, but rather defines the judicial sales that are meant to be captured by this paragraph.

Articles 12, 14 and 20

The words “convention, treaty or” could be deleted. Listing “convention, treaty or agreement” is not ideal wording as these three words are synonyms, making two of them redundant. Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. This makes it clear that using either “treaty” or “agreement” would cover treaties, agreements, conventions, protocols, etc.

Article 18

The number “19” should be changed to “22” and the number “20” to “23” because these should be references to the articles on entry into force and amendment, and the article numbering has been affected by the insertion of three articles.

Article 20

Article 20(1): The word “paragraph” preceding “1 or 2 of article 7...” should be singular given that “or” is used.

Article 20(2): If the words “convention, treaty” are not deleted as suggested above, the word “or” should be added in front of “agreement”. The word “or” is needed here before the penultimate item in the list that is introduced by “any other international” in order to close off that list. Otherwise, the reference to “applicable law” becomes the final item in that list and must be read as “any other international applicable law”, which is not the intended meaning.

It would be better not to capitalize the word “convention” when referring to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) (e.g. “also a party to that Convention...”) to avoid confusion with “this Convention”.

Article 21

Article 21(3): We suggest deleting the last sentence of article 21(3) as it is inconsistent with paragraph 1 of this article. Paragraph 1 stipulates that declarations shall be made

(or confirmed) at the time of ratification. Therefore, they cannot be made after entry into force of the Convention for that State. Declarations can only be modified (or withdrawn) after entry into force of the Convention for the declaring State. In that case, the timeline is set out under paragraph 4 of this article.

Article 21(4): Presumably a “modification” is the same thing as an “amendment” to a declaration mentioned in article 19(2). We suggest using the same word for consistency.

Article 21(4): If a declaration is modified or withdrawn less than six months before entry into force of the Convention for the declaring State, article 21(4) suggests the modification or withdrawal would take effect six months after notification of the modification or withdrawal, which would be later than the entry into force of the Convention for that State. In order to avoid this outcome, it should be specified that a modification or withdrawal of a declaration that is notified before entry into force of the Convention for the declaring State takes effect simultaneously with that entry into force. (Paragraph 3 makes a similar stipulation with respect to the initial declaration.)

Article 22

Article 22(2): If the wording in square brackets is retained, then “The Convention” should be changed to “This Convention” for consistency with the rest of the references to “this” Convention.

Article 22(2): If Article 21 is not retained, we suggest adding the following text to the end of Article 22(2):

“If the depositary receives the notification of the declaration before entry into force of this Convention in respect of the State concerned, this Convention shall enter into force for that territorial unit simultaneously with the entry into force of this Convention in respect of the State concerned.”

If text to this effect is not added, then article 22(2) will apparently have the result that, if the Convention is extended to a territorial unit via a modification/amendment to a declaration and that modification/amendment is notified to the depositary less than six months before entry into force of the Convention for the declaring State, the Convention will enter into force in that territorial unit six months after notification of the modification, which would be later than the entry into force of the Convention for that State. We would like to avoid that outcome.

Furthermore, our suggested added text addresses another issue as it underscores that the Convention cannot enter into force for a territorial unit before it enters into force for the State. It provides clarity and consistency in case: (1) the declaration is made upon signature (as permitted by articles 19 and 21), which would normally occur *more* than six months before entry into force, or (2) the first or second State to ratify makes the declaration *more* than six months before entry into force of the Convention for that State.

Article 23(4)

The words “to the Convention” should be deleted for consistency with the other references to the “States Parties”.

Article 24(2)

The words “the Convention” should be changed to “this Convention” for consistency with the rest of the references to “this” Convention.

C. China

[Original: English]
[6 May 2022]

Preamble, second paragraph

It is proposed that (1) the word “a” should be inserted before the word “means”, (2) the words “secure and” should be inserted before the word “enforce”, and (3) the words “maritime claims” should be replaced by the words “claims against shipowners”. And, after the above proposed changes, the last sentence of this paragraph will read as follows:

“..., as well as of the function of judicial sales as a means to secure and enforce maritime claims against shipowners.”

It is to be noted that (1) judicial sales of ships are also used in many jurisdictions to enforce non-maritime claims against shipowners, and (2) the insertion of the words “and secure” may better reflect the prevailing practice in many jurisdictions that judicial sales of ships also function as a means of securing claims against shipowners.

Preamble, fourth paragraph

It is proposed that the words “liens and” should be deleted and the words “and mortgages or hypothèques” should be inserted after the word “charges”, and after the changes the fourth paragraph will read as follows:

“Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective sales to interested parties and give international effects to judicial sales of ships sold free and unencumbered of pre-existing liens and charges and mortgages or hypothèques, including for ship registration purposes,”

It is to be noted that the word “charge” is defined in article 2 and the definition includes “lien” but excludes “mortgages or hypothèques”, and the proposed changes are also in line with the definition on clean title in article 2.

Article 1

It is proposed that the word “international” should be inserted before the word “effects”, and article 1 after the proposed change will read as follows:

“This Convention governs the international effects of a judicial sale of a ship that confers clean title on the purchaser.”

It is to be noted that the insertion of the word “international” may better reflect the true intention of this convention, i.e. to govern the international effects but not the domestic effects of a judicial sale of a ship, and to align it with article 6.

Article 2(a)(i)

It is proposed that the words “or public tender” should be inserted after the words “public auction”, and this subparagraph will read as follows:

“(i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or public tender or by private treaty carried out under the supervision and with the approval of a court; and”

It is to be noted that in Hong Kong SAR, which maintains a common law system, and also in some other common law jurisdictions, “public tender” is a popular way of judicial sale but may not be clearly covered by “public auction”.

Article 3(1)(a) and (b)

It is proposed that the word “was” in these subparagraphs should be replaced by the word “is”, and this paragraph will read as follows:

- “1. This Convention applies only to a judicial sale of a ship if:
- (a) The judicial sale ~~was~~ is conducted in a State Party; and
 - (b) The ship ~~was~~ is physically within the territory of the State of judicial sale at the time of the sale.”

Article 4(3)(a)

It is proposed that (1) the word “register” should be replaced by the word “registry” and (2) the word “in” should be replaced by the word “with” accordingly, and after the changes this subparagraph will read as follows:

- “(a) The registry of ships or equivalent ~~register in~~ registry with which the ship is registered;”

It is to be noted that a “register” may not be accepted as one of the listed recipients of the notice of judicial sale.

Article 4(3)(d)

It is proposed that the word “owner” should be replaced by “owner(s)”, and this subparagraph will read as follows:

- “(d) The owner(s) of the ship for the time being; and”

It is to be noted that this proposed change is for the purpose of keeping consistency with article 5(2)(h) and Appendix II, item 5.

Article 5(1)

It is proposed that the word “other” should be inserted before the words “public authority”, and this paragraph will read as follows:

- “1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the court or other public authority that ordered, approved or confirmed the judicial sale or other competent authority of the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser.”

It is to be noted that this change is for the purpose of keeping consistency with article 2(a)(i) and article 5(2)(e).

Article 5(2)(f)

It is proposed that (1) the word “register” in the first place should be replaced by the words “the registry”, (2) the word “ships” should be replaced by the word “ship”, (3) the word “register” in the second place should be replaced by the word “registry”, and (4) the word “in” should be replaced by the word “with” accordingly. And, after the changes, this subparagraph will read as follows:

- “(f) The name of the ship and ~~register~~ the registry of ships or equivalent ~~register in~~ registry with which the ship is registered;”

Article 7(1)(a)

It is proposed that the words “from the register” should be inserted after the word “delete”, and this subparagraph will read as follows:

“(a) Delete from the register any mortgage or hypothèque and any registered charge attached to the ship that had been registered before completion of the judicial sale;”

It is to be noted that this change is for the purpose of keeping grammatical consistency with article 7(1)(b).

Article 7(5)

It is proposed that (1) the words “paragraphs 1 and 2” should be replaced by the words “the preceding paragraphs”, and (2) the words “the registrar or other competent authority” should be replaced by the word “registration”, and after the changes this paragraph will read as follows:

“5. The preceding paragraphs ~~Paragraphs 1 and 2~~ do not apply if a court in the State of registration ~~the registrar or other competent authority~~ determines under article 10 that the effect of the judicial sale under article 6 would be manifestly contrary to the public policy of that State.”

It is to be noted that (1) paragraphs 3 and 4 should also not be applicable in the given circumstance, and (2) the replacement of the words “the registrar or other competent authority” by the word “registration” may simplify the wording and avoid any confusion that the “other competent authority” is also the subject as the “court”.

Article 8(4)

It is proposed that the words “paragraphs 1 and 2” should be replaced by the words “the preceding paragraphs”, and after the change this paragraph will read as follows:

“1. The preceding paragraphs ~~Paragraphs 1 and 2~~ do not apply if the court or other judicial authority determines that dismissing the application or ordering the release of the ship, as the case may be, would be manifestly contrary to the public policy of that State.”

It is to be noted that paragraph 3 should also not be applicable in the given circumstance.

Article 19(2)

It is proposed to delete article 19(2) while article 21(4) is retained.

It is to be noted that this is to avoid duplication.

Article 20(1)

It is proposed to revise article 20(1) to read as follows:

“1. A State that is party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) may [, at the time of signature, ratification, acceptance, approval or accession or at any time thereafter,]declare that, notwithstanding article 5, paragraph 4, if a certificate of judicial sale produced under paragraphs 1 or 2 of article 7 emanates from another State that is also party to that Convention, the registrar or other competent authority of the State may request the ~~production~~ addition of a certificate issued under that Convention. [A certificate issued under that Convention shall not be rejected on the sole ground that it is in electronic form.] [The declaration shall be notified to the depositary and may be withdrawn at any time.]”

As regards the addition of the words “or at any time thereafter”, it is to be noted that under the current language, declarations under article 20(1) can only be made at “the

time of signature, ratification, acceptance, approval or accession”, but cannot be made thereafter. This would mean that if a State becomes a party to the Apostille Convention after the time of its signature, ratification, acceptance, approval or accession to this convention, it would not be able to make a declaration under article 20(1). Obviously, this is something which should be avoided.

As regards the replacement of “production” by “addition”, it is to be noted that according to article 4(1) of the Apostille Convention and paragraphs 265 to 266 of the Apostille Handbook,¹ certificates issued under the Apostille Convention should be securely attached to the underlying public document. The current language “production of a certificate issued under that Convention” may appear to suggest that the said certificate is a separate document from the certificate of judicial sale. For clarity, it is proposed to revise “production” to “addition”, which is the term used in Article 3(1) of the Apostille Convention.

As regards the addition of the sentence in square brackets, i.e. “A certificate issued under that Convention shall not be rejected on the sole ground that it is in electronic form”, it is to be noted that the Certificates issued by the competent authorities under the Apostille Convention may be in electronic form, especially where the underlying public document is in electronic form. According to article 5(6), the certificate of judicial sale may be in the form of an electronic record. While the current language “certificate issued under that Convention” appears sufficient to cover such electronic certificate, if it is wished the formulation should be made clearer, it may consider adding the sentence in square brackets to article 20(1) or the explanatory notes. The formulation of the additional sentence follows that of article 5(7).

Article 21(1)

If (1) the above proposal to add “or at any time thereafter” to article 20(1) is accepted; and (2) if the Secretariat’s suggestion in paragraph 7 of its cover note to retain article 21 but delete the words in square brackets in articles 18(2), 19(1), 20(1) and 22(2), final sentence (which would mean also deleting the said added words) is also accepted, it is proposed to revise article 21(1) to read as follows:

“1. Declarations under article 18, paragraph 2, and article 19, paragraph 1, ~~and article 20, paragraph 1~~, shall be made at the time of signature, ratification, acceptance, approval or accession. Declarations under article 20, paragraph 1 may be made at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.”

Appendix I (items 9 and 10)

It is proposed that the word “owner” should be replaced by the word “owner(s)”, and these items should be read as follows:

- “9. Name of the owner(s)
10. Address or residence or principal place of business of the owner(s)”

It is to be noted that these changes are for the purpose of keeping consistency with articles 4(3)(d) and 5(2)(h).

Appendix I (item 11)

If the above proposal to add “or public tender” to article 2(a)(i) is accepted, it is further proposed to add an additional item after item 11 as follows:

- “12. *(If judicial sale by public tender)* The date, time and place of submission of tenders”

¹ Editorial note: Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention* (2013), available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5888>.

If, however, the above proposal to add “or public tender” to article 2(1)(i) is not accepted, it is proposed to (1) add a footnote to item 11 which reads, “In the case of public auction conducted by way of public tender, the date, time and place of submission of tenders.”; and (2) state in the explanatory notes that “public auction” is understood to cover public tenders.

It might be worth noting that for a public tender, tenderers are required to submit their tenders to a specified place by a specified date and time. Normally, the tender with the highest price is accepted. The current formulation of item 11 of Appendix I is not entirely appropriate for a public tender process.

Compared to public auction, a tenderer in a public tender cannot learn of the tender prices/bids of other tenderers and then raise its own tender price/bid. That said, public auctions and public tenders are both public competitive bidding processes in nature, and it is understood that public auctions can also be conducted by way of sealed bids.

D. Panama

[Original: Spanish]
[6 May 2022]

Article 2(e)

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

Within the scope established for the definition of “charge”, maritime liens are included but mortgages and hypothèques are excluded from the definition. It is important to note that, in Panamanian legislation, article 171 of Act No. 57 of 6 August 2008 establishes which maritime claims are privileged, as well as the order of priority among them, placing maritime mortgages fourth in priority.

For this reason, it would be in our interest for the exclusion that places mortgages and hypothèques outside the scope of this definition to be eliminated and for each country to instead be permitted to decide whether or not to recognize maritime mortgages as maritime liens, according to applicable legislation.

Article 2(g)

“Maritime lien” means any charge that is recognized as a maritime lien or privilège maritime on a ship under applicable law.

As noted in our previous comment, under applicable Panamanian legislation, maritime mortgages are recognized as maritime liens, and mortgagees are ranked fourth in priority relative to the ship’s other creditors.

However, the definition of maritime lien retained in the latest version of the draft convention again refers to the term “charge”, which is defined previously as excluding maritime mortgages and hypothèques, for which reason we think it appropriate to replace the term “charge” with “claim”.

Article 4

For the Panama Ship Registry it is vitally important that the rights acquired by mortgagees and other holders of maritime liens are upheld, and thus that they are able to participate in proceedings and assert their claims in a timely manner.

For this reason we think it necessary for the ship’s flag registry to be provided with an acknowledgement of receipt of the notice issued to registered mortgagees, once the judicial sale has been completed, together with the certificate that the purchaser is required to submit to have the ship’s registration cancelled.

The intention behind this observation is to prevent possible claims or applications to avoid the judicial sale on the part of the ship's registered mortgagees and thus ensure that the purchaser is conferred clean title to the ship.

Previous versions of the draft convention set forth the means of giving notice to be used by the State of judicial sale, which included:

- (a) registered mail or courier service;
- (b) any means of electronic communication [or other suitable means];
- (c) any means acceptable to the person to whom the judicial sale is to be notified;
- (d) any means provided for in an applicable treaty.

However, article 4(4) of the latest revision of the draft convention states that: "The notice of judicial sale shall be given in accordance with the law of the State of judicial sale, ...". We think it advisable to reinstate the list of means of giving notice with a view to standardizing the relevant procedures, given the differences between national legislation that may exist.

Article 5

We think it appropriate to include the sale price of the ship in the model certificate of judicial sale proposed (Appendix II). It is in our interests that the price be included for purposes of transparency towards holders of maritime liens who might not have been able to participate in the proceedings and assert their claims for payment, such as members of the ship's crew and its suppliers, among others.

As a general rule, the decision or document by means of which a judicial authority confers ownership of a ship upon a third party, as a result of a public auction, includes the ship's sale price.

E. Côte d'Ivoire

[Original: French]
[9 May 2022]

General comment

The provisions of the draft convention are not contrary to the applicable community provisions, namely articles 293 and 294 of the OHADA Uniform Act organizing Summary Debt Collection Procedures and Measures of Execution, or to the provisions of Ivorian law on the matter, in particular article 282 of the Maritime Code, Act No. 2017-442 of 30 June 2017:

"Once the award is made, in addition to transferring ownership of the ship sold, the following effects are produced:

- Mortgages and liens cease to attach to the ship;
- The duties of the master of the ship cease."

Observations on the form

The French appears to be a literal translation and contains some terms in English.

Concerning the title ("International effects of a judicial sale"), on reading the provisions of article 6, it appears that the effects concerned are those linked to the holding of the certificate of judicial sale and not those linked to the judicial sale in general.

Proposals

Make a complete translation of the version into French, taking care to retranscribe the English words faithfully into French.

The title of article 6 should be reworded. It would thus read:

Article 6. “Effects of the certificate of judicial sale”

Observations on the content

The understanding of the definition of the term “*titre libre de tout droit*” (clean title) does not seem clear enough: does this mean that the judicial sale procedure is not subject to any appeal? If this is the case, another term should be proposed that specifies that this involves a wholly owned acquisition.

Proposals

The use of the terms “final award” or “final sale” would be more appropriate.

F. Dominican Republic

[Original: Spanish]

[9 May 2022]

The judicial sale of a ship is a court-ordered forced sale that entails the transfer of the ship’s ownership upon payment of a price and the distribution of the proceeds among the ship’s creditors.

Ships are maritime navigation vessels, maritime navigation being the most important activity established in the relevant corporate charter and being carried out internationally, all over the world.

By their inherent nature, ships are moveable assets and, owing to the activities and transactions involved in maritime trade, are required to call at various ports around the world.

The fact that there is currently no harmonized international instrument regulating the judicial sale of ships creates legal uncertainty in this area, and this uncertainty has led to the need to formulate this legal instrument.

One of the problems that this initiative has encountered is the lack of internal regulations on the recognition of foreign judgments. However, for the Dominican Republic, this is not an obstacle: mechanisms for recognizing such judgments have been established under the Act on Private International Law (No. 544–14), as well as appropriate linkages between law and forum, domicile and the application of international treaties regulating private activities.

The provisions of the draft convention under consideration are in line with the provisions of the national law regulating mortgages secured against maritime and river vessels of any kind, whether built or under construction, that weigh more than three tons (Act No. 603–77).

The draft convention under consideration makes appropriate provision for the publication of a notice announcing the sale of the ship. However, we are of the view that, to duly uphold the rights established in articles 68 and 69 of the Constitution of the Dominican Republic, this notice should be published also in a national newspaper of the State of ordinary registration and a national newspaper of the State of bareboat charter registration, if applicable.

The draft under consideration also makes appropriate provision for the notification of interested parties, to be given at least 30 days prior to the sale of the ship. However, we are of the view that, to duly uphold the rights established in articles 68 and 69 of the Constitution of the Dominican Republic, for reasons of time and distance and owing to the nature of maritime trade, the notice should be published at least 60 days

in advance, with the text specifying whether this period is based on calendar days or business days, or, alternatively, that a more precise formula should be established based on a mechanism whereby, for example, the distance between the State of the place of sale and the State of registration is the main factor used to determine the length of the period of notice to be given to interested parties.

We take the view that it is appropriate for the Dominican Republic to sign the draft convention under consideration, subject to the observations made above.

G. Germany

[Original: English]
[9 May 2022]

Article 2

A definition on “completion of a judicial sale” should be added as the term is used in article 5(1) and is unclear. The definition would add to the proper functioning of the convention.

Therefore, Germany proposes to add the following definition to article 2:

““Completion of a judicial sale” means that according to the law of the State of judicial sale the judicial sale of a ship cannot be avoided anymore by any appeal or application against the judicial sale, with the exception of constitutional challenges.”

Article 2(a)

In the definition of “judicial sale” it should be added that the sale shall be conducted in accordance with the law of the State of judicial sale. At the same time, this clarification which is currently included in article 4(1) could be deleted. This change would clarify that the complete procedure of the judicial sale is determined by national law and not only the notification procedure.

Article 2(a) should thus read:

“(a) “Judicial sale” of a ship means any sale of a ship conducted in accordance with the law of the State of judicial sale.”

Article 3(1)

According to the wish of the Working Group, the term “time of judicial sale” should be determined by the national law of the State of judicial sale. This term currently appears in two provisions of the draft convention, namely in article 3(1) and article 4(1). In article 3(1) the term should be clarified by adding “as determined by the law of the State of judicial sale”. In addition, the term “time of the sale” should also be amended for reasons of clarity into “time of *that* sale”.

Article 3(1) should thus read:

“1. This 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~~ that sale as determined by the law of the State of judicial sale.”

The same applies to article 5(2)(e) (“that conducted the judicial sale and the date of ~~the~~ that sale”).

Article 4(1)

Article 4(1) should be deleted. The first part of the sentence (“The judicial sale shall be conducted in accordance with the law of the State of judicial sale”) should be

deleted because of the proposed addition to article 2(a). The second part of the sentence (“which also determines the time of the sale for the purposes of this Convention”) should also be deleted as it is not necessary for the purpose of article 4(1) (see proposal on article 3(1)).

Article 4(2)

As a consequence to the suggested deletion of article 4(1), article 4(2) should become article 4(1) and the words “notwithstanding paragraph 1” should be deleted.

Furthermore, the “a” before “judicial sale” should be deleted in order to clarify that it is not sufficient to only give one notice to one of the addressees listed in paragraph 3 but that rather notice has to be given to all the addressees in paragraph 3 as the case may be.

Finally, the term “prior to the judicial sale” seems to be unclear. This is so because the definition of the term “judicial sale” in article 2(a) comprises the whole procedure (ordering of the judicial sale, auction, completion). Therefore, the event to which “prior” refers should be specified. At the same time, it should be ensured that the persons concerned are notified in due time beforehand.

Article 4(2) should thus read:

“~~21. Notwithstanding paragraph 1, a~~ Δ certificate of judicial sale under article 5 shall only be issued if a notice of judicial sale is given in due time prior to the public auction or the conclusion of a private treaty carried out under the supervision and with the approval of a court and in accordance with the requirements of paragraphs 3 to 7.

Article 4(7)

Germany thanks the Secretariat for the change that has been made in article 4(7) which aims at clarifying that the court or authority conducting the judicial sale is allowed to use information on the identity or address of any person to whom the notice of judicial sale is to be given even if it is not derived from a source mentioned in subparagraphs (a) to (c). However, we are of the opinion that the change does not solve the problem and still propose to delete the word “exclusively”.

Article 4(7) should thus read:

“7. In determining the identity or address of any person to whom the notice of judicial sale is to be given, reliance may be placed exclusively on: ...”.

Otherwise, Germany supports the written comments and suggestions as submitted by the European Union.

H. Madagascar

[Original: French]
[11 May 2022]

Article 2

Place article 2, on definitions, before article 1, on the purpose of the convention, as article 1 already contains technical terms that are only explained in article 2.

To facilitate the reading the convention, terms should be defined in alphabetical order.

The following terms should also be defined:

- (a) “IMO number”;
- (b) “Certificate of judicial sale”.

Article 15

For the sake of logic, place article 15 after article 3, on the scope of application, and renumber the articles that follow accordingly.

Article 6

Combine article 6 with article 7, as article 7 follows logically from article 6, and remove all references to article 7 in the other articles of the convention. All references to article 6 will become: “article 7, paragraph 1” (because article 15 has been inserted just after article 3); paragraphs 1 and 2 mentioned in article 7 will become article 7, paragraphs 2 and 3 (see the drafting proposal in the third column).

If it is considered that articles 6 and 7 should not be combined, then change the title of article 6 to “International effect of a judicial sale of ships” or “main effect of a judicial sale of ships”, as this article mentions only one effect.

Drafting proposals:

“Article ~~6-7~~. International effects of a judicial sale of ships

1. A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State Party of conferring clean title to the ship on the purchaser.

~~Article 7. Action by registrar~~

~~2~~. 2. At the request of the purchaser or subsequent purchaser and upon production of the certificate of judicial sale referred to in article 5, the registrar or other competent authority of a State Party shall, as the case may be and in accordance with its regulations and procedures, but without prejudice to ~~article 6~~ paragraph 1:

...

~~2-3~~. ...

~~3-4~~. ...

~~4-5~~. ...

~~5-6~~. Paragraphs ~~1 and 2~~ 2 and 3 do not apply if ...”

Article 10

For a logical reading, place article 10 after article 7 and renumber the articles that follow accordingly.

Put “circumstances” in the singular, because article 10 mentions only one circumstance causing a judicial sale to have no international effect.

Article 14

Place this article directly after the article on the circumstance in which judicial sale has no international effect.

Article 17(3)

Replace “date it is open for signature” with “date it is open for ratification”.

Article 20. Authentication of certificate of judicial sale

This article is not required by virtue of article 5(4), which exempts the certificate of judicial sale from any legalization or similar formality.

Structure of the draft convention after the above observations

Article 1. Definitions

- Article 2. Purpose
- Article 3. Scope of application
- Article 4. Matters not governed by this Convention
- Article 5. Notice of judicial sale
- Article 6. Certificate of judicial sale
- Article 7. International effects of a judicial sale
- Article 8. Circumstance in which judicial sale has no international effect
- Article 9. Other bases for giving international effect
- Article 10. No arrest of the ship
- Article 11. Jurisdiction to avoid and suspend judicial sale
- Article 12. Repository
- Article 13. Communication between authorities of States Parties
- Article 14. Relationship with other international conventions
- Article 15. Depositary
- Article 16. Signature, ratification, acceptance, approval, accession
- Article 17. Participation by regional economic integration organizations
- Article 18. Non-unified legal systems
- Article 19. Procedure and effects of declarations
- Article 20. Entry into force
- Article 21. Amendment
- Article 22. Denunciations

Other observations

With regard to the role of the depositary, all acts brought to the attention of the depositary must also be notified to the States parties to the convention, including the various declarations, instruments of signature, ratification, accession, approval and acceptance, within a time limit that must also be set in the convention.

With regard to the duplication mentioned in the note by the secretariat of the United Nations Commission on International Trade Law, on page 2, paragraph 7, concerning article 21, we consider that it is not necessary to delete the words in square brackets in articles 18(2), 19(1) and 22(2) (last sentence) because these words in square brackets facilitate the reading of the convention and are not disruptive in themselves. Article 21(1) is a gentle reminder of these words.

I. Argentina

[Original: Spanish]
[13 May 2022]

Item 13 of Appendix I, entitled “Statement as to whether the sale will confer clean title to the ship, including the circumstances under which the sale would not confer clean title”, would appear to contradict the purpose of the convention, which, as expressed in articles 1 and 6, is to govern the effects of a judicial sale of a ship that confers clean title to the purchaser. For this reason, it is suggested that item 13 of Appendix I be deleted.

The signature field contained in Appendix II reads: “Signature and/or stamp of issuing authority or other confirmation of authenticity of the certificate”. Given the reference

to other means of confirming the authenticity of the certificate, it would be advisable to specify in the text of the draft convention what this other confirmation might be, or else to delete this phrase altogether in order to prevent possible ambiguities of interpretation.

II. Organizations

A. Islamic Development Bank Group

[Original: English]
[27 April 2022]

Article 3

Maybe to exclude explicitly the case where the sale was decided via arbitration if this convention intends to do so. In addition, maybe to mention that it concerns only ships that were used for trade/commercial purposes.

Article 4 and Appendix I

Appendix I provides for minimum information to be contained in the notice of judicial sale. However, there are circumstances where the sale is organized following a bankruptcy procedure applied to the shipowner (usually a special purpose vehicle) either before or as a result of the intended judicial sale of the ship. Such procedure requires a time limit for the creditors to declare their debts in the jurisdiction of the State. Failing to do so, the creditors cannot claim their dues from the sale proceeds after the judicial sale of the ship is completed. Therefore, the notice of judicial sale may be ineffective from this perspective.

It is preferable to include a pre-notice of judicial sale that covers bankruptcy notice to inform all the creditors about the start of the procedure so that they can claim their debts within the time limit in accordance with the law of the State of judicial sale.

Article 5

Maybe to mention a timeline within which the certificate can be issued. Is this certificate to operate as a tradable instrument or not?

Article 7(1)(c)

The “or” at the end of subparagraph (c) seems to mean that (a), (b), (c), (d) are alternative steps. Although the understanding may be that this relates only to points (c) and (d). It would be good to enhance for better clarity.

Article 19(2)

Maybe to consider adding “save when there is an ongoing case which may be subject to this scenario”.

Article 22(3)

It is preferable to refer to the precise legal terminology of “initiated” in order to ensure that the convention shall apply only to the new cases and not the ongoing ones.

B. International Chamber of Shipping

[Original: English]
[29 April 2022]

ICS has participated in all the sessions of Working Group VI on judicial sale of ships, representing shipowners' interests during the deliberations. Our position is coordinated with BIMCO.

Having reviewed the text of the draft convention in document [A/CN.9/1108](#), ICS would like to record its thanks to the secretariat for their work in the production of the document and for their diligent support throughout the project to date. The ICS secretariat considers that the revised text accurately reflects the deliberations and the decisions that were made during the fortieth session of Working Group VI.

Shipowners are central to judicial sales of ships in their capacities as the owner of the ship being sold, the purchaser, and often as creditors with claims against the proceeds of sale. The draft convention would promote greater legal certainty by ensuring that a properly held judicial sale of a ship in a State Party, which conferred clean title to the purchaser resulting in a certificate of judicial sale being issued by the State of the judicial sale, would be given full effect in other States Parties. This would be to the benefit of all interests.

Throughout the Working Group's deliberations, ICS has sought to ensure that a fair balance is struck between all of the interests involved in a judicial sale. The ICS secretariat can confirm that the text of the draft convention is broadly satisfactory from the perspective of shipowners' interests, and we commend its approval by the Commission. Provided no substantive changes are made to the material provisions, we expect that once adopted, the convention would find the support of our members and its ratification would be promoted by ICS and BIMCO.

C. Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States

[Original: Russian/English]
[4 May 2022]

The phrases "State of judicial sale", "State of registration", "State Party" are repeatedly used in the text of the draft convention. Thus, regardless of the context of the article, it is specified that it does not refer to any State, but only to those who have expressed their consent to be bound by this document in an appropriate international way. In order to ensure uniformity and avoid different interpretations, we propose to consider adding the words "State party" after "approved or confirmed by the court" to article 2(a)(i) of the draft convention.

In articles 2(a)(i), 4(3)(c), 5(1) and 5(2)(e), and items 3 and 12 of Appendix I to the draft convention, we believe it possible to replace the words "other public authority" and "public authority" with "International Tribunal for the Law of the Sea" in order to avoid a possible extensive interpretation and taking into account the competencies enshrined in the statutory documents of this international organization and the emerging jurisprudence.

In article 2(b) of the draft convention, we believe it possible to clarify the notion of "ship", since in this form, by definition through the broad universal concept of "vehicle" (which also includes auto, rail and air transport), it is incorrect and vague. Primarily, the characteristic features of the ship are buoyancy as well as constructiveness, purpose, crew and several others. In this regard, it would be appropriate to consider the possibility of using a concept that follows the outline of generally accepted concepts in international law, for example, close or similar to that used in the International Regulations for Preventing Collisions at Sea (COLREGs).

We believe it possible to consider excluding the words “or operated by” from article 3(2) of the draft convention. According to article 32 “Immunities of warships and other government ships operated for non-commercial purposes” of the United Nations Convention on the Law of the Sea (1982) (hereinafter “UNCLOS”), with such exceptions as are contained on subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes. Thus, it exclusively refers to ships owned by the State. At the same time, the draft convention refers to State-operated ships, that is, ships that can be leased by the State from a third party and that do not legally belong to this State, which would be contrary to the UNCLOS provisions.

We believe it would be appropriate to supplement article 4(3)(a) of the draft convention with the word “ship” before “register in which”, since such registers are publicly available lists in which not only ships are entered, but also changes related to them, in particular, restrictions (encumbrances) on the ship. We also would like to draw attention to the fact that, for example, in article 4(d), (f) and (h), article 4(7)(a) of the draft convention and a number of others, the phrase “in the register of ships or equivalent register” is used.

Article 11 of the draft convention is called “Repository”. A similar term is also repeatedly found both in the text of the above-mentioned article and in other articles of the draft convention (for example, paragraph (b) of section 5 of article 4, section 3 of article 5 and a number of others). This concept has an unnecessarily general meaning, implying a place of storage of both tangible and intangible objects of a wide range. According to the Note of the UNCITRAL Secretariat to the Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft (A/CN.9/WG.VI/WP.94), the provisions of article 11 of the draft convention are drawn from the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration that entered into force on 1 April 2014 (hereinafter “Rules on Transparency”). The title of article 8 “Repository of the Published Information” of the Rules of Transparency has a clarified wording, which contributes to a better understanding of the legal provisions meaning. In this connection, we believe it appropriate to supplement accordingly the wording of the title of article 11 “Repository” of the draft convention and the content of the remaining articles of the draft convention in which this term is used.

We would like to propose using a broader wording in article 13 of the draft convention, which makes it possible to reflect all international conventions related to this draft convention, without focusing exclusively on the Convention on the Registration of Inland Navigation Vessels (1965) and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965).

Article 13(2) of the draft convention regarding the methods of transmission abroad of notices of judicial sale, in our opinion, contradicts the provisions of article 4(4) of the draft convention. If the said actions are carried out “using channels other than those provided for in that Convention”, that is, notifications of sale based on a judgment are sent in ways not provided for by the law of the State of sale based on a judgment, then they a priori cannot be carried out without prejudice to article 4(4) of the draft convention and, accordingly, to the interests of this State.

We believe it possible to consider supplementing the draft convention with the article “Reservations” in line with similar articles in the Convention on Limitation of Liability for Maritime Claims (1976), the International Convention on Arrest of Ships (1999) and a number of others, which is allowed by article 19 of the Vienna Convention on the Law of Treaties (1969) in order to exclude or change the legal effect of certain provisions of an international treaty in their application to a given State. We would like to note that reservations could have a positive effect on the effectiveness of the adopted document. Thus, a reservation may allow a State to become a party to an international treaty, whereas without such a reservation, the State would not decide to participate in it for one reason or another.

We would also like to draw your attention to the fact that the words “An adopted amendment”, contained in article 23(4) of the draft convention, are incorrectly translated as “This Convention” in the text of the draft convention in Russian, and therefore need to be replaced.

D. International and Comparative Law Research Center

[Original: Russian]
[5 May 2022]

These comments are based on the draft convention on the international effects of judicial sales of ships (A/CN.9/1108), the report of Working Group VI (Judicial Sale of Ships) on the work of its fortieth session (A/CN.9/1095) and other earlier UNCITRAL documents prepared by the Working Group.

The proposals reflect solely the point of view of the International and Comparative Law Research Center, an accredited independent entity, as an observer in the Working Group, and were developed on the basis of expert analysis of the provisions of the documents under consideration.

Time period for the production of the certificate of judicial sale (article 5)

In order to ensure legal certainty and avoid possible abuse after issuance of the certificate of judicial sale, it is recommended to introduce an amendment to article 5 of the draft convention on the time period in which the certificate may be produced in a State other than the State of judicial sale or the certificate’s period of validity.

It seems reasonable to limit the period for the production or period of validity of the certificate to one year from the date of issuance. The expiry of such periods does not in itself affect the consequences of a judicial sale of a ship, but, if the certificate is not promptly produced within the time limit for its production or validity, it means that the registrar will not perform the registration actions on the basis of the draft convention but in accordance with national procedures, including by checking that the consequences of a judicial sale comply with the law and rules of the registrar’s country.

This proposal could be inserted as paragraph 4 after article 5(3).

Registrar’s actions upon receipt of a notice of the prospective sale (article 7)

Article 7 of the draft convention describes the actions of the registrar upon production of a certificate of judicial sale. However, the text of the draft convention does not contain any article that describes the registrar’s actions upon receipt of a notice of the prospective judicial sale in accordance with article 4 of the draft convention.

It would seem that such an omission should be corrected. The registrar’s main task is to maintain a register of ships and ship titles and, accordingly, to make entries in the part of the register relating to a particular ship. Furthermore, registrars themselves have no interest in the ship.

The current draft convention is silent on what exactly a registrar who has received notice of a prospective sale should do. Obviously, the legal regime of a ship that will be sold in a judicial sale in a foreign country in the near future is fundamentally different from the legal regime of a ship that is not likely to be thus sold in the near future.

It is important for third parties, the protection of whose rights is one of the main functions of any property rights registry, to know that the ship in whose legal regime they are interested is about to be sold. Such persons have a clear and legitimate interest in knowing about the prospective sale, but they are not necessarily on the list of persons to whom notice of a judicial sale of a ship is directly given in accordance with article 4(3).

There are two possible solutions for the registrar to make a record of notice of a prospective sale:

(a) Minimum solution: article 7 of the draft convention should specify that a registrar who receives notice of a prospective judicial sale from a court in another State must perform the same actions as it is required to do when receiving such notice from a court of its own State, in accordance with its own rules and procedures. Thus, a notification sent by a foreign competent authority to the registrar would have the same legal effect on that registrar as if it had received the notification from a court of its own State. Such a solution would not require amendments to the national law of the registrar's country, thus increasing the chances of ratification of the convention being drafted;

(b) Maximum solution: since not all legal systems (including in Russia) provide for a notation or any other entry in the register on the prospective judicial sale of a ship, it may make sense for article 7 of the draft convention to impose a treaty obligation on the registrar to reflect in the register acknowledgement of receipt of notice of the prospective judicial sale of the ship and the content of the notice itself. This would increase protection for third parties whose rights may be affected by the prospective sale and ensure that the judicial sale of the ship is public. However, such an obligation on the registrar could require amendments to the national laws of countries that do not provide for such notations.

Use of the term “to take any other similar measure against a ship” alongside the term “to arrest a ship” (article 8)

Traditionally, for purposes of maritime law, the term “arrest” means “any detention or restriction on removal of a ship by order of a Court to secure a maritime claim but does not include the seizure of a ship in execution or satisfaction of a judgment or other enforceable instrument”.²

Meanwhile, courts, including in the Russian Federation, often use as an interim measure a prohibition on registering a ship that does not involve the ship's physical detention and accordingly is not a physical restriction on the ship similar to an arrest.

The application of this type of interim measure should not be limited by the draft convention, as to do so would be an encroachment on national law that is not justified by the purposes of the draft convention.

We believe that, in order to avoid misinterpretation of the term “arrest” and include an interim measure such as a prohibition of registration actions, the words “to take any other similar measure against a ship” should be either removed from the text of the draft convention, or the definition of “arrest” from the International Convention on Arrest of Ships should be reproduced, or it should otherwise be expressly stated that the prohibition of registration actions against a ship is not considered a “similar measure against a ship” for purposes of the draft convention.

Accordingly, the reference to “other similar measure” in the text of the draft convention, including in article 2(b), should be deleted or it should be clarified what is meant by “arrest”.

Issuance of a duplicate copy of the certificate in case of loss or destruction

Article 5 of the draft convention provides for the issuance of a certificate of judicial sale in paper form as the main option.

Since the issuance of a certificate is established by the draft convention and not by national law, and since, as with any paper document, it can be destroyed (including accidentally) or lost, the text of the draft convention should provide for a treaty obligation of the issuing authority to issue a duplicate copy of the certificate at the

² International Convention on Arrest of Ships, 1999 (Geneva, 12 March 1999).

request of the purchaser or a subsequent purchaser if sufficient evidence of its loss is presented.

We believe that, by analogy with information on the issuance of the original certificate, information on the issuance of a duplicate certificate of judicial sale and the cancellation of the certificate originally issued and subsequently lost should be sent by the issuing authority to the repository in order to avoid cases of two competing paper documents and production of two certificates – the original and a duplicate – for the registrar.

Single term “register” or “registry” in the text of the draft convention in Russian

In article 4(3)(a) and (e)(ii) of the draft convention, paragraph 6 of the minimum information to be contained in the notice of judicial sale (Appendix I to the draft convention) and paragraph 4.2 of the model certificate of judicial sale (Appendix II to the draft convention), we propose to make the translation more precise and replace in the Russian version of the draft convention the term “*registr*” (registry) with “*reestr*” (register) to bring it into line with the rest of the Russian text of the draft convention where the term “*reestr*” is used.

As an alternative, one could propose to use the term “registry” throughout the text of the draft convention, which corresponds to the Russian translation of the terminology of the 1982 United Nations Convention on the Law of the Sea.

E. Comité Maritime International

[Original: English]
[6 May 2022]

Introduction

Having considered the Draft Convention on the International Effects of Judicial Sales of Ships now before us as finally settled in New York in February 2022, the CMI can confirm that it is most satisfied with the Draft as it exists; the Draft meets all the objectives of the entire project which was and remains to ensure that:

- (a) When a purchaser of a ship in a validly held judicial sale,
- (b) Held in accordance with the domestic law,
- (c) In full observance of the notification provisions of the convention,
- (d) For which a Certificate of judicial sale is issued confirming that the vessel was sold free and unencumbered,

such a sale is given its full effects by each State Party with the only exception being if giving effect to such a sale is manifestly contrary to the public policy of the State Party.

The CMI is convinced that the text of the Draft Convention, subject the following few minor suggestions provides the legal certainty that the CMI has sought to attain and the industry supported at the Malta Colloquium.

The CMI is of the firm opinion that the Secretariat has, following the deliberations during the 40th session, presented us with a final version which subject to a very few suggestions which do not affect the substance at all, should be presented to the Commission with no further amendments as to the substance of the text. The CMI is confirmed of this view particularly given the extent of the very extensive debates exchanged by all the delegations actively taking part in the sessions since May 2019 resulting in the very Draft before us being the fruit of these debates which came to a conclusion during the 40th session.

Preamble, second paragraph

As the delegates to the 40th session will recall, the entire draft was discussed and deliberated except for the Preamble. The narrative of the Preamble needed to be fine-tuned in line with the draft Convention as agreed and the Secretariat was requested to amend the existing Preamble for this purpose. As a result, and unlike the extensive debate on each article of the Draft Convention, there was no discussion of each and every paragraph in the Preamble.

The CMI has considered the Preamble as amended by the Secretariat and agrees with its content. There are just three recommendations which the CMI would like to make to assist in avoiding any misunderstanding and these are the following:

(a) It is being suggested that the words “secure and” are inserted between the words “to” and “enforce”. The CMI believes the insertion of the words “secure and” may well reflect the practice in a number of jurisdictions that judicial sales of ships also serve to secure (or conserve) claims against ships and/or shipowners;

(b) It is also being suggested that the word “maritime” is removed and that the words “against ships and/or shipowners” are added at the end of the line. The CMI feels that these amendments are required to ensure that as has been expressed during the debates, States Parties whose law allows the sales of ships for claims other than maritime claims (such as a number of civil law countries) would not be confused by the wording in the Preamble;

(c) It is also being suggested that the word “a” is inserted before the word “means”.

Thus CMI is suggesting that the second paragraph reads as follows:

“Mindful of the crucial role of shipping in international trade and transportation, of the high economic value of ships used both in seagoing and inland navigation, as well as the function of judicial sales as a means to secure and enforce ~~maritime~~ claims against ships and/or shipowners,”

Preamble, fourth paragraph

In view of the fact that the word “charge” is defined and the definition includes “lien” but excludes “mortgages or hypothèques”, it is being suggested that the words “lien and” be deleted and the words “and mortgages or hypothèques” be inserted after the word “charge”.

The CMI is suggesting that the fourth paragraph reads as follows:

“Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective sales to interested parties and give international effects to judicial sales of ships sold free and unencumbered of pre-existing ~~liens and~~ charges and mortgages or hypothèques, ~~including as well as~~ as for ship registration purposes”

Text of the convention

Article 3(1)(a). It is suggested that the word “was” be substituted by the word “is”.

Article 3(1)(b). It is suggested that the word “was” be substituted by the word “is”.

Article 4(3)(a). It is suggested that the word “register” be substituted by the word “registry”.

Article 7(5). It is being suggested that the word “in” in the first line be substituted by the word “of”. And, it is being further suggested that the words “of the” be inserted between the words “registrar of” and “other competent authority”. Thus article 7(5) would read:

“Paragraphs 1 and 2 do not apply if a court ~~is~~ of the State of the registrar or of the other competent authority determines under article 10 that the effect of the

judicial sale under article 6 would be manifestly contrary to the public policy of that State.”

Square brackets

Article 17(1): The CMI assumes that this is something that will be considered at the Commission session.

Article 19(1): Subject to the debate during the meeting the CMI would agree to the removal of the square brackets.

Article 20: Subject to the debate during the meeting the CMI is in favour of removing all square brackets.

Articles 21, 22 and 23: With regard to the choice between months and days, this is a matter on which the Secretariat’s advice as to the usual terminology in such matters would be helpful.

Article 22(1) and (2): The CMI is in favour of removing the square brackets around the other wording.

F. Hague Conference on Private International Law

[Original: English]
[6 May 2022]

Article 13(2)

The Permanent Bureau (PB) notes the inclusion of the reference to the Convention of 15 November 1965 on the *Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention) and understands that the intention of the draft provision is to afford flexibility as to the method used to give notice of the judicial sale under article 4(4). This would allow recourse either to the Service Convention or to other methods of transmission, despite the *prima facie* exclusive character of the Service Convention.

The PB considers that the question of the method of transmission for the notice of judicial sale should be left to the legal framework otherwise applicable to this question and would therefore respectfully suggest that article 13(2) be removed from the draft convention. If the States Parties to the Judicial Sales of Ships Convention are also party to the Service Convention, any channel of transmission available under the Service Convention may be used to give notice of the judicial sale (subject to States’ declarations). The PB recalls that under the Service Convention, Contracting Parties may conclude additional agreements to permit other transmission channels, in particular direct communication between their respective authorities (Art. 11).

Alternatively, the PB would invite the Working Group to consider a more general formulation of article 13(2) to avoid an express reference to the Service Convention. This could refer to the transmission of the notice of judicial sale, giving States Parties discretion as to the method used. For example:

“2. Without prejudice to article 4, paragraph 4, and taking into account other international conventions, treaties or agreements, a State Party to this Convention may use any method available to it to transmit the notice of judicial sale.”

Article 20

The PB notes its concern that the current draft provision could give rise to an unusual situation where only Contracting Parties to the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents* (Apostille Convention) have the opportunity to require authentication of the certificate of judicial sale. The PB understands there to be a desire within the Working Group to

further simplify the authentication process, while retaining the option for a State Party to the Judicial Sales of Ships Convention to require an Apostille (if applicable).

In the view of the PB, it would, however, be preferable that the draft convention not make a distinction between legalisation and analogous formalities, such as Apostilles. If the article 7 certificate is exempt from authentication, this exemption should apply equally to legalisation and the issuance of an Apostille; if States Parties to the Judicial Sales of Ships Convention are to be afforded the possibility of nonetheless requiring authentication, this should be whichever authentication is applicable in the circumstances, i.e. legalisation or an Apostille.

As such, with a view to avoiding potential confusion and an imbalance among States Parties to the Judicial Sales of Ships Convention, the PB would respectfully suggest that article 20 be reformulated to allow the default rule in article 5(4) to prevail unless a State declares otherwise:

“[Article 20. Authentication of certificate of judicial sale

1. Notwithstanding article 5, paragraph 4, a State [Party] may declare that its registrar or other competent authority may require that the certificate of judicial sale produced under paragraphs 1 or 2 of article 7 be subject to legalisation or similar formality.
2. A declaration under paragraph 1 shall not affect the application, as between the States concerned, of any international convention, treaty, agreement or applicable law that exempts the certificate of judicial sale from legalization or abolishes or simplifies the formality under that Convention.]”

If the above proposal for reformulation is not acceptable to the Working Group, the PB would nonetheless respectfully invite the Working Group to consider amending the text of the current draft provision to avoid a situation where States which join the Apostille Convention after joining the future Judicial Sales of Ships Convention are unable to make a declaration to ensure the application of the Apostille Convention. In this regard, the PB would suggest removing the text in square brackets in the current draft of article 20(1): “[, at the time of signature, ratification, acceptance, approval or accession,]”.

In addition, the Apostille Convention does not enter into force between Contracting Parties when an objection has been raised under its article 12(2). The PB therefore recommends nuancing the language of article 20(1) to reflect this reality, by adding text such as in the following formulation:

“if a certificate of judicial sale produced under paragraphs 1 or 2 of article 7 emanates from another State that is also party to that Convention and the Convention has entered into force between the two States,”

G. European Union

[Original: English]
[10 May 2022]

This submission sets out the views of the European Union (EU) and its member States on the draft convention on the international effects of judicial sales of ship as set out in document [A/CN.9/1108](#) which have been commendably prepared by the UNCITRAL secretariat.

It should be clear that this submission is intended to provide certain considerations in preparation for the 55th Session of UNCITRAL Commission scheduled to take place from 27 June–15 July 2022 in New York, and to respond to the invitation from the UNCITRAL secretariat for written comments.

The European Union and its member States take this opportunity to commend the UNCITRAL secretariat for the outstanding work in encompassing the outcome of the intense discussions of Working Group VI at its fortieth session in the draft convention

as set out in document [A/CN.9/1108](#) which have been crucial for the formulation of the following comments.

Preamble

The term “judicial” should be added to the fourth paragraph of the preamble:

“Wishing, for that purpose, to establish uniform rules that promote the dissemination of information on prospective judicial sales to interested parties and give international effects to judicial sales of ships sold free and unencumbered of pre-existing liens and charges, including for ship registration purposes,”.

Article 1 and article 5(2)(b): Consistency in the terminology used in these two provisions

Article 1 provides that “[t]his Convention governs the effects of a judicial sale of a ship that confers clean title on the purchaser”, while article 5(2)(b) reads that “[t]he purchaser acquired clean title”. Against this background and for consistency, the terminology used in article 5(2)(b) should be aligned to that of article 1 to read:

“(b) A statement that the purchaser ~~acquired~~ has been conferred clean title to the ship;”.

Article 4(6): Certified translation

The European Union recalls its proposal made at the fortieth session that the translation referred to in article 4(6) should be certified ([A/CN.9/1095](#), para. 101). At the time, there was broad agreement in the Working Group not to include a certification requirement. While the European Union took good note of the discussion from which it also understood that the language requirement was for the purpose of communicating the notice to the repository, it reiterates that the absence of certification of the translation of the notice of judicial remains problematic for some jurisdictions which might require notified documents to be accompanied by a certified translation if they are not in the official language of the State of judicial sale.

Against this background, article 4(6) should be amended to read:

“6. For the purpose of communicating the notice to the repository, if the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation into such a working language of the information mentioned in Appendix I.”

Article 5(2)(e): Consistency in the terminology used in this provision and the Appendices

At the fortieth session, the Working Group heard that item 3.1 of Appendix II to the draft convention called for the name of the court or other public authority and not its contact details, which responded to concerns about whether a court would be in a position to handle enquiries ([A/CN.9/1095](#), paras. 75 and 103). In the current draft, item 3.1 of Appendix II has been adapted in the same sense in order to align with item. 3 of Appendix I.

To be consistent and for Appendix II to be in accordance with article 5 (Certificate of judicial sale), article 5(2)(e) of the draft convention should also be aligned to the same terminology used in item 3.1 of Appendix II.

Against this background, article 5(2)(e) should be amended to read:

“(e) The name of the court or other public authority ordering, approving or confirming ~~that conducted~~ the judicial sale and the date of the sale;”

Article 7

Recalling the discussion at the thirty-ninth session and the concerns raised about extending the protection of the convention down an unlimited chain of subsequent purchasers (A/CN.9/1089, paras. 34–38) which continued at the fortieth session (A/CN.9/1095, paras. 18–21), the European Union still considers that further clarifications on this matter are needed and specifically in article 7(1). It is important to ascertain that if a request is made under paragraph 1 or under paragraph 2 of article 7 by a subsequent purchaser, the latter must not only produce the certificate of judicial sale but should also be obliged to produce the necessary documents proving that the ownership to the ship has been transferred from the purchaser to the subsequent purchaser.

Against this background, article 7(1) should be amended to read:

“1. At the request of the purchaser ~~or subsequent purchaser~~ and upon production of the certificate of judicial sale referred to in article 5 or at the request of the subsequent purchaser and upon production of the certificate and further documentation on the transfer of ownership from the purchaser to the subsequent purchaser, the registrar or other competent authority of a State Party shall, as the case may be and in accordance with its regulations and procedures, but without prejudice to article 6:”

Article 10: “judicial remedies”

The future convention should guarantee due process with respect to the judicial sale and ensure that all the affected parties have the opportunity to assert their rights. Additionally, it should afford protection and judicial remedies to good faith creditors, which typically aim at maximizing their claims. As it currently stands, article 9 of the draft convention establishes exclusive jurisdiction in the courts of the State of judicial sale in respect of any claim or application to avoid a judicial sale of a ship conducted in that State. However, this provision (or any other provision) does not provide that a contracting State should be required to provide an effective remedy to aggrieved creditors/parties, nor does article 9 explicitly guarantee the existence of judicial remedies.

Against the foregoing, it should be clearly specified in the draft convention that if the State of judicial sale does not offer judicial remedies in respect of a judicial sale of a ship, the concerned parties do not have legal protection in accordance with Article 10.

Against this background, Article 10 should be amended to read:

“A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party, including situations where the specific proceedings leading to the issuance of the certificate are incompatible with fundamental principles of procedural fairness of that other State.”³

Article 14

In Article 14, it should be clarified that if a State Party gives effect to a judicial sale of a ship conducted in another State under any other international convention, treaty or agreement or under applicable law, this effect shall not be binding for other States Parties but only in this particular State.

Against this background, Article 14 should be amended to read:

“Nothing in this Convention shall preclude ~~any basis for giving effect in one a~~ State Party to give effect to a judicial sale of a ship conducted in another State

³ The proposed amendment to article 10 is inspired by article 7(1)(c) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

under any other international convention, treaty or agreement or under applicable law in that State.”

Article 18

As a general comment, the European Union highlights that the reference to articles 19 and 20 in the last sentence of article 18(1) is not correct. It should be to article 22 (entry into force) and article 23 (amendment).

Having carefully heard the UNCITRAL secretariat at the fortieth session that this additional sentence is necessary for the application of the convention (A/CN.9/1095, para. 78), an additional sentence should be added to clarify this last phrase.

Against this background, Article 18(1) should be amended to read:

“1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a State Party, to the extent that that organization has competence over matters governed by this Convention. For the purposes of articles ~~19~~ 22 and ~~20~~ 23 an instrument deposited by a regional economic integration organization shall not be counted in addition to the instruments deposited by its member States that are State Parties to the Convention.”

Article 18: Disconnection clause

The European Union wishes to underline that the “disconnection clause” is intended to cover the members States of the European Union in their mutual relations and not in their relations with other States or individuals.

Against this background, the following disconnection clause should be included in article 18 of draft convention:

Article 18(4)

“This Convention shall not prevail over conflicting rules of a regional economic integration organization, whether such rules were adopted or entered into force before or after this Convention:

- (a) if, under article 4, the transmission of notice of a judicial is made between member States of such an organization; or
- (b) as concerns jurisdictional rules applicable between member States of such an organization.”

Appendices

Throughout the Appendices (Appendix I, items 4, 12, 13; Appendix II, items 3.1 and 3.2), the term “judicial sale” should be used instead of “sale”.

In Appendix I, item 12, the term “time period” is not clear. A clarification should be included in the explanatory note.