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

**Note by the Secretariat**

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## I. Introduction

1. At its thirty-fifth session (New York, 13–17 May 2019), the Working Group considered a draft convention prepared by the Comité Maritime International (CMI) on the recognition of foreign judicial sales of ships, known as the “Beijing Draft” (see [A/CN.9/WG.VI/WP.82](#)). The Working Group decided that the Beijing Draft provided a useful basis for its deliberations on the topic of the judicial sale of ships ([A/CN.9/973](#), para. 25).

2. The annex to this document contains an annotated first revision of the Beijing Draft, which has been prepared by the Secretariat to incorporate the discussions and decisions of the Working Group at its thirty-fifth session, and which is presented for consideration by the Working Group at its thirty-sixth session.

## II. Issues for consideration by the Working Group

### 1. Some fundamental questions

#### (a) Form of the instrument

3. The Beijing Draft is in the form of a treaty. At its thirty-fifth session, the Working Group agreed that it would be premature to consider the form of any eventual instrument (e.g., treaty or model law) ([A/CN.9/973](#), para. 25). In keeping with that decision, the first revision follows the form and structure of the Beijing Draft considered by the Working Group at its thirty-fifth session, but includes, in *italicized text*, drafting options for a model law to help the Working Group visualize such an alternative.

#### (b) Geographic scope

4. No decision has been taken as to whether the instrument, if it takes the form of a treaty, will apply to judicial sales conducted in a non-State Party. The Beijing Draft applies to the recognition of judicial sales conducted in *any* State, although article 9 of the Beijing Draft allows States Parties to make a reservation limiting the scope of the treaty to judicial sales conducted in a State Party. While the geographic scope of the instrument has not been considered in detail by the Working Group, some doubts have already been expressed about applying the recognition regime to judicial sales conducted in a non-State Party, assuming that the instrument were to take the form of a treaty ([A/CN.9/973](#), paras. 47, 52–53). The first revision is drafted on the basis that, in the form of a treaty, the recognition regime only applies between States Parties.

#### (c) Substantive scope

5. No decision has been taken on whether the recognition regime under the instrument applies only to judicial sales for which clean title has (already) been conferred on the purchaser under the national law of the State of judicial sale (“option A”), or whether it applies more broadly to mandate that all judicial sales confer clean title (“option B”) (see [A/CN.9/973](#), para. 92). As requested by the Working Group ([A/CN.9/973](#), para. 93), the first revision reflects both options (see articles 2(2), 4 and 6 and accompanying footnotes).

#### (d) “Qualified” judicial sales

6. No decision has been taken as to whether the instrument should accommodate so-called “qualified” judicial sales (i.e., sales for which clean title is not conferred on the purchaser under the national law of the State of judicial sale). As suggested at the thirty-fifth session of the Working Group ([A/CN.9/973](#), para. 92), the first revision includes drafting options to accommodate such sales (see articles 4(2), 5(2)(h), 7(2), 8(3) and accompanying footnotes).

7. Some reservations have been expressed about introducing a qualified title into the instrument ([A/CN.9/973](#), para. 37), including the impact it might have on the value

of the certificate of judicial sale issued under article 5 and the effectiveness of the recognition regime under the instrument. It has been noted that, when considering “qualified” sales, the Working Group should not lose sight of the fundamental objective of the instrument to facilitate the deregistration of the ship by way of the certificate of judicial sale ([A/CN.9/973](#), para. 93).

## 2. Other issues for consideration

8. In addition to the issues identified in the annotations to the first revision, the Working Group may wish to consider the following issues (without any order of priority):

(a) *Reference to “recognition”*: A query has been raised as to whether it is necessary for the instrument to provide for the *recognition* of a foreign judicial sale if it already provides for the sale to have *effect* beyond the State of judicial sale ([A/CN.9/973](#), para. 49). It has been suggested that the instrument be cast in terms of “effects” rather than “recognition” (*ibid.*). The substantive provisions of the first revision have been prepared to avoid the term “recognition”. For ease of reference, the annotations continue to use the expression “State of recognition” and “recognition regime” to describe particular aspects of the draft instrument;

(b) *References to “clean title”*: The Working Group has agreed that the initial focus of its work should be on clean title and deregistration ([A/CN.9/973](#), para. 25). The concept of “clean title” is not used in the International Convention on Maritime Liens and Mortgages (1993) (“MLMC 1993”). The Working Group may wish to consider whether reference to this concept in a future instrument is redundant given that the substance of “clean title”, as defined in article 1(b) of the first revision, is already covered in the substantive provisions of the instrument (see article 4);

(c) *Minimizing the number of definitions*: It has been suggested that the Working Group should work to minimize the number of definitions in the instrument ([A/CN.9/973](#), para. 76). In line with this suggestion, some of the terms for which a definition is provided in article 1 of the Beijing Draft are defined in the first revision in the provisions in which they are used. In some cases, defining the term this way has obviated the need to use the defined term. This is the case, for example, with the term “competent authority”. Moreover, some definitions have become redundant or unnecessary in the first revision. This is the case, for example, with the term “day” (which is understood to refer to calendar day, [A/CN.9/973](#), para. 75) and “recognition”. The Working Group has agreed not to define the term “court” (see [A/CN.9/973](#), para. 85). The Working Group may wish to consider whether it is necessary to retain definitions for “person” (UNCITRAL instruments tend not to define this term), “purchaser” and “subsequent purchaser”, which are still defined terms in article 1 of the first revision. It may also wish to consider the need to qualify the definition of the term “ship” in article 1(i) of the first revision by reference to whether the ship is “capable of being subject of a judicial sale under the law of the State of judicial sale”;

(d) *The definition of “maritime lien”*: The definition of “maritime lien” has not yet been considered by the Working Group. The term is used (a) to define the term “charge” (article 1) (which in turn is used to define the term “clean title”), (b) to define the classes of persons to whom the notice of judicial sale is to be given, i.e., holders of maritime liens (article 3), and (c) to define the classes of persons with standing to challenge a judicial sale in the State of judicial sale, i.e., holders of maritime liens (article 9). It has been explained that defining the term “maritime lien” by reference to those that are “recognized... by the law applicable in accordance with the private international law rules of the State of judicial sale” allows the term to encompass a list of maritime liens that is more expansive than that contained in article 4 of the MLMC 1993, which are recognized by all States Parties to the MLMC 1993: see William M. Sharpe, “Towards an International Instrument for Recognition of Judicial Sales of Ships - Policy Aspects”, [CMI Yearbook 2013](#)

(Antwerp, 2013), p. 175. It is equally conceivable that the applicable law will recognize fewer maritime liens than those listed in article 4 of the MLMC 1993;

(e) *The definition of “mortgage”*: The definition of “mortgage” has not yet been considered by the Working Group. The term is used (a) to define the term “clean title”, i.e., free of any pre-existing mortgage (article 1), (b) to define the classes of persons to whom the notice of judicial sale is to be given, i.e., holders of registered mortgages (article 3), (c) to define the pre-existing rights or interests that are preserved despite the judicial sale, i.e., a mortgage remaining attached to the ship (article 4), (d) to define the obligations of the registrar in the State of registration, i.e., to delete any registered mortgage except any preserved registered mortgage (article 7), (e) to define the obligations of the courts in the State of registration, i.e., not to arrest the ship except for a claim relating to any preserved mortgage (article 8), and (f) to define the classes of persons with standing to challenge a judicial sale in the State of judicial sale, i.e., holders of registered mortgages (article 9). The Working Group may wish to consider whether, for each of these uses, it is appropriate for the term “mortgage” to mean a mortgage that is “recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale”, particularly when the term is used to define an obligation that is addressed to States other than the State of judicial sale (e.g., the obligations in articles 7, 8 and 9);

(f) *Preservation of mortgages and charges “assumed by the purchaser”*: Like the Beijing Draft considered by the Working Group at its thirty-fifth session, the first revision makes provision for preserving mortgages and charges that are “assumed by the purchaser” (see articles 4(1), 5(2)(g) and 7(2)(a)). It has been suggested that, if purchasers do not assume existing mortgages or charges in practice, such provision be deleted (A/CN.9/973, para. 32). Provision for preserving mortgages and charges that are “assumed by the purchaser” is made in the MLMC 1993. Similar provision is made in articles VII(4) and VIII of the Convention on the International Recognition of Rights in Aircraft (1948);

(g) *Effect of judicial sale on ownership*: It has been noted that, by conferring clean title to the purchaser, the instrument has the effect of transferring ownership of the ship (A/CN.9/973, para. 39). The instrument thus pre-empts national law (including private international law rules) by which ownership of the ship may be otherwise determined (e.g., by reference to the registry of ships in which the ship is registered);

(h) *Interaction between notice requirements in the instrument and notice requirements under the national law of the State of judicial sale*: Like in the Beijing Draft considered by the Working Group at its thirty-fifth session, the notification requirements in article 3 of the first revision apply regardless of whether the sale is ultimately sought to be recognized abroad. The general view of the Working Group is that the notice requirements establish minimum standards and therefore do not supersede any additional notice requirements under national law (A/CN.9/973, para. 30). Nevertheless, the Working Group may wish to consider the interaction between the notice requirements in the instrument and those under national law, and what would occur in the event of a conflict between the two (ibid.). One matter that would be governed by national law is the identity of the notice giver. In this regard, the first revision does not reproduce the prescription in article 3(1) of the Beijing Draft that notice may be given either by the “competent authority” (presumably the authority conducting the judicial sale or judicial officers) or by “one or more parties to the proceedings resulting in [the] judicial sale”. Another matter that would be governed by national law is the modalities for giving notice to a legal person;

(i) *Identification of registry and registrar*: In some States, the registry of ships is separate to the registry of ship mortgages and charges (e.g., the latter might be part of a general registry of security interests). This separation is acknowledged in the United Nations Convention on Conditions for Registration of Ships (1986) (article 11(2)), as well as in the UNCITRAL [Model Law on Secured Transactions](#):

[Guide to Enactment](#) (para. 28). In the first revision, the term “registry” refers to the registry of ships and the registry of ship mortgages or charges, and the term “registrar” refers to the person appointed in the State of registration to administer those registries, whether those registries are different or one and the same;

(j) *Compliance with requirement of the law of the State of judicial sale as condition for issuing certificate of judicial sale*: Like the Beijing Draft considered by the Working Group at its thirty-fifth session, article 5(1) of the first revision provides that the certificate of judicial sale is issued if the conditions required by the law of the State of judicial sale have been met. The Working Group may wish to consider the need for this condition, noting that it does not appear in the corresponding provision of the MLMC 1993 (article 12(5)). A question may be raised as to whether this condition exposes the judicial sale to unwarranted challenge in the State of judicial sale (particularly if the authority issuing the certificate is not the same as the authority that conducted the judicial sale) or in the State of recognition. If, however, the intention of this condition is to allow the State of judicial sale to specify procedures for applying for a certificate (including costs), the Working Group may wish to consider reformulating the paragraph to make this clear;

(k) *Publication of notices and certificates in a centralized repository*: The Working Group has agreed that a centralized online repository could be used to publish notices and certificates of judicial sales ([A/CN.9/973](#), paras. 46 and 73). At the same time, some reservation has been expressed as to the potential cost of such a mechanism ([A/CN.9/973](#), para. 46). Article 12 of the first revision, which is operationalized by cross-references in articles 3(4)(b) and 5(3), is drafted on the basis of article 8 of the [UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration](#) (which establishes a Transparency Registry that is maintained by the Secretariat). International registries or similar notification schemes are established under other international instruments, such as the Convention on International Interests in Mobile Equipment (“Cape Town Convention”) and the Protocol thereto on Matters Specific to Aircraft Equipment (which establishes an international registry of interests in aircraft equipment, operated by Aviareto Ltd under contract with the International Civil Aviation Organization), the International Convention for the Safety of Life at Sea (“SOLAS”) (which provides in regulation XI-1/3 for the adoption of IMO ship identification number scheme, operated by IHS Maritime & Trade under an arrangement with the International Maritime Organization), and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”) (which establishes a scheme for the notification of anti-dumping actions, administered by the secretariat of the World Trade Organization). If the Working Group wishes to retain the repository mechanism, which presupposes that the instrument will take the form of a treaty, it may wish to consider (a) which organization is well suited to perform the repository function, (b) whether the mechanism obviates the need to give notice to some of the persons entitled to notice under article 3, and (c) whether a timeframe should be provided for giving the notice of judicial sale to the repository (see article 3(4) of the first revision);

(l) *Listing particulars for the certificate of judicial sale*: Like the Beijing Draft considered by the Working Group at its thirty-fifth session, article 5(2) of the first revision lists the minimum particulars to be contained in the certificate of judicial sale (article 5(2)) while requiring the certificate to be substantially in the form of the annexed model. As the model also specifies the listed particulars, the Working Group may wish to consider the need to list the particulars in article 5(2);

(m) *Certified copies and translations of the certificate of judicial sale*: Like the Beijing Draft considered by the Working Group at its thirty-fifth session, the first revision provides for the certification of copies and translations of the certificate of judicial sale. A similar requirement (for arbitral awards) is contained in article IV(1) and (2) of the [Convention on the Recognition and Enforcement of Foreign Arbitral Award](#) (1958) (“New York Convention”), although, unlike the New York Convention, the first revision only provides for production of certified copies and translations *upon request*. No requirement for certification of copies or translations is contained in more

recent UNCITRAL instruments such as the [Model Law on International Commercial Arbitration](#) (see article 35(2)) and the [United Nations Convention on International Settlement Agreements resulting from Mediation](#) (2018) (“Singapore Convention”) (see article 4(3)). The Working Group may wish to consider whether it is necessary to retain the certification requirement and, if so, to clarify the authorities that are competent to certify copies and translations. The Working Group may also wish to consider whether it is sufficient for the purposes of articles 7 and 8 that a (certified) copy of the certificate be produced, rather than the original. This option might be useful where the purchaser seeks simultaneously to deregister the ship in the State of registration and the State of bareboat charter registration, a scenario already discussed by the Working Group ([A/CN.9/973](#), para. 48).

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## Annex

### First Revision of the Beijing Draft

[The States Parties to the present Convention,

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

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

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

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

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

HAVE AGREED as follows:]<sup>1</sup>

#### *Article 1. Definitions*

For the purposes of this Convention [*law*]:

(a) “Charge” means any right whatsoever and howsoever arising which may be asserted against a ship, including a maritime lien, lien, encumbrance, attachment, right of use or right of retention;<sup>2</sup>

(b) “Clean title” means title free and clear of any mortgage or charge[, except as assumed by any purchaser];<sup>3</sup>

(c) “Judicial sale” of a ship means any sale of a ship ordered or carried out by a court or other authority by way of public auction or private treaty or any other way provided for by the law of the State of judicial sale;<sup>4</sup>

<sup>1</sup> *Preamble*: This first revision of the Beijing Draft reproduces the preamble contained in the Beijing Draft. Preambles are a usual feature of UNCITRAL instruments in the form of treaties. They also feature in some UNCITRAL model laws (see, e.g., [UNCITRAL Model Law on Cross-Border Insolvency](#) and the more recent [Model Law on Recognition and Enforcement of Insolvency-Related Judgments](#)), although in a different form. On the form of the instrument, see paragraph 3 of the cover note.

<sup>2</sup> *Definitions – “charge”*: It has been explained that the term “charge” is intended to cover all kinds of private rights and interests that could be enforced in rem ([A/CN.9/973](#), para. 79). The definition has been revised to open with the general definition, followed by specific examples, and to remove the reference to “arrest” as such an example (see [A/CN.9/973](#), paras. 79 and 80).

<sup>3</sup> *Definitions – “clean title”*: It has been suggested that the definition of “clean title” omit reference to mortgages and charges that are “assumed by [the] purchaser” on the basis that the preservation of these mortgages and charges should be addressed in the substantive provisions ([A/CN.9/973](#), para. 81). On references to “clean title”, see paragraph 8(b) of the cover note.

<sup>4</sup> *Definitions – “judicial sale”*: The definition of “judicial sale” in the Beijing Draft contains two additional elements, namely (a) that the judicial sale confers clean title, and (b) that the proceeds of sale are made available to the creditors. The Working Group has accepted that these two elements should be considered in the context of the provision on the substantive scope of the instrument (see article 2), or the provisions regarding the legal effects of the judicial sale (see

(d) “Maritime lien” means any claim recognized as a maritime lien or *privège maritime* on a ship by the law applicable in accordance with the private international law rules of the State of judicial sale;

(e) “Mortgage” means any mortgage or *hypothèque* that is:

(i) effected on a ship in the State in whose registry of ships the ship is registered; and

(ii) recognized as such by the law applicable in accordance with the private international law rules of the State of judicial sale;

(f) “Owner” of a ship means any person registered as the owner of the ship in the registry of ships in which the ship is registered;

(g) “Person” means any individual or partnership or any public or private body, whether corporate or not, including a state or any of its constituent subdivisions;<sup>5</sup>

(h) “Purchaser” means any person who acquires ownership in a ship or who is intended to acquire ownership in a ship pursuant to a judicial sale of the ship;

(i) “Ship” means any ship or other vessel [capable of being subject of a judicial sale under the law of the State of judicial sale];

(j) “State of judicial sale” means the State in which the judicial sale of a ship is conducted;

(k) “Subsequent purchaser” means any person to whom ownership of a ship has been transferred through a purchaser.

#### *Article 2. Scope of application*

1. This Convention [law] shall apply to a judicial sale of a ship other than:

(a) a judicial sale in tax, administrative or criminal proceedings;<sup>6</sup>

article 4) (A/CN.9/973, para. 89). Accordingly, these elements have been removed from the definition in this first revision and are dealt with in articles 2 and 4. The Beijing Draft refers to sales “by” a “competent authority”. Some support has been expressed for the view that the starting point for the instrument is that it applies to sales by *courts* (A/CN.9/973, para. 91). Support has also been expressed for the view that the definition of “judicial sale” refer to sales “ordered” or “confirmed” by a court (*ibid.*). The definition in this first revision has been revised to reflect these views.

<sup>5</sup> *Definitions – “person”*: This definition reproduces the definition of “person” in the Beijing Draft, which in turn mirrors that in article 1(3) of the International Convention on the Arrest of Ships (1999) (“Arrest Convention 1999”). The definition has not yet been considered by the Working Group, although the breadth of the definition was noted at the thirty-fifth session in discussions on the definition of “competent authority” (A/CN.9/973, para. 79). On the need for defining the term “person”, see paragraph 8(c) of the cover note.

<sup>6</sup> *Substantive scope – exclusion of tax, administrative and criminal matters*: A concern has been expressed about applying the recognition regime to forced sales in tax, administrative and criminal matters (A/CN.9/973, paras. 19 and 90). One option to address this concern is to exclude these matters expressly from the substantive scope of the instrument. A second option, already suggested to the Working Group (A/CN.9/973, para. 79), is to limit the scope to civil and commercial matters, a device commonly used to define the scope of conventions concluded by the Hague Conference on Private International Law (in which case, as noted in document A/CN.9/WG.VI/WP.85, the judicial sale would presumably take the character of the proceedings giving rise to the judicial sale). A third option, also suggested at the thirty-fifth session, is to exclude from scope judicial sales for which the proceeds are not to be paid out to creditors (*ibid.*). Subparagraph (a) reflects the first option. The Working Group may wish to consider whether the second and third options provide any desirable additional limitation on scope. In this regard, it may wish to note that article 1(1) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019) (“Judgments Convention”) states that the Convention applies “in civil or commercial matters”, while also expressly excluding “revenue, customs or administrative matters”.

(b) a judicial sale of a ship owned or operated by a State which, at the time the proceedings leading to the judicial sale were instituted, was used only for government non-commercial purposes.<sup>7</sup>

[2. This Convention shall only apply to a judicial sale of a ship by which all mortgages and charges[, except those assumed by the purchaser,] cease to attach to the ship.]<sup>8</sup>

### *Article 3. Notice of Judicial Sale*<sup>9</sup>

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

- (a) The registrar of the registry of ships in which the ship is registered;
- (b) All holders of any registered mortgage or registered charge, provided that the registry in which it is registered, and any instrument required to be registered with the registrar under the law of the State of the registry, are open to public inspection, and that extracts from the registry and copies of such instruments are obtainable from the registrar;
- (c) All holders of any maritime lien, provided that the court or other authority ordering the judicial sale has received notice of the claim secured by the maritime lien;<sup>10</sup>
- (d) The owner of the ship; and
- (e) The registrar of the registry of ships in any State in which the ship is granted bareboat charter registration.

<sup>7</sup> *Substantive scope – exclusion of State-owned ships*: It has been suggested that the recognition regime in the instrument not apply to State-owned ships (A/CN.9/973, para. 40). It is common for treaties dealing with maritime matters to exclude ships that are owned or operated by States, while also limiting this exclusion to ships that are used exclusively for government non-commercial purposes. Subparagraph (b) is based on a recent formulation of this limited exclusion that is found in article 16 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). Earlier examples may be found in article 3 of the Convention for the Unification of Certain Rules concerning the Immunity of State-owned Vessels (1926), article 96 of the United Nations Convention on the Law of the Sea (1982), article 13(2) of the MLMC 1993, and article 8(2) of the Arrest Convention 1999.

<sup>8</sup> *Substantive scope – “option A”*: This paragraph reflects option A described in the cover note (para. 05). In case of a model law, this limitation would be included in the provision governing the effects of a foreign judicial sale, i.e., article 6 of this first revision.

<sup>9</sup> *Notice requirements – general*: Article 3 of this first revision is based on article 3 of the Beijing Draft, with amendments to reflect the discussions at the thirty-fifth session of the Working Group (A/CN.9/973, paras. 67–75). Article 3(1) does not reproduce the requirement in article 3(1) of the Beijing Draft that the notice of judicial sale be given “in accordance with the law of the State of judicial sale”. Such a requirement is not contained in the corresponding provision of the MLMC 1993 (article 11). Article 3(3) of this first revision, which is based on article 3(4) of the Beijing Draft, has been revised following work done by the Secretariat on the interaction between the instrument and the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (“Service Convention”) (see footnote 15).

<sup>10</sup> *Notice requirements – holder of maritime lien*: Paragraph (c) is a recast of article 3(1)(c) of the Beijing Draft, which requires the notice of claim to be received by the “competent authority conducting the judicial sale”. A query has been raised as to how this provision would operate in practice (A/CN.9/973, para. 70), noting that courts may not have procedures to receive ad hoc notices from holders of maritime liens. Article 3(1)(c) of the Beijing Draft is based on article 11(1)(c) of the MLMC 1993, which deals with the judicial sale of ships in the context of a broader regime for the recognition and enforcement of maritime liens and mortgages. In this context, the claim (i.e., the claim secured by the maritime lien) would ordinarily be notified in the proceedings involving the enforcement of a maritime lien or mortgage (i.e., “the proceedings leading to the judicial sale”, to use terminology already used in the Beijing Draft), and thus to the court which ultimately orders the judicial sale. The present provision seeks to clarify this.

2. The notice required by paragraph 1 shall be given at least 30 days prior to the judicial sale and shall contain, as a minimum, the following information:

(a) The name of the ship, the IMO number (if assigned), and the names of the owner of the ship and the bareboat charterer (if any), as appearing in the registry of ships in which the ship is registered or granted bareboat charter registration;

(b) The time and place of the judicial sale or, if the time and place of the judicial sale cannot be determined with certainty, the approximate time and anticipated place of the judicial sale, provided that an additional notice of the actual time and place of the judicial sale shall be provided when known but, in any event, not less than seven days prior to the judicial sale;<sup>11</sup> and

(c) Such particulars concerning the judicial sale or the proceedings leading to the judicial sale as the court of other authority conducting the judicial sale determines are sufficient to protect the interests of persons entitled to notice.

3. The notice shall be in writing and shall be given [in such a way not to frustrate or significantly delay the proceedings concerning the judicial sale]<sup>12</sup>:

(a) by registered mail or by courier;

(b) by any electronic [or other appropriate] means<sup>13</sup>;

(c) by any means agreed to by the person to whom the notice is to be given<sup>14</sup>;  
or

(d) by any means provided under an applicable treaty.<sup>15</sup>

4. The notice shall also be:

(a) published by press announcement in the State of judicial sale [*this State*] and in other publications published or circulated elsewhere, if required by the law of the State of judicial sale [*this State*];<sup>16</sup> and

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

<sup>12</sup> *Notice requirements – frustration or significant delay*: Given that this first revision, like the Beijing Draft considered by the Working Group at its thirty-fifth session, sets a time limit for giving notice, which is measured back from the judicial sale to the time that the notice is *given*, the Working Group may wish to consider the need to include the words “in such a way not to frustrate or significantly delay the proceedings concerning the judicial sale”. These words would be significant if the time limit was measured back to the time that the notice was *sent*.

<sup>13</sup> *Notice requirements – giving notice by “other appropriate means”*: This wording comes from article 11(3) of the MLMC 1993. The Working Group may wish to consider whether the reference to “other appropriate means” of giving notice is necessary and, if so, what means of giving notice fall within the scope of “other appropriate means”.

<sup>14</sup> *Notice requirement – giving notice by “means agreed to by the person”*: Subparagraph (c) is a recast of article 3(7) of the Beijing Draft.

<sup>15</sup> *Notice requirements – interaction with the Service Convention*: The Beijing Draft contains a provision allowing recourse to other treaties dealing with notification (article 3(5)). It has been suggested that this provision be deleted in favour of a general provision governing the interaction with other international instruments (A/CN.9/973, para. 72) (see article 14). In this regard, it has been noted that the Service Convention potentially applies to notices given under article 3. The interaction with the Service Convention is considered in document A/CN.9/WG.VI/WP.85, and article 3(3) of this first revision has been redrafted to facilitate that interaction. Subparagraph (d) of article 3(3) draws from article 3(5) of the Beijing Draft and allows the notice of judicial sale to be given *either* under the means of transmission prescribed in subparagraphs (a) to (c) *or* through the channels of transmission provided in the Service Convention. This reflects the third option presented in document A/CN.9/WG.VI/WP.85.

<sup>16</sup> *Notice requirements – publication in newspaper*: This subparagraph is a recast of article 3(4)(b) of the Beijing Draft. It has been separated from the other provisions of article 3(4) of the Beijing

(b) given to the repository referred to in article 12.

5. In determining the identity or address of any person to whom notice is to be given, reliance may be placed exclusively on:

(a) information set forth in the registry of ships in which the ship is registered or granted bareboat charter registration;

(b) information set forth in the registry in which the mortgage or charge referred to in paragraph 1, subparagraph (b) is registered, if different to the registry of ships; and

(c) information contained in the notice referred to in paragraph 1, subparagraph (c).

*Article 4. Effects of judicial sale in the State of judicial sale [in this State]*<sup>17</sup>

1. In the event of a judicial sale of a ship in a State Party [*this State*], all mortgages and charges[, except those assumed by the purchaser,] shall cease to attach to the ship [and clean title to the ship shall be acquired by the Purchaser], provided that:

(a) The ship was physically within the jurisdiction of the State of judicial sale [*this State*] at the time of the sale; and

(b) The judicial sale was conducted in accordance with the law of the State of judicial sale [*this State*]<sup>18</sup> and the notice requirements in article 3.<sup>19</sup>

[2. Notwithstanding paragraph 1, a charge shall not cease to attach to the ship in the event of the judicial sale if it is of a kind declared by the State of judicial sale in accordance with article [X] [*Notwithstanding paragraph 1, the following charges shall not cease to attach to the ship: [...]*].<sup>20</sup>

3. A judicial sale of a ship shall not affect any personal claim against the person who owned the ship prior to the judicial sale to the extent that the claim is not satisfied by the proceeds of the judicial sale.<sup>21</sup>

Draft (now article 3(3) of this first revision) on the basis that (a) those other provisions deal with the *means* by which the notice is given to the persons entitled to notice, and that (b) it complements the suggested provision for the publication of the notice in a centralized repository, which is also provided for in paragraph 4 of this first revision. On the publication of notices in a centralized repository generally, see paragraph 8(k) of the cover note. The Working Group may wish to consider whether a timeframe should also be provided for publishing the notice by press announcement and giving the notice to the repository.

<sup>17</sup> *Effects of judicial sale in the State of judicial sale – “option B”*: Article 4 reflects option B described in paragraph 5 of the cover note.

<sup>18</sup> *Effects of judicial sale in the State of judicial sale – compliance with national law as a condition*: In both the Beijing Draft (article 4(1)(b)) and the MLMC 1993 (article 12(1)(b)), compliance with the national law of the State of judicial sale is a condition for conferring clean title. The Working Group may wish to consider whether this condition is necessary, particularly in light of article 9.

<sup>19</sup> *Effects of judicial sale in the State of judicial sale – drafting of article 4(1)*: Paragraph 1 is a recast of article 4(1) of the Beijing Draft. The recast follows more closely the language and structure of article 12(1) of the MLMC 1993.

<sup>20</sup> *Effects of judicial sale in the State of judicial sale – “qualified” judicial sales*: This paragraph – together with articles 5(2)(h), 7(2) and 8(3) – has been included for the consideration of the Working Group, recalling that no decision has been taken as to whether “qualified” judicial sales should be accommodated in the instrument. In treaty form, this first revision accommodates “qualified” judicial sales by a declaration mechanism (see, e.g., article 19 of the [United Nations Convention on the Use of Electronic Communications in International Contracts](#) (2005)). Only charges declared by the State of judicial sale would remain attached to the ship. If “qualified” judicial sales are to be accommodated by the option presented, an article can be included in the final provisions of the treaty setting out the mechanism for making declarations.

<sup>21</sup> *Effects of judicial sale – preservation of in personam claims against former shipowner*: This paragraph is a recast of article 4(2) of the Beijing Draft based on the discussions at the thirty-fifth session (A/CN.9/973, para. 34). It seeks to incorporate the definition of “unsatisfied personal obligation”, a term defined in the Beijing Draft that is only used in article 4(2) of the Beijing Draft.

*Article 5. Certificate of judicial sale*<sup>22</sup>

1. When a ship is sold by way of judicial sale [and the conditions required by the law of the State of judicial sale and by this Convention [*this State*] have been met], the authority designated by the State of judicial sale<sup>23</sup> [*specified by this State as competent*] shall, at the request of the purchaser, issue a certificate of judicial sale to the purchaser recording that the ship has been sold to the purchaser, in accordance with the law of the State of judicial sale [*this State*] and the notice requirements in article 3, free of any mortgage or charge[, except as assumed by the purchaser].<sup>24</sup>

2. The certificate of judicial sale shall be issued substantially in the form of the annexed model [and shall contain the following minimum particulars:

- (a) The name of the State of judicial sale [*this State*];
- (b) The name, address and the contact details of the authority issuing the certificate;
- (c) The place and date [when clean title was acquired by the purchaser];<sup>25</sup>
- (d) The name, IMO number, or distinctive number or letters, and port of registry of the ship;
- (e) The name, address or residence or principal place of business and contact details, if available, of the owner(s) immediately prior to the judicial sale;
- (f) The name, address or residence or principal place of business and contact details of the purchaser;
- [(g) Any mortgage or charge assumed by the purchaser;]
- [(h) Any mortgage or charge that remains attached to the ship by virtue of paragraph 2 of article 4;]<sup>26</sup>
- (i) The purchase price;<sup>27</sup>

<sup>22</sup> *Certificate of judicial sale – general*: The Working Group has agreed in principle with the utility of a provision dealing the issuance of certificates of judicial sale (A/CN.9/973, para. 41).

<sup>23</sup> *Certificate of judicial sale – issuing authority*: It has been pointed out that the authority issuing the certificate of judicial sale might be different to the authority that orders or conducts the judicial sale (A/CN.9/973, para. 82). It has also been suggested that, if the instrument takes the form of a convention, a mechanism could be set up by which a State joining the convention would be required to notify the depositary of the authorities competent in its jurisdiction for the purposes of the convention (which could include different authorities for the purposes of different provisions of the instrument) (A/CN.9/973, para. 84). If the instrument takes the form of a model law, it could prompt the enacting State to make this designation in the text of the enacting law.

<sup>24</sup> *Certificate of judicial sale – certification of clean title*: Article 5(1) of the Beijing Draft provides that the certificate of judicial sale must certify (a) that the ship was sold in accordance with the law of the State of judicial sale and the provisions of the instrument free of any mortgage or charge, except as assumed by the Purchaser, and (b) that any title to and all rights and interests existing in the ship prior to its judicial sale are extinguished. It has been observed that both these elements cover the same thing (i.e., the acquisition of clean title), and that (b) should also be subject to the preservation of mortgages and charges that are assumed by the purchaser (A/CN.9/973, para. 43). This first revision has been prepared in line with these observations. On the preservation of mortgages and charges “assumed by the purchaser”, see paragraph 8(f) of the cover note.

<sup>25</sup> *Certificate of judicial sale – specification of place and date of acquisition of clean title*: As clean title is acquired in the event of a judicial sale, the Working Group may wish to consider whether this particular should instead refer to the place and date of the judicial sale.

<sup>26</sup> *Certificate of judicial sale – “qualified” judicial sales*: This subparagraph – together with articles 4(2), 7(2) and 8(3) – has been included for the consideration of the Working Group, recalling that no decision has been taken as to whether “qualified” judicial sales should be accommodated in the instrument.

<sup>27</sup> *Certificate of judicial sale – specification of purchase price*: It has been suggested that the certificate specify the purchase price (A/CN.9/973, para. 44).

- (j) The place and date of issuance of the certificate; and
  - (k) The signature, stamp or other confirmation of authenticity of the certificate.]
3. The authority shall promptly communicate the certificate to the repository referred to in article 12.
  4. The authority shall:
    - (a) maintain a record of certificates issued, including the particulars of the judicial sale; and
    - (b) at the request of the registrar or court referred to in articles 7 and 8, verify whether the particulars in the certificate produced correspond with particulars included in the record.<sup>28</sup>
  5. Subject to article 10, the certificate of judicial sale [*a certificate of judicial sale issued by a competent authority in another State which substantially satisfies the provisions of this article*] shall constitute conclusive evidence of the particulars therein.<sup>29</sup>

*Article 6. Effects of [foreign] judicial sale outside the State of judicial sale  
[in this State]*<sup>30</sup>

The effects of a judicial sale of a ship provided in article 4 [*conducted in another State which substantially satisfies the provisions of this law*] shall extend to all States Parties [*this State*].<sup>31</sup>

<sup>28</sup> *Certificate of judicial sale – verification*: The Working Group has agreed that a centralized online repository could be used to publish certificates of judicial sales (A/CN.9/973, paras. 46 and 73) (see article 12). It has been suggested that, as an alternative to establishing a centralized repository, the instrument could require the issuing authority to maintain a publicly accessible record of certificates issued, similar to the requirement in article 7 of the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) (“Apostille Convention”) (A/CN.9/973, para. 46). Paragraph 4 presents an option for this alternative.

<sup>29</sup> *Certificate of judicial sale – evidentiary value*: This paragraph is a recast of article 7(5) of the Beijing Draft, which finds no precedent in the MLMC 1993. The extent of the evidentiary value of the certificate is closely linked to the content of the certificate, as prescribed in article 5. It has been questioned whether the authority issuing the certificate can certify the *foreign* legal effect of the judicial sale, as this effect derives from the instrument (article 6) and not the certificate (A/CN.9/973, para. 42). This raises a related question as to whether the evidentiary value of the certificate can extend to that effect, or whether it should instead extend to the conditions for giving a judicial sale that effect under this instrument, i.e., the conditions listed in article 4(1). However, it has also been observed that it is not unusual to require a competent authority to certify the *domestic* legal effect of the sale i.e. that, in or under the law of the State of judicial sale, the judicial sale has conferred clean title on the purchaser (ibid.).

<sup>30</sup> *Effects of judicial sale outside the State of judicial sale – “option B”*: Together with article 4, article 6 reflects option B described in paragraph 5 of the cover note. To reflect option A alone, article 2(2) could be retained (for a treaty), article 4 could be omitted, and article 6 could be redrafted as follows: “A judicial sale of a ship conducted in a State Party shall have the effect in all States Parties that all mortgages and charges[, except those assumed by the purchaser,] cease to attach to the ship, provided that [*insert conditions (a) and (b) of article 4(1)*]”. If the Working Group wished to accommodate so-called “qualified” judicial sales in option A, article 2(2) could be omitted and article 6 could be expanded to give effect to a foreign judicial sale by which, in accordance with the law of the State of judicial sale, a mortgage or charge remains attached to the ship, provided also that the mortgage or charge is specified in the certificate of judicial sale.

<sup>31</sup> *Effects of judicial sale outside the State of judicial sale – recognition of foreign mortgages and charges*: If so-called “qualified” judicial sales are accommodated in the instrument, a question arises as to whether a court in the State of recognition would or should be required to recognize a preserved mortgage or charge that arises under the law of the State of judicial sale, including any maritime lien.

*Article 7. Deregistration of the ship*<sup>32</sup>

1. The registrar of a State Party shall, upon production of the certificate of judicial sale referred to in article 5 [*or a certificate of judicial sale issued by a competent authority in another State which substantially satisfies the provisions of article 5*]:

(a) delete any registered mortgage or registered charge attached to the ship; and

(b) at the direction of the purchaser or subsequent purchaser:

(i) register the ship in the name of the purchaser or subsequent purchaser;

(ii) delete the ship from the register and issue a certificate of deregistration for the purpose of new registration; or

(iii) if the ship was granted bareboat charter registration, issue a certificate to the effect that registration has been withdrawn.

[2. However, the registrar may refuse to take any of the actions specified in paragraph 1 if:

(a) the certificate specifies a registered mortgage or registered charge that is assumed by the purchaser [or remains attached to the ship by virtue of paragraph 2 of article 4 [*under the law of the other State*]]; and

(b) the holder of the registered mortgage or charge has not given its consent to the action.]<sup>33</sup>

3. If the certificate of judicial sale is not issued in an official language of the State Party [*this State*], the registrar may request the production of a [certified] translation into such an official language.

4. The registrar may also request the production of a [certified] copy of the certificate for its records.

*Article 8. No arrest of the ship*<sup>34</sup>

1. If an application is brought before a court in a State Party [*this State*] to arrest a ship for a claim arising prior to the judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5 [*or a certificate of judicial sale issued by a competent authority in that another State which substantially satisfies the provisions of article 5*], dismiss the application.

2. If a ship is arrested by order of a court in a State Party [*this State*] for a claim arising prior to the judicial sale of the ship, the court shall, upon production of the

<sup>32</sup> *Deregistration – general*: The Working Group has agreed that the initial focus of its work should be on clean title and deregistration (A/CN.9/973, para. 25). Article 7 of this first revision is based on article 6 of the Beijing Draft, which in turn builds on article 12(5) of the MLMC 1993 (ibid., para. 48).

<sup>33</sup> *Deregistration – “qualified” judicial sales and other preserved mortgages and charges*: This paragraph – together with articles 4(2), 5(2)(h) and 8(3) – has been included for the consideration of the Working Group, recalling that no decision has been taken as to whether “qualified” judicial sales should be accommodated in the instrument. The Working Group has not considered in detail how the obligation to deregister would apply to “qualified” sales. It has been suggested that, if “qualified” sales are accommodated in the instrument, the registrar should have a discretion whether to deregister the ship (A/CN.9/973, para. 37). It has also been suggested that the instrument might provide for the holders of those mortgages and charges to consent to the deregistration (cf., article 3(1) of the MLMC 1993) (A/CN.9/973, para. 32). If the Working Group decides (a) not to accommodate “qualified” sales in the instrument, and (b) not to make provision for preserving mortgages and charges “assumed by the purchaser”, this paragraph can be omitted.

<sup>34</sup> *No arrest – general*: Article 8 of this first revision is a recast of article 7(2) of the Beijing Draft. The Working Group has so far not considered this provision in detail. Article 7(2) of the Beijing Draft deals both with applications to arrest and with applications to release from arrest. This first revision splits these two provisions into separate paragraphs.

certificate of judicial sale referred to in article 5 [*or a certificate of judicial sale issued by a competent authority in that another State which substantially satisfies the provisions of article 5*], order the release of the ship from arrest.

[3. However, the court may refuse to dismiss the application under paragraph 1 or order the release of the ship under paragraph 2 if the claim relates to a mortgage or charge specified in the certificate that was assumed by the purchaser or remains attached to the ship by virtue of paragraph 2 of article 4 [*under the law of the other State*].]<sup>35</sup>

4. If the certificate is not issued in an official language of the State Party [*this State*], the court may request the production of a [certified] translation into such an official language.<sup>36</sup>

#### *Article 9. Challenge to judicial sale*<sup>37,38,39</sup>

1. The courts<sup>40</sup> of a State Party [*this State*] shall:

<sup>35</sup> *No arrest – “qualified” judicial sales and other preserved mortgages and charges*: This paragraph – together with articles 4(2), 5(2)(h) and 7(2) – has been included for the consideration of the Working Group, recalling that no decision has been taken as to whether “qualified” judicial sales should be accommodated in the instrument. The Working Group has not considered in detail how the obligation not to arrest would apply to “qualified” sales.

Paragraph 3 mirrors article 7(2) of this first revision, which is explained in footnote 33. If the Working Group decides (a) not to accommodate “qualified” sales in the instrument, and (b) not to make provision for preserving mortgages and charges “assumed by the purchaser”, this paragraph can be omitted. Article 7 deals only with the arrest of ships, and not with the recognition and enforcement of the claim secured by the arrest.

<sup>36</sup> *No arrest – translation of certificate of judicial sale*: This paragraph reflects a suggestion made to the Working Group (A/CN.9/973, para. 57) and is modelled on article 7(3) of this first revision.

<sup>37</sup> *Challenging the judicial sale – general*: Article 9 replaces articles 7(3) and 7(4) of the Beijing Draft, and is thus concerned with (a) international jurisdiction to hear a challenge to the judicial sale (see footnote 38), and (b) standing to challenge the judicial sale (see footnote 39). As has been observed, these provisions do not affect jurisdiction or standing with respect to challenges to the distribution of proceeds from the judicial sale, nor do they affect jurisdiction or standing with respect to *in personam* actions against the purchaser, such as actions in tort (A/CN.9/973, para. 55).

<sup>38</sup> *Challenging the judicial sale – international jurisdiction*: Article 7(3) of the Beijing Draft confers exclusive jurisdiction on the courts of the State of judicial sale. Some support has been expressed for retaining such a provision (A/CN.9/973, para. 51), which is now recast in article 9(1)(a) and article 9(2) of this first revision. These two provisions adopt the same “belts and braces” approach of the Beijing Draft, which mirrors articles 5(1) and 6 of the Convention on Choice of Court Agreements (2005) (“Choice of Court Convention”); article 9(1)(a) confers exclusive jurisdiction on the courts of the State of judicial sale, while article 9(2) denies jurisdiction to the courts of any other State. The Working Group may wish to consider whether the mere conferral of (exclusive) jurisdiction on the courts of the State of judicial sale obligates those courts to exercise jurisdiction, or whether the exercise of that jurisdiction remains a matter of applicable national law (i.e., the law of the forum). The Working Group may also wish to confirm that the grounds for avoiding or suspending the effects of the judicial sale are a matter of the applicable national law.

<sup>39</sup> *Challenging the judicial sale – standing*: Article 7(4) of the Beijing Draft limits standing to challenge a judicial sale to “interested persons”, a term which is defined in article 1(g) of the Beijing Draft to include the owner of the ship immediately prior to the judicial sale, and holders of registered mortgages and registered charges attached to the ship immediately prior to the sale. A concern has been expressed that denying standing to other persons, notably holders of maritime liens, may restrict the constitutional right to access to justice (A/CN.9/973, paras. 55 and 86). Accordingly, it has been suggested either (a) that article 7(4) of the Beijing Draft not be retained, or (b) that the definition of “interested persons” be expanded to include holders of maritime liens (A/CN.9/973, para. 86). The Working Group has agreed to consider expanding the definition to include a holder of a maritime lien which had filed its claim to the court. Article 9(4) of this first revision reflects this position. It also reflects a suggestion that the definition of “interested person” be moved from article 1 to the article in which it is used (A/CN.9/973, para. 88). This has obviated the need to use the term “interested person” in this first revision.

<sup>40</sup> *Challenging the judicial sale – internal competence*: It has been observed that, in some States, competence to hear challenges to a judicial sale is vested not in courts but in other authorities

(a) have exclusive jurisdiction to hear any claim or application to avoid or suspend the effects of a judicial sale of a ship conducted in that State [*this State*];

(b) dismiss any such claim or application other than by a person specified in paragraph 4; and

(c) dismiss any such claim or application by a person specified in paragraph 4 if the person fails to demonstrate that its rights will suffer irreversible material detriment if the judicial sale is not suspended or avoided, as the case may be.<sup>41</sup>

2. The courts of a State Party [*this State*] shall decline jurisdiction in respect of any claim or application to avoid or suspend the effects of a judicial sale of a ship conducted in another State Party [*another State*].

3. Unless the judicial sale of a ship is avoided in the State of judicial sale [*by the competent court*], no remedies shall be exercised either against the ship or against any [*bona fide*] purchaser or subsequent purchaser of the ship.<sup>42</sup>

4. For the purposes of paragraph 1, the persons which may make a claim or application to avoid or suspend the effects of the judicial sale are:

(a) the owner of the ship immediately prior to the judicial sale;

(b) the holder of a registered mortgage or charge attached to the ship immediately prior to the judicial sale; and

(c) any holder of a maritime lien entitled to notice under article 3.<sup>43</sup>

*Article 10. Circumstances in which judicial sale has no effect*<sup>44,45</sup>

1. The effects of a judicial sale of a ship provided in article 4 [conducted in *another State*] shall not extend to another State Party [*this State*] if, on application by a person

(A/CN.9/973, para. 51). The Working Group may wish to consider whether this can be addressed by replacing the term “courts” with “authorities”.

<sup>41</sup> *Challenging the judicial sale – persons with a legitimate interest*: It has been suggested that, in considering an expansion to the classes of persons with standing to challenge a judicial sale, it is important that the instrument provide finite circumstances in which a judicial sale could be challenged (A/CN.9/973, para. 54). In this regard, it has been observed that it would not be inconsistent with the right to access to justice for standing to be denied to persons not having a legitimate interest in challenging the judicial sale (A/CN.9/973, paras. 55 and 87). Article 9(1)(c) of this first revision establishes a test to define circumstances in which a person specified in article 9(4) will have a legitimate interest in challenging the judicial sale.

<sup>42</sup> *Challenging the judicial sale – no further remedies against the purchaser*: Article 9(3) is a recast of the final sentence of article 7(4) of the Beijing Draft. The purpose of that provision is to ensure that necessary and sufficient protection was provided to the purchaser following the judicial sale: see CMI International Working Group, “Commentary on the Beijing Draft: A Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships”, *CMI Yearbook 2013* (Antwerp, 2013), p. 226. This provision has not yet been discussed in detail by the Working Group, except to query the meaning of “*bona fide*” purchase (A/CN.9/973, para. 57). The provision is drafted in broad terms (it is not limited in its terms to remedies related to a challenge to the judicial sale or remedies against the ship), and the Working Group may wish to consider whether the provision is necessary and whether it needs to be refined. There appears to be some overlap between this provision and the no arrest provisions in article 8.

<sup>43</sup> See footnote 39.

<sup>44</sup> *Grounds for refusal – general*: Article 10 of this first revision is a recast of article 8 of the Beijing Draft. It refers to grounds for *not giving effect* to a foreign judicial sale, rather than grounds for *refusing to recognize* that sale. This responds to the observation that the concept of ground for refusal presupposes that the judicial sale already has effect in the State of recognition (A/CN.9/973, para. 61), while also dealing with the suggestion that the instrument be cast in terms of “effects” rather than “recognition” (A/CN.9/973, para. 49). Building on this observation, the grounds for refusal have been split into two categories: those that apply to deny a foreign judicial sale ever having effect (article 10(1), see footnote 46) and those that apply to cease the effect of a foreign judicial sale, whether temporarily or permanently (article 10(2), see footnote 47).

<sup>45</sup> *Grounds for refusal – operation*: It has been explained that, where a ground for refusal applies, the obligation to recognize clean title conferred by a foreign judicial sale and the obligation not

specified in paragraph 4 of article 9, a court in that other State Party [*this State*] determines that:

(a) The ship was not physically within the jurisdiction of the State of judicial sale [*the other State*] at the time of the sale;

(b) Extending those effects to that other State Party [*this State*] would be manifestly contrary to the public policy of that other State Party [*this State*]; or

(c) The sale was procured by fraud [committed by the purchaser].<sup>46</sup>

2. A judicial sale of a ship shall cease to have the effects provided in this Convention [*law*] in all States Parties [*in this State*] if:

(a) the sale is avoided in the State of judicial sale by a court exercising jurisdiction under article 9 [*by a competent court of the State in which the sale was conducted*]; and

(b) the judgment of the court avoiding the sale is no longer subject to appeal in that State.

3. The effects of a judicial sale of a ship provided in this Convention [*law*] shall be suspended in all States Parties [*in this State*] if the effects of the sale are suspended in the State of judicial sale by a court exercising jurisdiction under article 9 [*by a competent court of the State in which the sale was conducted*].<sup>47</sup>

#### *Article 11. No legalization*<sup>48</sup>

The certificate of judicial sale referred to in article 5 [*conducted in another State*] shall be exempt from legalization or similar formality.

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to arrest are not engaged (A/CN.9/973, para. 59). A question has been raised as to the effect of the grounds on the obligation of deregistration (*ibid.*). This first revision provides that, where a ground for refusal applies, the foreign judicial sale shall have no effect, or cease to have that effect, which disengages not only the obligation to recognize clean title in article 6, but also the obligation to deregister in article 7 and the obligation not to arrest in article 8. A question has also been raised as to the legal consequence in one State of a court in another State determining that a ground for refusal applies (A/CN.9/973, para. 60). Article 10(1) of this first revision is drafted on the basis that the decision will only have legal consequence for the judicial sale in the first State.

<sup>46</sup> *Grounds for refusal – effect of foreign judicial sale denied*: Paragraph 1 is a recast of article 8(a) and article 8(c) of the Beijing Draft. For the public policy ground (article 8(c) of the Beijing Draft), the view has been expressed that the notion of “manifestly contrary” should be interpreted in a similar way to how it is interpreted in other instruments, such as article 9(e) of the Choice of Court Convention, where it is intended to set a high threshold: see Trevor Hartley and Masato Dogauchi, “[Explanatory Report](#)”, para. 189 (A/CN.9/973, para. 62). A question has been raised whether giving effect to a foreign judicial sale that extinguishes certain liens that are considered mandatory law of the State of recognition might trigger the public policy ground (A/CN.9/973, para. 38). Broad support has been expressed for including fraud as an additional ground (A/CN.9/973, para. 63), although some concern has been expressed about doing so (*ibid.*). The Working Group may wish to consider the additional requirement that the fraud be committed by the purchaser.

<sup>47</sup> *Grounds for refusal – effect of foreign judicial sale ceased*: Article 10(2) of this first revision is a recast of article 8(b) of the Beijing Draft. If a foreign judicial sale ceases to have effect pursuant to article 10, the obligations that flow from that effect – notably the obligation to give effect to the sale generally (article 6), the obligation to deregister (article 7) and the obligation not to arrest (article 8) – no longer apply.

<sup>48</sup> *Certificate of judicial sale – no legalization*: A query has been raised as to whether the certificate of judicial sale could or should be subject to legalization (A/CN.9/973, para. 45). “Legalization” refers to the (often time-consuming and costly) procedure whereby the signature/seal/stamp on a public document is certified as authentic by a series of public officials: Hague Conference on Private International Law, *Apostille Handbook: A Handbook on the Practical Operation of the Apostille Convention* (2013), para. 9. The Apostille Convention exempts public documents from legalization and establishes a single procedure to certify authenticity, whereby an Apostille is issued for the document. Article 1(2) of the Apostille Convention defines public documents to include “documents emanating from an authority or an official connected with the courts or

*Article 12. Repository*<sup>49</sup>

1. The repository of notices given under article 3 and certificates issued under article 5 shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.
2. Upon receipt of a notice or certificate under this Convention, the repository shall promptly make it available to the public.

*Article 13. Communication between States Parties [with other States]*<sup>50</sup>

For the purposes of articles 7 and 8, the authorities of the States Parties shall be authorized to correspond directly between themselves.

*Article 14. Relations with other international instruments*

Nothing in this Convention [*law*] shall derogate from any other basis for the recognition of a judicial sale of a ship under any other bilateral or multilateral convention, instrument or agreement or principle of comity.<sup>51</sup>

tribunals”, as well as “administrative documents”. As already foreshadowed at the thirty-fifth session, the certificate of judicial sale would ordinarily be a public document within the meaning of the Apostille Convention and would thus be exempt from legalization under article 2 of the Convention among the 117 States that are party to that Convention (A/CN.9/973, para. 45). It has also been suggested that the Working Group consider including a provision that removes any requirement of legalization or similar requirement (such as the issuance of an Apostille) for the certificate of judicial sale (*ibid.*). Article 11 reflects this suggestion. The drafting of this provision is based on similar provisions found in instruments concluded by the Hague Conference on Private International Law, such as article 18 of the Choice of Court Convention. Nothing in the Apostille Convention precludes a State Party from agreeing to dispense with all requirements for certifying the authenticity of certain public documents, a scenario expressly contemplated in article 3(2) of that Convention. The present provision would not preclude the authority addressed from determining that a document purporting to be a certificate of judicial sale is not authentic.

<sup>49</sup> *Publication of notices and certificates in a centralized repository*: See paragraph 8(k) of the cover note.

<sup>50</sup> *Cooperation between authorities*: It has been suggested that the draft instrument contain a provision similar to article 14 of the MLMC 1993, which provides for cooperation between authorities (A/CN.9/973, para. 24). This article reflects that suggestion and supplements the communication contemplated in article 5(4)(b).

<sup>51</sup> *Relationship with other treaties and national law*: Article 14 reproduces article 10 of the Beijing Draft with minor amendments. At the thirty-fifth session, there was some discussion about the relationship between the Beijing Draft and the Judgments Convention (A/CN.9/973, para. 24). This issue is considered in document A/CN.9/WG.VI/WP.85. As indicated in footnote 15, the interaction with the Service Convention is also considered in that document. The Working Group may wish to consider simplifying this provision by replacing the words “bilateral or multilateral convention, instrument or agreement or principle of comity” with “treaty”, as well as expanding the provision to preserve the application of national law that is more favourable to the recognition of foreign judicial sales (which may well be based on the principle of comity: e.g., High Court of England and Wales, Admiralty Division, *The “Acrux”*, Judgment, 16 April 1962, *Lloyd’s List Law Reports*, vol. 1 (1962), p. 409).

## ANNEX TO THE [DRAFT INSTRUMENT ON THE JUDICIAL SALE OF SHIPS]

### Certificate

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

This is to certify that the ship described below has been sold by way of judicial sale, that all conditions prescribed in article 4, paragraph 1 of the Convention [*this law*] have been met, and that all mortgages and charges, except those specified below, have ceased to attach to the ship.<sup>52</sup>

1. **State of judicial sale** .....
2. **Authority issuing this certificate**
  - 2.1 Name .....
  - 2.2 Address .....
  - 2.3 Telephone/fax/email, if available .....
  - 2.4 Place and date clean title acquired by purchaser<sup>53</sup> .....
3. **Ship**
  - 3.1 Name .....
  - 3.2 IMO number or distinctive number or letters .....
  - 3.3 Place of issuance of the distinctive number or letters .....
  - 3.4 Port of registry .....
4. **Owner(s) immediately prior to the judicial sale**
  - 4.1 Name .....
  - 4.2 Address or residence or principal place of business .....
  - 4.3 Telephone/fax/email .....
5. **Purchaser**
  - 5.1 Name .....

<sup>52</sup> *Certificate of judicial sale – content and evidentiary value*: This model form is operationalized by article 5(1). As noted in footnote 29, the content of the certificate is closely linked to the extent of its evidentiary value.

<sup>53</sup> See footnote 25.

5.2 Address or residence or principal place of business .....

5.3 Telephone/fax/email .....

**[6. Holder of the mortgage or charge assumed by the purchaser or remaining attached to the ship<sup>54</sup>**

6.1 Name .....

6.2 Address or residence or principal place of business .....

6.3 Telephone/fax/email .....

6.4 Maximum amount of each preserved mortgage or charge (if available) .....

**7. Purchase price<sup>55</sup>** .....

**At**.....  
(place)

**On** .....  
(date)

.....  
Signature and/or stamp

<sup>54</sup> See article 5(2)(h) and accompanying footnote.

<sup>55</sup> See article 5(2)(i) and accompanying footnote.