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Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-sixth session (Vienna, 18–22 November 2019)

Contents

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I. Introduction

1. At its thirty-sixth session, the Working Group continued its work preparing an international instrument on the judicial sale of ships in accordance with a decision taken by the Commission at its fifty-second session (Vienna, 8–19 July 2019).[1] This was the second session at which the topic had been considered. At its thirty-fifth session (New York, 13–17 May 2019), the Working Group considered the topic on the basis of a draft convention prepared by the Comité Maritime International (known as the "Beijing Draft").

2. Background information on the project may be found in document A/CN.9/WG.VI/WP.83, paragraphs 5–7.

II. Organization of the session

3. The thirty-sixth session of the Working Group was held in Vienna from 18 to 22 November 2019. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Burundi, Canada, Chile, China, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Malaysia, Mexico, Nigeria, Peru, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Ukraine, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

4. The session was also attended by observers from the following States: Bolivia (Plurinational State of), Bulgaria, Burkina Faso, Cyprus, El Salvador, Greece, Kuwait, Malta, Morocco, Panama, Saudi Arabia, Slovenia and Uruguay.

5. The session was also attended by observers from the European Union (EU).

6. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Maritime Organization (IMO);

(b) *Intergovernmental organizations*: Gulf Cooperation Council (GCC), World Maritime University (WMU);

(c) *Non-governmental organizations*: Baltic and International Maritime Council (BIMCO), China Council for the Promotion of International Trade (CCPIT), Comité Maritime International (CMI), International and Comparative Law Research Center (ICLRC), International Association of Judges (IAJ), International Bar Association (IBA), International Chamber of Shipping (ICS), International Law Institute (ILI), International Transport Workers' Federation (ITF), Moot Alumni Association (MAA) and the Law Association for Asia and the Pacific (LAWASIA).

7. The Working Group elected the following officers:

Chairperson: Ms. Beate CZERWENKA (Germany)

Rapporteur: Mr. Vikum DE ABREW (Sri Lanka)

8. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.VI/WP.83); (b) an annotated first revision of the Beijing Draft (A/CN.9/WG.VI/WP.84); and (c) a note prepared by the Secretariat on the interaction between a future instrument and selected conventions adopted by the Hague Conference on Private International Law (A/CN.9/WG.VI/WP.85).

[1] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 192(f).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Future instrument on the judicial sale of ships.
5. Adoption of the report.

III. Deliberations and decisions

10. The deliberations and decisions of the Working Group are found in chapter IV of this report.

IV. Future instrument on the judicial sale of ships

A. Article 1. Definitions

11. The Working Group agreed to commence its consideration of the first revision of the Beijing Draft by reading through the definitions contained in article 1. It was recalled that some of the definitions had not been considered by the Working Group at its thirty-fifth session and remained substantively unchanged from the Beijing Draft.

1. "Charge"

12. It was noted that the Working Group had agreed at its thirty-fifth session to delete "arrest" from the definition on the grounds that it was a remedy and not a right (A/CN.9/973, para. 79). There was support for including reference to a "right to arrest" in the definition, noting that such a right should be understood in many jurisdictions since both the International Convention Relating to the Arrest of Seagoing Ships (1952) and the International Convention on Arrest of Ships (1999) ("Arrest Convention 1999") referred to the arrest of ships in respect of maritime claims. However, concerns were expressed as to the need to distinguish between a charge and the rights and obligations that may arise from it. In response, it suggested that the definition should focus on rights that gave rise to the right to arrest, as well as to a right of attachment or right of retention.

13. A suggestion was made that the definition should only include rights that were "legitimate". The prevailing view was that the question of legitimacy was outside the scope of the instrument and thus a matter for the State of judicial sale. Another suggestion was to limit the definition to rights of a civil or commercial nature. In response, it was stated that this was a matter of substantive scope that was addressed in article 2(1). It was further observed that article 4(3) expressly excluded from scope – and thus from the conferral of clean title – any personal claim against the shipowner. The Working Group agreed that the term "charge" should be given a broad meaning.

14. It was noted that the term "encumbrance" in the definition might be understood to include a mortgage, and therefore that the term "charge" covered mortgages. To avoid overlap between definitions, it was suggested that the definition of charge expressly exclude "mortgages", for instance by adding the words "other than a mortgage as defined in subparagraph (e)". It was noted that mortgages and charges were treated separately in the draft instrument, mirroring the separate treatment in the International Convention on Maritime Liens and Mortgages (1993) ("MLMC 1993"). The Working Group agreed to proceed on the understanding that the term "charge", as used in the instrument, did not include a mortgage.

2. “Clean title”

15. It was suggested that the text in square brackets (i.e., “except as assumed by any purchaser”) should be omitted, or alternatively that the text should only apply to a mortgage, not a charge. The Working Group agreed to delete the text from the definition, noting that the preservation of mortgages and charges would be addressed later in a discussion of the substantive provisions of the draft, notably article 4 (for further discussion on the definition, see para. 49 below).

3. “Judicial sale”

16. A view was expressed that the term “other authority” could produce ambiguity. The Working Group agreed with the suggestion that a judicial sale could only be ordered or carried out by an authority exercising judicial power or a public authority. It was further observed that, in some jurisdictions, a judicial sale was “approved” by the relevant authority. After discussion, the Working Group agreed to add a reference to the approval of judicial sales.

17. Although it was noted that article 2 of the first revision expressly excluded judicial sales in tax, administrative or criminal proceedings, a suggestion was made that this limitation should be contained in the definition of judicial sale.

18. In response to questions as to its meaning, it was explained that a sale by “private treaty” was not a private sale, but rather a sale that was carried out under the supervision and with the approval of a court. It was added that sale by private treaty was recognized in several jurisdictions and that reference to this method of judicial sale should be retained. It was suggested that the definition should be revised to reflect this explanation (for further discussion on the definition in the context of discussions on article 2(1)(a), see paras. 35–39 below).

4. “Maritime lien”

19. A question was raised as to the need to refer in the definition to rules of private international law of the State of judicial sale. In response, it was observed that such a prescription was needed for the court of judicial sale to delimit the maritime lienholders entitled to notice under article 3. The reference to rules of private international law also served to clarify that the court should not automatically exclude maritime liens not recognized under the law of the State of judicial sale, but should rather determine the existence of such liens in the light of their own governing law. At the same time, it was noted that, for the purposes of clean title and thus the definition of “charge”, it was neither necessary nor desirable to limit maritime liens to those recognized in accordance with the rules of private international law of the State of judicial sale. It was added that, in that context, the term “maritime lien” should be given a broad meaning. To address the dual use of the term in the draft instrument, it was suggested that the reference to the rules of private international law of the State of judicial sale should be omitted from the definition of “maritime lien” and instead inserted in article 3(1)(c).

20. The Working Group agreed to defer further discussion of the definition of “maritime lien” to its discussion of the substantive provisions in which the term is used.

5. “Mortgage”

21. A suggestion was made that the word “effected” should be replaced or supplemented with “registered” or “recorded” as it was felt that the current definition lacked the important element of registration. After discussion, the Working Group agreed to include the words “and registered or recorded” after the words “effected on a ship” and to defer further discussion of the definition to its discussion of article 3 for similar reasons to deferring the discussion of the definition of “maritime lien”.

6. “Owner”

22. It was noted that the definition might exclude the owner of smaller vessels such as fishing trawlers that were not registered in a registry of ships. At the same time, it was acknowledged that those vessels were entered in some form of registry, and the suggestion was thus made to include the words “or an equivalent registry” after the words “registry of ships”. A suggestion was also made to specify that the “owner” referred only to the person who was the owner of the ship prior to the time of completion of the judicial sale. It was noted that, if this suggestion was accepted, the words “immediately prior to the judicial sale” in article 5(2)(e) and article 9(4)(a) would become redundant.

7. “Person”

23. There was some support to delete the definition, as most legal systems considered “person” to refer to both natural and legal persons. It was also noted that UNCITRAL texts did not ordinarily define the term “person” and that there did not seem to be a compelling reason for departing from that practice in the present instrument. An alternative view was expressed that a definition would provide clarity in legal systems and languages where the term “person” was understood to refer only to natural persons.

24. It was noted that the definition included States, and that removing the definition should not have the consequence of excluding States from the scope of the term “person”. In response, it was noted that the reference to States in article 2(1)(b) militated against such a conclusion. After discussion, the Working Group agreed to retain the definition as drafted.

8. “Purchaser”

25. A query was raised as to the reason why the definition referred to a purchaser “who is intended to acquire ownership” in the ship. It was explained that those words might accommodate those legal systems where ownership in the ship did not pass at the judicial sale itself, but rather upon registration of the purchaser as the new owner. While it was felt that the instrument should be sensitive to differences between legal systems, the view was expressed that the Working Group should devise a definition of purchaser that did not refer to ownership, noting that the instrument was not concerned with regulating transfer of ownership, and that the reference to ownership did not assist in interpreting the term “purchaser” as it was used in the draft. Instead, the instrument should define purchaser by reference to the judicial sale.

26. One suggestion put forward was to define the purchaser as the person who “acquired” the ship in a judicial sale. While there was some support for this suggestion, it was observed that, for some languages and perhaps some legal systems, the concept of “acquisition” might imply a transfer of ownership, in which case the concept might need further clarification. Another suggestion was to define the purchaser as the successful buyer, although some doubts were expressed as to the utility of this suggestion. Yet another suggestion was to define the purchaser as the person who signed the contract of sale or to whom the ship was “adjudicated” in the judicial sale. After discussion, a further view was expressed that there was no real need to define the term “purchaser” as used in the draft, and therefore that the definition should be deleted.

27. The Working Group agreed to put the definition in square brackets to indicate its possible deletion, and asked that the Secretariat propose text for a definition for future consideration that did not refer to ownership. It was suggested that similar amendments could be reflected in the definition of “subsequent purchaser”, and in such a way as to cover not only the first subsequent purchaser, but also later purchasers.

9. “Ship”

28. It was observed that the law in one State might recognize a broader range of objects as ships than the law in another State. The example was given of oil rigs and pontoons. A suggestion was made that the object only be defined as a “ship” if it was so characterized in both the State of judicial sale and the State of registration. The importance of the determination of the State of registration was emphasized, although it was suggested that the concept did not need to be reflected in the definition but rather in the substantive provisions. Alternatively, it was suggested that only the characterization of the State of judicial sale mattered, and that this was the effect of the text in square brackets (that the ship was “capable of being subject of a judicial sale under the law of the State of judicial sale”). Support was expressed for retaining this text. After discussion, the Working Group agreed to remove the square brackets from the definition. At the same time, it was suggested that a revised draft could clarify the meaning of the text.

29. It was suggested that the definition should be amended so that the instrument would only apply to the judicial sale of ships used for commercial navigation. In response, it was observed that this would exclude pleasure craft, which the Working Group might wish to include within the scope of the instrument. The view was also expressed that the current definition covered ships that were under construction. After discussion, the Working Group agreed not to limit the definition to ships used for commercial navigation.

30. A query was raised as to whether the instrument applied only to the judicial sale of seagoing vessels, or whether it also applied to vessels used for inland navigation. While some assumed that the instrument would not apply to the latter, others expressed support for including the latter within scope.

31. It was noted that, if it did apply to vessels used for inland navigation, the instrument might overlap with the Convention on the Registration of Inland Navigation Vessels (1965), in particular its Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels. The Working Group asked the Secretariat to analyse the relationship between that convention and a future instrument and to present its findings for consideration by the Working Group at its thirty-seventh session.

32. It was noted that several existing treaties, including treaties concluded under the auspices of the International Maritime Organization, included definitions of “ship”. A note of caution was sounded about applying those definitions without considering the object and purpose of those treaties.

10. “State of judicial sale”

33. While a view was expressed that a definition might not be necessary, the Working Group agreed to retain the definition as drafted.

B. Article 2. Scope of application

1. General

34. As a general comment, it was suggested that article 2(1) should revert to article 2 of the original Beijing Draft, which explained that the instrument not only governed judicial sales, but also their effects abroad, including deregistration. In response, it was felt that, as a provision on the substantive scope of the instrument, article 2(1) should aim to identify instances in which the instrument would apply or not, and that the current draft served this function. It was added that such a provision should not function as a statement of object and purpose, which might find its place in the preamble. It was therefore agreed that article 2 should retain its current format.

2. Paragraph 1(a)

35. It was recalled that the definition of "judicial sale" in the original Beijing Draft contained an additional element to the effect that the proceeds of sale should be made available to the creditors. It was further recalled that, at its thirty-fifth session, the Working Group had agreed to consider that additional element in the context of a provision on substantive scope (A/CN.9/973, para. 89). Paragraph 1(a) was the outcome of those deliberations.

36. Broad support was expressed for including a provision along the lines of paragraph 1(a). It was emphasized that the provision should be carefully drafted to avoid uncertainty. It was suggested that the paragraph should refer to "purposes" rather than "proceedings". In response, it was suggested that a focus on purpose could lead to greater uncertainty because a judicial sale – or the proceedings giving rise to the judicial sale – might serve multiple purposes.

37. It was noted that, as there were some doubts as to the contours of the expressions "tax", "administrative" and "criminal", paragraph 1(a) did not sufficiently address the deliberations at the thirty-fifth session. It was observed that there was still merit in expressly limiting the scope of the instrument to judicial sales for which the proceeds were made available to the creditors. While some queried the need for this additional limitation, the Working Group agreed to reincorporate the element into the definition of "judicial sale". As such, it was foreshadowed that further consideration might need to be given to the notion of "creditor". It was added that, in some legal systems, State authorities could be regarded as creditors.

38. With regards to the interaction between paragraph 1(a) and the revised definition of "judicial sale", it was suggested that the Working Group should recognize a distinction between tax proceedings and proceedings for which the tax authorities were creditors. In this regard, it was noted that the identity of a creditor as a tax authority should not be determinative of the character of the proceedings.

39. The Working Group agreed to retain paragraph 1(a), subject to including additional drafting options to address the concerns expressed during the discussion.

3. Paragraph 1(b)

40. It was suggested that paragraph 1(b) should be revised to make reference to warships. In this regard, it was suggested to align the wording more closely with article 16(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) ("Jurisdictional Immunities Convention"). Reference was also made to articles 32 and 95 of United Nations Convention on the Law of the Sea (1982) ("UNCLOS"). In response, it was noted that the reference to ships used "for government non-commercial purposes" probably covered warships already.

41. Alternatively, it was suggested that paragraph 1(b) was unnecessary and could be omitted entirely. In this regard, it was observed that, because ships used only for government non-commercial purposes were immune from arrest (as reflected in article 8(2) of the Arrest Convention 1999), and because a judicial sale ordinarily followed arrest, there would be no occasion for such a ship to be the subject of a judicial sale.

42. Finally, a view was expressed that the instrument should exclude from scope all ships owned or operated by a State, and therefore that article 2(1)(b) should not include the qualification that the ship was used for government non-commercial purposes. After discussion, the Working Group agreed to retain the qualification, and to include a reference to warships in line with the Jurisdictional Immunities Convention and UNCLOS.

C. Article 2(2) and Article 4. Effects of judicial sale in the State of judicial sale

43. There was wide agreement to limit the scope of the instrument to judicial sales that (already) provided clean title under the domestic law of the State of judicial sale (i.e., "option A" described in para. 5 of document A/CN.9/WG.VI/WP.84). It was observed that, as a consequence, judicial sales for which clean title was *not* conferred on the purchaser under the law of the State of judicial sale would fall *outside* the scope of the instrument. In this regard, it was noted that, in some jurisdictions, the rights of bareboat charterers survived a judicial sale; but even in these jurisdictions, most judicial sales would result in the conferral of clean title. As such, it was emphasized that a provision limiting the scope of the instrument should allow an assessment of whether a judicial sale fell within scope to be carried out on a case-by-case basis.

44. It was observed that, if article 2(2) were retained, significant changes would need to be made to the draft to reflect the position that the instrument did not regulate the conduct or effects of the judicial sale in the State of judicial sale.

45. In this regard, it was observed that it was not necessary for the instrument to accommodate so-called "qualified" judicial sales (as described in paras. 6–7 of document A/CN.9/WG.VI/WP.84). Accordingly, the Working Group agreed to omit article 4(2). It was noted that consequential amendments would need to be made to other provisions in the draft that sought to accommodate such sales. It was further observed that it was not necessary for the instrument to accommodate the preservation of mortgages and charges "assumed by the purchaser". Accordingly, the Working Group agreed to omit the text in square brackets (i.e., "except those assumed by the purchaser") in article 2(2), as well as all other similar instances throughout the draft (in addition to the omission already proposed in the definition of "clean title").

46. The Working Group further agreed that article 4(1) should not be retained in its present form insofar as it established a substantive obligation with regard to the domestic effect of the judicial sale. At the same time, it was observed that subparagraphs (a) and (b) of article 4(1) contained important safeguards that should be featured in the recognition regime under the instrument. Accordingly, a proposal was made to transform these safeguards into conditions for giving effect to the judicial sale abroad, which would then be incorporated into article 6. The Working Group agreed for article 6 to be revised along the following lines:

> A judicial sale which, under the law of the State of judicial sale, confers clean title to the ship on the purchaser shall have the same effect in all States Parties, provided that [*conditions in subparagraphs (a) and (b) of article 4(1) are satisfied*].

47. The point was made that this revision would render article 2(2) redundant. It was thus proposed to omit article 2(2). Alternatively, it was suggested that, for the two provisions to co-exist, article 6 could refer to a judicial sale "to which this [instrument] applies". After discussion, the Working Group agreed to retain article 2(2) as amended (see para. 45 above) and to keep the text in square brackets for further consideration.

48. It was suggested that there might be merit in including, as an alternative to current article 2(2), a provision that declared – in positive terms – that the object and purpose of the instrument was to provide for the effects, in all States Parties, of judicial sales of ships that conferred clean title on the purchaser. It was added that such a provision would ordinarily feature at the start of the instrument. There was general agreement for inserting such a provision.

49. A number of other amendments were suggested to the text to reflect its limited scope of application. First, it was suggested that article 5 should be revised to ensure that the certificate of judicial sale contained a clear statement that the judicial sale conferred clean title (for further discussion on article 5, see paras. 90–95 below).

Second, it was suggested that the definition of clean title might need to be revisited to ensure that it accurately covered all effects contemplated in the original Beijing Draft.

50. A question was raised about the condition in article 4(1)(a) that the ship be "physically within the jurisdiction of the State of judicial sale". It was noted that, under article 92 of UNCLOS, exclusive jurisdiction was conferred on the flag State when the ship was on the high seas, and that, therefore, the word "physically" would not restrict the application of the flag State jurisdiction. In response, it was observed that, as a matter of historical practice in maritime matters, the physical presence of the ship in the territory of the State was required in order to arrest and sell the ship. A strong preference was voiced for not expanding jurisdiction beyond physical presence in the territory of the State in the context of the present instrument.

51. It was noted that, by incorporating article 4(1) into article 6 and omitting article 4(2), only article 4(3) remained. It was observed that article 4(3) declared that the instrument did not affect any *in personam* claim against the former shipowner that might exist under domestic law, and did not create any *in personam* claim if such a claim did not exist or had been extinguished under domestic law.

52. There was some support for the view that, because the instrument no longer regulated the effects of the judicial sale in the State of judicial sale (see para. 43 above), article 4(3) no longer had any substantive effect. The prevailing view, however, was that it could be useful to retain the provision. In particular, it was noted that the provision would provide comfort to the financial industry by confirming that the conferral of clean title under the instrument would not affect enforcement proceedings against a debtor. It was suggested that the provision was more closely related to the scope of the draft instrument and could be moved to article 2, but there was also support for retaining it closer to the current article 4.

53. It was generally felt that the words "to the extent that the claim is not satisfied by the proceeds of the judicial sale" were no longer necessary and could cause confusion. Moreover, it was felt that the provision could be cast in more neutral terms and confirm that the instrument also did not affect the distribution of proceeds or the priority of creditors.

54. After discussion, the Working Group agreed that article 4(3) should be revised along the following lines:

> "Nothing in this convention shall affect the procedure for or priority in the distribution of proceeds of a judicial sale or any personal claim against the person who owned the ship prior to the judicial sale."

D. Article 3. Notice of judicial sale

1. Function of the notice requirements

55. The Working Group acknowledged that, in limiting the scope of a future instrument so as not to regulate the conduct or effect of the judicial sale in the State of judicial sale, a question arose as to the function that the notice requirements served. While some support was expressed for omitting article 3 entirely, on the grounds that giving notice concerned the conduct of judicial sales, the prevailing view was that the instrument should still establish some minimum standards. It was reiterated that the notice requirements should strike a balance between fairness and efficiency (see A/CN.9/973, para. 67). In this regard, it was observed that receiving notice of a judicial sale was important not only for ship owners and creditors, but also crew members. At the same time, it was queried what interest those parties would have in the judicial sale itself, as opposed to the distribution of the proceeds of sale.

56. It was recalled that, if the condition in article 4(1)(b) was incorporated into article 6 as earlier agreed (see para. 46 above), the notice requirements would function as a condition for giving effect to the judicial sale abroad (i.e., giving the judicial sale

"international effect"). This was because article 4(1)(b) required, among other things, that the judicial sale be conducted "in accordance with … the notice requirements in article 3". Some hesitation was expressed with that understanding, as it would allow or require the authorities of the foreign State to scrutinize the range of activities contemplated in article 3, most of which would have taken place outside that State. In particular, it was noted that this would impose an unrealistic burden on foreign registrars, which could in turn undermine the effectiveness of the recognition regime under the instrument.

57. Several alternative options were put forward for discussion. One suggestion was that the notice requirements could function as a condition for issuing the certificate of judicial sale. As such, failure to comply with the notice requirements would not invalidate the sale in the State of judicial sale, but would deny the judicial sale the benefit of the recognition regime under the instrument.

58. Another suggestion was that the notice requirements could function as a ground for refusal to give "international effect" to a judicial sale, and therefore be incorporated into or otherwise linked to article 10. It was noted that, as such, a failure to comply with the notice requirements would not invalidate the judicial sale in the State of judicial sale. A concern was expressed that this suggestion might allow the "international effect" of a judicial sale to be denied on a technicality arising from a failure to comply strictly with the notice requirements. In response, it was suggested that this concern might be assuaged somewhat by "streamlining" the content of the notice requirements. In this regard, it was widely felt that one of the most important elements of the notice requirements was the identification of persons to whom notice was to be given, as addressed in article 3(1).

59. A third suggestion was that the notice requirements could function as a ground for avoiding the judicial sale in the State of judicial sale, and therefore should be incorporated or otherwise linked to article 9. While some support was expressed for this suggestion, it was noted that there could be difficulties in harmonizing these grounds.

60. Yet another suggestion was that the notice requirements could function as a stand-alone provision, in the sense that the instrument would not prescribe any legal effect for non-compliance. It was observed that it would be up to the domestic law of each State to determine any such effect. In this regard, it was added that, to the extent that non-compliance gave rise to a claim to avoid the judicial sale, the threshold requirement in article 9(1)(c) to bring the claim would still apply.

61. The Working Group decided to consider these options further in its consideration of article 9.

2. Content of the notice requirements

62. The Working Group heard several specific suggestions to amend the content of the notice requirements.

63. With regards to article 3(1), it was suggested to merge subparagraphs (a) and (e), although it was explained that the registry of ships in which the ship was granted bareboat charter registration would be different from the registry of ships in which ownership and mortgages were registered. It was also suggested to add bareboat charterers because they would not be holders of a registered charge in some jurisdictions. The Working Group heard that, in several jurisdictions, the registrar of the registry of ships was not given notice.

64. With regards to article 3(2), it was noted that many States had no notice period and that imposing a 30-day minimum notice period would affect the way that judicial sales were conducted in those States. It was observed that the notice period was taken from the MLMC 1993 and the International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages (1967) before it, and that technological advancements since then, notably the use of electronic communications, rendered such a period excessive. It was suggested that the notice

requirements should allow for some flexibility in the notice period, particularly in cases where the ship was deteriorating or facing a natural disaster. The view was expressed that, in some jurisdictions, it would be difficult for the executive or legislative branch of government to impose requirements on the judicial branch of government as to how it conducted its proceedings.

65. With regards to article 3(3), a question was raised as to the meaning of the words "in such a way not to frustrate or significantly delay the proceedings concerning the judicial sale". It was suggested that, given the timeframes involved, it might not be appropriate to use the channels of transmission provided in the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965). It was also suggested that the means for transmitting the notice should not be exhaustively listed in article 3(3), such that means other than those listed could be used.

66. Many were of the view that the matters covered in articles 3(2) and (3) should be left to domestic law. As a compromise, it was suggested that these matters could be addressed by way of guidance notes set out in a model notice form annexed to the instrument. It was also suggested that, if it was not possible to give notice to all the persons listed in article 3(1), the judicial sale could still comply with the notice requirements if the notice was published in accordance with article 3(4).

3. Centralized repository

67. It was recalled that the Working Group had agreed at its thirty-fifth session that a centralized online repository could be used to publish notices of judicial sales (A/CN.9/973, para. 73), and that drafting suggestions for this mechanism were set out in articles 3(4)(a) and 12 of the first revision. It was suggested that publishing the notice with the repository could obviate the need for including notice requirements in the instrument. While some support was given to this suggestion, reservations were expressed as to the potential cost of maintaining such a mechanism (see A/CN.9/973, para. 46). A question was also raised as to which organizations were well-suited to perform the repository function (see A/CN.9/WG.VI/WP.84, para. 8(k)). It was suggested that the Secretariat could look further into options for possible repositories, including related financial implications.

E. Article 9. Challenge to judicial sale in the State of judicial sale

1. Meaning and implications of avoiding a judicial sale

68. It was noted that avoiding a judicial sale would render the sale null and void, and thus restore the parties to their position prior to the sale. It was noted that, in some jurisdictions, the remedy of avoiding a judicial sale was not available. Other remedies, such as in tort for fraud, would still be available against a wrongdoer in respect of the sale (see A/CN.9/973, para. 55). Yet other remedies might be available to delay or call off the sale.

69. It was widely acknowledged that it would be difficult, if not impossible, to restore the parties to their position before the sale once the sale had been concluded, particularly after the ship had been reregistered or the proceeds of sale had been distributed.

2. Object and purpose of article 9

70. It was noted that article 9 served not only to confer exclusive jurisdiction on the courts of the State of judicial sale, but also to limit the standing of potential claimants and the circumstances in which they could bring their claim. There was widespread support for the view that article 9 should function only as an exclusive jurisdiction provision, and that the instrument should leave all other matters to the domestic law of the State of judicial sale. It was added that this approach was consistent with the decision taken earlier by the Working Group for the instrument not to regulate the

conduct or effects of the judicial sale in the State of judicial sale (see paras. 43–44 above). It followed that the requirements for conducting the judicial sale, such as notice requirements, as well as remedies for non-compliance and standing to obtain those remedies, would be governed by the law of the State of judicial sale.

71. A different view was that there were advantages in the Working Group harmonizing some of these other matters, and thus that article 9 could serve as a "multi-purpose" provision. In this regard, it was observed that rules on challenging the judicial sale could enhance legal certainty and provide additional safeguards for more vulnerable parties, such as crew members. In response, it was cautioned that it might be difficult for the Working Group to reach consensus on these matters.

3. Content of article 9

72. The Working Group heard several specific suggestions to amend the content of article 9. It was suggested that the heading to article 9 could be changed to better reflect its focus on avoidance.

73. With regards to paragraph 1(a), it was suggested that the scope of exclusive jurisdiction should be expanded to cover other actions relating to the judicial sale, including challenges to the validity of the certificate of judicial sale. It was also noted that, in its current form, paragraph 1(a) could be read as referring to avoidance of the *effects* of the judicial sale, rather than avoidance of the sale itself, and a question was raised as to the meaning of avoiding those effects.

74. With regards to paragraph 1(c), some questions were raised as to the meaning of the term "irreversible material detriment", which did not appear in other international instruments. It was suggested that this standard could be clarified. It was also suggested that two additional preconditions should be imposed on the claimant: (1) that there was no other remedy available; and (2) that the claimant did not contribute to the detriment (e.g., by electing not to appear in the proceedings resulting in the judicial sale).

75. It was suggested that paragraph 3 should be deleted entirely on the basis that the instrument was not concerned with *in personam* claims, which might involve some form of attachment or other remedy being exercised against the ship.

76. With regards to paragraph 4, it was suggested that the list of persons with standing to challenge the judicial sale should not be exhaustive. It was also suggested that the draft could clarify that only the holder of a "registered" charge had standing to challenge the judicial sale.

77. Finally, it was suggested that, in order to protect a good faith purchaser, the instrument should prescribe a time limit for challenging the judicial sale, although some doubts were raised as to the merits of doing so.

4. Conclusion

78. After discussion, the Working Group agreed that article 9 should serve only as an exclusive jurisdiction clause and should therefore only retain paragraphs 1(a) and 2. It was further agreed that the scope of exclusive jurisdiction should cover challenges to the validity of the certificate of judicial sale.

F. Article 10. Circumstances in which judicial sale has no "international effect"

79. Broad support was expressed for retaining a provision in the instrument that provided grounds for refusing to give "international effect" to a judicial sale. It was clarified that article 10 was addressed to States other than the State of judicial sale, and that the res judicata effect of a decision that a ground for refusal applied would not, by virtue of the instrument, extend to any other State (including the State of judicial sale) (see also A/CN.9/973, para. 60).

80. It was noted that the State in which a challenge to the "international effect" of the judicial sale could be brought was left open. While there was support for this approach, there was also support for giving special consideration to States in which a challenge was most likely, namely the State of registration, when formulating the grounds for refusal.

81. It was noted that the grounds for refusal were addressed to courts. Some concern was expressed that the local court at the port of registry might not have the competence to assess the public policy ground in paragraph 1(b). As for the grounds in paragraphs 1(a) and 1(c), it was noted that it might be difficult to apply those grounds for want of evidence, and that the State of judicial sale would be better placed to determine (respectively) whether the ship was physically located in that State, or whether fraud had been committed by the purchaser. It was added that the current chapeau of article 10(1) appeared to allow the court seized to apply domestic rules allowing it to decline jurisdiction in favour of a more appropriate court.

82. It was emphasized that the grounds for refusal needed to balance the rights of creditors against the rights of a good faith purchaser. In this regard, there was some support for introducing a time limit for challenging the "international effect" of the judicial sale. Alternatively, it was suggested that a challenge should be barred once a ship had been deregistered (or reregistered) as at that moment any registered mortgages and registered charges would have been deleted. In response, it was felt that such a time limit might not be necessary in practice, as there was little occasion to challenge the "international effect" of the judicial sale once the ship had been deregistered (or reregistered).

83. While there was general support for including in the instrument a rule that the ship should be physically within the State of judicial sale, it was questioned whether that rule should serve as a ground for refusal (article 10(1)(a)), or whether it was better placed in article 6 as a condition for giving the judicial sale "international effect" in the first place. In response, there was support for retaining it as a ground for refusal.

84. There was general agreement to retain a ground for refusal based on public policy (article 10(1)(b)) (cf. A/CN.9/973, para. 62). It was noted that public policy was a vague notion that varied from jurisdiction to jurisdiction. Concern was expressed that the ground could expose the judicial sale to unwarranted challenge and be used to harass good faith purchasers. In response, it was noted that the words "manifestly contrary" set a high threshold. It was also noted that the public policy ground was a common feature in conventions establishing recognition regimes, and that including the ground would assist in gaining acceptance of the instrument.

85. It was recalled that non-compliance with the notice requirements (currently in article 3) could serve as a ground for refusal (see para. 58 above). Concern was again expressed at this suggestion. It was added that, if failure to notify should serve as a ground for refusal, the ground should be formulated in terms similar to those found in article X(1)(b) of the International Convention on Civil Liability for Oil Pollution Damage (1969) (i.e., failure to give "reasonable notice and a fair opportunity to present [a] case"). It was also added that a serious failure to notify could be tantamount to a denial of due process and trigger the public policy ground, and that the explanatory notes to the instrument could make this clear. After discussion, the prevailing view was that a failure to notify should not serve as a stand-alone ground for refusal.

86. It was noted that fraud could also trigger the public policy ground and that, therefore, a separate ground for refusal based on fraud (article 10(1)(c)) could be omitted. In response, it was suggested that there was merit in retaining fraud as a separate ground as it was less vague than public policy. Attention was drawn to the fact that, in the first revision, it was proposed that the ground should be limited to fraud "committed by the purchaser". There was general support for the view that this text should be retained.

87. It was noted that only the persons listed in article 9(4) had standing to invoke the grounds for refusal. As the Working Group had decided to omit article 9(4) (see para. 78 above), it was suggested that a list should be incorporated into article 10. There was also a suggestion to include "and for as long as" after the word "if" in article 10(3).

88. There was some support for the view that the grounds for refusal should be minimized, and that public policy should serve as the sole ground for refusal. It was observed that a greater number of grounds for refusal increased the risk of the ship being subsequently arrested in a State that refused to recognize the judicial sale, which in turn could lead to a new judicial sale and multiple certificates of judicial sale for the same ship.

89. Bearing in mind the suggestion for the Working Group to give special consideration to States in which a challenge was most likely, a proposal was put forward for the grounds for refusal to be linked and adapted to the obligations imposed on States other than the State of judicial sale, namely the obligation to deregister (article 7) and the obligation not to arrest (article 8). Specifically, it was proposed that only the public policy ground should apply to the obligation not to arrest, while the full "suite" of grounds – whatever they may be – should apply to the obligation to deregister. Broad support was given to exploring this proposal further, and the Secretariat was invited to propose drafting options to give it effect. It was noted that the Secretariat should formulate these options bearing in mind that registrars were not in a position to apply the public policy ground. It was also recalled that making findings of fact to support the other grounds for refusal would impose a considerable burden on registrars (cf. para. 56 above). It was added that the procedure for applying the grounds for review would be a matter for domestic law.

G. Article 5. Certificate of judicial sale

90. It was suggested that the instrument should specify a time period for issuing the certificate of judicial sale (for example, upon completion of sale, upon delivery of the ship, or upon expiry of appeal period). The prevailing view was to leave this matter to the law of the State of judicial sale.

91. The Working Group agreed to remove the first set of square brackets in paragraph 1 and to require the issuing authority to be a public authority (see also para. 16 above).

92. The Working Group agreed to ask the Secretariat to consider the implications of allowing certificates to be issued in electronic form.

93. It was observed that the particulars in paragraph 2 should be clear and kept to a minimum. It was agreed that the "default" identifier in subparagraph (d) should be the IMO number. Where not available, paragraph 2 could refer to other information capable of identifying a ship, such as the shipbuilder, time and place of the shipbuilding, licence number, and recent photographs. While there was support for deleting subparagraph (i), the Working Group agreed to place it in square brackets for future discussion.

94. It was queried whether the centralized repository would deal with certificates in multiples languages or whether it should require the certificates to be filed in a specific language.

95. It was suggested that paragraph 5 should not be subject to article 10, but rather to the invalidation of the certificate pursuant to the avoidance of the judicial sale. It was stated that this issue could be considered further in the context of revision made to the grounds for refusal.

H. Article 7. Deregistration of the ship

96. The Working Group agreed that the title of article 7 should be revised to better reflect its scope, and that bareboat charter registration should be dealt with in a separate paragraph with more appropriate terminology. The Working Group agreed that the order of actions in points (i) and (ii) of paragraph 1(b) should be reversed.

97. It was suggested that paragraph 1 should refer to the registrar "of ships". A point was made that the registry of ships could be separate from the registry of ship mortgages and charges. The Working Group agreed that article 7 did not supersede domestic law and procedure relating to the registration of ships and that the draft could state that the registrar would act "in accordance with normal procedural requirements". In this regard, it was noted that domestic law might limit the classes of persons who may be registered as owner.

98. On paragraph 3, it was queried whether the translation needed to be certified. It was suggested that the text could clarify that the issuing authority was not required to prepare the translation.

I. Form of the instrument

99. There was wide support within the Working Group for continuing working on the assumption that the draft instrument would eventually take the form of a convention. The Working Group also agreed to make a final decision at a future session.