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**United Nations Commission on
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New York, 27 June–15 July 2022**Draft explanatory note on the Convention on the
international effects of judicial sales of ships – Part II*****Note by the Secretariat****Contents**

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* Part I may be found in document [A/CN.9/1110](#). Part III may be found in document [A/CN.9/1110/Add.2](#).



II. Article-by-article remarks (*continued*)

E. Article 4. Notice requirements

1. Purpose and function of the notice requirements (articles 4(1) and (2))

1. Notification of a judicial sale is only one aspect of the judicial sale procedure, but one that is particularly important in safeguarding the interests of creditors, who might otherwise not be party to the proceedings giving rise to the judicial sale. Judicial sale procedures differ significantly between jurisdictions, not only in terms of competent authorities and notification requirements, but also in terms of the circumstances in which a judicial sale procedure starts and ends, and the various stages of the procedure in between (see remarks on article 2(a)(i)). The convention is not designed to harmonize the procedure for judicial sales. This is confirmed by article 4(1), which leaves matters related to the conduct of the judicial sale to the law of the State of judicial sale.

2. The notice requirements in the remaining paragraphs of article 4 prescribe minimum standards regarding the persons to be notified of the judicial sale (article 4(3)), the content of the notice (article 4(4)), and the public advertisement of the judicial sale (article 4(5)). Those requirements do not substitute or displace notification requirements under domestic law, including those relating to the service of judicial documents. The distinction between the notice requirements under the convention and the notification requirements under domestic law, as well as the coexistence of those requirements, is acknowledged in article 4(4) and article 5(1) of the convention.

3. The notice requirements in the convention are adapted to the judicial sale itself and not to related proceedings (e.g. proceedings giving rise to the judicial sale or proceedings related to the distribution of proceeds). In that context, while notification attracts potential bidders and can help maximize the eventual proceeds available to creditors, the primary purpose of the notice requirements in the convention is to alert creditors to the impending sale and eventual distribution of proceeds. The requirements are designed to strike a fair balance between due process towards creditors and the expediency required in judicial sale proceedings. They acknowledge that creditors and other persons to be notified may have other means at their disposal, including the use of online tools, to track the ship and be informed of its arrest or impending sale.

4. The notice requirements do not serve as a stand-alone obligation but rather as a condition for the issuance of the certificate of judicial sale under article 5. This is confirmed by article 4(2). Nevertheless, given the central role of the certificate of judicial sale in the convention regime, compliance with the notice requirements is essential to securing the international effects of a judicial sale. The notice requirements may also have an “indirect” impact on the procedure of the judicial sale, insofar as States might align their procedural law to the notice requirements to ensure that their judicial sales benefit from the convention regime. This is particularly relevant for States in which the judicial sale is not notified to prescribed classes of persons but rather advertised publicly (e.g. by publishing a notice in the press or maritime periodicals).

5. It follows that a failure to comply with the notice requirement does not constitute a breach of the convention, but it would prevent the issuance of a certificate of judicial sale. Under the convention, any claim challenging the validity of a certificate due to a failure to comply with the notice requirements is heard in the State of judicial sale in exercise of the exclusive jurisdiction conferred under article 9. However, it is conceivable that a particularly egregious failure to comply with the notice requirements could give rise to an application invoking the public policy ground in another State under article 10 in which the effect of the judicial sale is sought to be produced.

6. Article 4(1) adds that the law of the State of judicial sale “also determines the time of the sale for the purposes of this Convention”. Several provisions of the convention refer to the time of judicial sale:

(a) The time of the judicial sale is relevant in determining the scope of the convention, given that (a) the physical presence requirement in article 3(1)(b) applies “at the time of the sale”, and (b) the exclusion of State-owned or operated vessels in article 3(2) applies by reference to use “prior to the time of judicial sale”;

(b) Reference to action taken prior to the time of judicial sale is relevant to the application of the notice requirements, given that article 4(2) provides for the notice of judicial sale to be given “prior to the judicial sale”;

(c) The time of the judicial sale is relevant in determining whether the judicial sale has reached completion, and thus in determining (a) whether the conditions for issuance of the certificate of judicial sale under article 5(1) have been met, and (b) the range of mortgages, hypothèques and other registered charges to be deleted from the register under article 7(1)(a).

7. The convention does not assume that the law of the State of judicial sale makes specific provision for determining the time of a judicial sale. Concepts and principles of broader application under domestic law could guide such a determination.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , paras. 22, 30, 67–70
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , paras. 55–61
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 49–50
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 16–17
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 52, 57–59, 73
Report of the fortieth session of Working Group VI	A/CN.9/1095 , para. 99

2. Persons to be notified (article 4(3))

8. Article 4(3) prescribes classes of persons to be notified. The application of article 4(3) is complemented by article 4(7). The law of the State of judicial sale might prescribe additional classes of persons to be notified, e.g. the holder of any unregistered charge, diplomatic or consular agents of the State of registration in the State of judicial sale, or the insolvency representative (e.g. in the event of that the owner is insolvent). Nothing in the convention displaces those requirements.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 52–53
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , para. 67

(a) Ship registries (article 4(3)(a))

9. Article 4(3)(a) requires notification of the ship registry. As noted above (see [A/CN.9/1110](#), para. 76), the “registry” is the entity which maintains the register, which in turn is administered by the registrar. Article 4(3)(a) refers not only to the registry maintaining the “register of ships” but also to the registry maintaining an “equivalent register in which the ship is registered”. Reference to “equivalent register” is a consequence of the broad definition of “ship”, which covers different types of vessels that may be registered in different registers under the law of the State of registration (see remarks on article 2(b)).

10. In some States, the law may not require the ship registry to be notified and the ship registry may not have procedures in place to receive and respond to notices. Moreover, the ship registry may not have an interest in the judicial sale proceedings or in the distribution of proceeds. Nevertheless, the requirement in the convention to notify the ship registry acknowledges the utility of alerting the ship registry to possible future action on the registration of the ship under article 7.

11. In some States, the law may make special provision for the notification of the registry so that it can (a) provide information that is needed for the court of judicial sale to identify other persons to be notified under that law, or (b) take action required to notify or otherwise advertise the sale. The convention does not mandate either role for the registry.

12. The requirement to notify the ship registry applies regardless of the location of the registry. Accordingly, article 4(3)(a) requires the notice of judicial sale to be given to the registry even if the State of registration is not party to the convention (see remarks on the geographic scope of the convention) or is the State of judicial sale.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , paras. 73–74
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 63
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 57–58

(b) Holders of any mortgage, hypothèque or registered charge (article 4(3)(b))

13. Article 4(3)(b) requires notification of each holder of a mortgage, hypothèque or registered charge attached to the ship, but only if the relevant register (whether it be the register of ships or separate register of security interests) is “open to public inspection”. This precondition is modelled on article 1 of the International Convention on Maritime Liens and Mortgages (1993), which defines the conditions for a mortgage, hypothèque or registered charges to be recognized and enforceable under the convention (and thus whose holders are to be notified according to the forced sale regime under article 12 thereof).

14. Public access to the register is a common feature of registry practice both in relation to registers of ships and separate registers of security interests. The practice is reflected in article 6(3) of the United Nations Convention on Conditions for Registration of Ships (1986) as well as the Model Registry Provisions of the UNCITRAL Model Law on Secured Transactions.¹ The convention does not elaborate on the depth and breadth of the enquiry required to determine whether a register is “open to public inspection”. A register should not fail to satisfy the precondition

¹ UNCITRAL, *Model Law on Secured Transactions* (2019), United Nations publication, Sales No. E.17.V.1.

merely because the regulations and procedures of the State of registration prescribe a fee or form requirements for requesting an extract from the register or copy of a registrable instrument, or require the person making the request to demonstrate a legitimate interest in accessing the register.

Reference to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , para. 55

(c) Holders of any maritime lien (article 4(3)(c))

15. Article 4(3)(c) requires notification of each holder of a maritime lien attached to the ship, but only if (a) the holder has notified the court of judicial sale (or other public authority conducting the judicial sale) of the claim secured by the maritime lien, and (b) the holder has done so “in accordance with the regulations and procedures of the State of judicial sale”.

16. The first precondition is inspired by article 11(1)(c) of the International Convention on Maritime Liens and Mortgages (1993) but differs insofar as it identifies the person that is required to notify the court of judicial sale of the claim secured by the maritime lien. Various procedures exist under domestic law by which a claim may be notified to the court of judicial sale, but not all provide for the claim to be notified by the holder of the maritime lien. In some jurisdictions, the party requesting the judicial sale is required to inform the court of any maritime lien that is known to the party. In several jurisdictions, the procedure for filing a caveat (or caution) with the court against release of the ship after its arrest allows a holder of a maritime lien to notify the court of particulars of its claim. In other jurisdictions, a special procedure exists for a holder (among other holders of unregistered charges) to intervene in the judicial sale proceedings. Nothing in article 4(3)(c) requires the notice to the court to be in any particular form.

17. The second precondition acknowledges that not all jurisdictions have procedures in place for the court to receive notices from the holders of maritime liens, particularly where the holder is not the party requesting the judicial sale. In some jurisdictions, the holder of a maritime lien will only address the court of judicial sale in proceedings related to the distribution of proceeds once the judicial sale is completed. Nothing in article 4(3)(c) requires the State of judicial sale to amend its regulations and procedures for conducting judicial sales to accommodate the notification of claims. Moreover, article 4(3)(c) does not require the holder of a maritime lien to be notified merely because it has given the court an ad hoc or informal notice that is not provided for under the applicable regulations and procedures.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , para. 70
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 51–54
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 64–66

(d) Shipowners (article 4(3)(d))

18. Article 4(3)(d) requires notification of the owner of the ship “for the time being”. By virtue of article 4(2), that time is the time at which the judicial sale is notified. As noted above ([A/CN.9/1110](#), para. 66), more than one person may be the owner.

(e) Bareboat charterers and bareboat charter registries (article 4(3)(e))

19. Article 4(3)(e) applies only if the ship has been granted bareboat charter-in registration (i.e. a State other than the State of registration has granted the ship the right to fly its flag). If it applies, subparagraph (e)(i) requires notification of the person registered as the bareboat charterer of the ship in the bareboat charter register, while subparagraph (e)(ii) requires notification of the bareboat charter registry.

20. Article 4(3)(e) acknowledges that the practice of bareboat charter registration differs between States. References to the person “registered”, the “register”, “registration” and the “registry” therefore cover situations in which particulars of the bareboat charter arrangement are recorded in a record other than a “register”. Moreover, that record may not be the same as the register of ships and may be maintained by an entity other than the ship registry of the State of bareboat charter-in registration.

21. Article 4(3)(e) applies regardless of whether the law of the State of judicial sale recognizes the practice of bareboat charter registration.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 63
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , para. 68

3. Content of notice and methods of notification (article 4(4))

22. If article 4(3) requires the notice of judicial sale to be given to prescribed classes of persons, article 4(4) addresses the content of the notice and how it is to be given.

23. The notice of judicial sale is to contain the minimum information itemized in appendix I. Recalling that the primary purpose of the notice requirements in the convention is to alert creditors to the impending sale and eventual distribution of proceeds, the items in appendix I are designed to ensure that the notice of judicial sale contains the essential information that a creditor would need to assert its rights. Appendix I does not contain a model form, and nothing in the convention prevents the use of an existing form that is prescribed under the law of the State of judicial sale. Moreover, nothing in the convention prevents the inclusion of other information in the notice of judicial sale, such as information required by the law of the State of judicial sale.

24. Article 4(4) defers to the law of the State of judicial sale on other matters related to the manner and form of notification. Accordingly, the law of the State of judicial sale determines the notice period, method of notification, form of the notice, and the persons responsible for giving the notice. That law also determines the language of the notice, although article 4(6) prescribes language requirements for the minimum information when transmitting the notice to the repository.

25. With regard to the method of notification, the law of the State of judicial sale might apply standard procedures for the service of judicial documents to the notice of judicial sale. The default method of service under those procedures typically requires the notice of judicial sale to be given personally (e.g. by hand to the person being notified or their representative). If the default method is not possible or feasible (e.g.

due to an evasive addressee or in view of the state of the ship and its crew), the procedures might allow the person giving notice to resort to an alternative method of service, by which the notice is given by post or by email or some other form of electronic communication addressed to the person with confirmation of receipt. To that end, the notification requirements in the convention are formulated in medium-neutral terms and thus accommodate the issuance and transmission of a notice of judicial sale in electronic form. Failing that, the procedures might allow the notice to be given by public announcement. In those circumstances, a judicial sale should not be regarded as failing to comply with the notice requirements under the convention merely because the notice of judicial sale was not given “to” the person concerned.

26. With regard to responsibility for giving the notice, the convention accommodates circumstances in which the law of the State of judicial sale requires the notice to be given by the court of judicial sale (or other public authority conducting the judicial sale), by a judicial officer, or by a party to the proceedings or their representative. Accordingly, a judicial sale does not fail to comply with the notice requirements under the convention merely because of the identity of the person giving the notice.

27. Consistent with the international nature of shipping, it is anticipated that there may be occasion for the notice of judicial sale to be transmitted outside the State of judicial sale for service in the territory of another State (e.g. the State of registration). Article 4(4) manifests the consent of a State Party to the notice of judicial sale being served in its territory. Accordingly, a judicial sale does not fail to comply with the notice requirements under the convention merely because the notice of judicial sale is given to a person located in the territory of a State other than the State of judicial sale, and the notice is given in a manner that is not provided for under the law of that place.

28. The transmission of the notice of judicial sale for service abroad may engage the application of a treaty between the State of judicial sale and the other State on judicial assistance in matters relating to the service of judicial documents. See further remarks on article 13(2).

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , paras. 18, 22, 71, 75
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , paras. 64–66
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 59, 61–62
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 73–80
Report of the fortieth session of Working Group VI	A/CN.9/1095 , paras. 102–106

4. Public advertisement (article 4(5))

29. The notice of judicial sale is published by announcement in the press or other publication available in the State of judicial sale. It is also transmitted to the repository. Article 4(5) applies in addition to – and not as an alternative to – the requirement in article 4(3) to notify the prescribed classes of persons. By virtue of article 4(4), the notice that is published and the notice that is transmitted are to contain the information itemized in appendix I.

(a) Announcement in the press or other publication (article 4(5)(a))

30. Article 4(5)(a) is concerned with the fact of publication and not with the modalities for publication, such as the selection of newspaper or periodical by which the notice of judicial sale is to be published. In accordance with article 4(4), those modalities are left to the law of the State of judicial sale.

31. As noted above (see remarks on article 4(1)), the notification requirements acknowledge the use of online tools to track ships and provide information on their arrest and impending sale. Like the other notification requirements, article 4(5) is formulated in medium-neutral terms and thus accommodates the publication of the notice in newspapers and other periodicals that are circulated in electronic form. Accordingly, a judicial sale does not fail to comply with the notice requirements under the convention merely because the notice is published in electronic form.

32. Article 4(5)(a) offers a choice between two options, namely (a) publication by “announcement in the press” and (b) publication by “other publication available in the State of judicial sale”. The first option typically entails placing an advertisement in a newspaper containing the notice of judicial sale, as opposed to posting an announcement to a noticeboard or website of the court of judicial sale or other person responsible for notification. Article 4(5)(a) does not prescribe any requirements regarding circulation if the first option is chosen. The second option typically entails an advertisement placed in a periodical, including an online journal or newsletter published for the shipping industry. Article 4(5)(a) requires the publication to be “available in the State of judicial sale” if the second option is chosen. For the purposes of that requirement, it does not matter whether the publication is published in the State of judicial sale or abroad. What matters is whether the publication is “available” in the State of judicial sale, which typically entails the circulation of a paper-based publication or accessibility of an online publication in that State.

33. In keeping with the purpose of the notice requirements to alert creditors to the impending sale and eventual distribution of proceeds, and given the international nature of shipping, it is advisable that, whichever option is chosen, the selected newspaper or periodical should be widely available outside the State of judicial sale.

(b) Transmission of notice to repository (article 4(5)(b))

34. Article 4(5)(b) is concerned with the fact of transmission and not with the modalities of transmission, such as the method used and person responsible for transmitting the notice to the repository. Those modalities are left to the law of the State of judicial sale, in accordance with article 4(4), and the procedures put in place by the repository in performing its functions under article 11. In keeping with the purpose of the notice requirements to alert creditors to the impending sale and eventual distribution of proceeds, what matters is that the content of the notice is received in a format that can be published by the repository. See remarks on article 11.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 66
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , para. 63
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 82–84, 87–88

5. Language requirements when transmitting notice to repository (article 4(6))

35. When transmitted to the repository under article 4(5)(b), the notice of judicial sale is to be accompanied by a translation of the information itemized in appendix I

(i.e. the minimum information to be contained in the notice by virtue of article 4(4)). Article 4(6) does not apply when the notice is given under article 4(3). Accordingly, a judicial sale does not fail to comply with the notice requirements under the convention merely because the notice of judicial sale that is given under article 4(3) is only in the language of the court of judicial sale and without an accompanying translation.

36. Article 4(6) reflects the balance between due process towards creditors and the expediency required in judicial sale proceedings (see remarks on article 4(1)). On the one hand, due process demands that information should be communicated in a manner that can be readily understood by the addressee, including in a language that the addressee knows. This is particularly relevant in international shipping, where creditors can be dispersed around the globe and might not know the language of the court of judicial sale. On the other hand, expediency demands that the judicial sale procedure should not be overburdened by the time and cost of translating documents into multiple languages, let alone identifying the language that is known to each person that is to be notified. It recognizes that most creditors in the international shipping industry are likely to know at least one of the working languages of the repository, which, at the time that the convention was being prepared, were English, French and Spanish. It also recognizes that the burden of translation will be significantly reduced by focusing on the minimum information itemized in appendix I. That information is likely to be concise and the translation will already benefit from the text of each item heading already being available in English, French and Spanish, among the other official languages of the United Nations in which the text of the convention is adopted. Indeed, some of the information, such as the “reference number or other identifier for the sale procedure” may require little or no translation.

37. As with transmitting the notice of judicial sale under article 4(5)(b), the modalities for transmitting the accompanying translation are left to the law of the State of judicial sale and the procedures of the repository. Article 4(6) does not require the translation to be certified.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , para. 64
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 69–72
Report of the fortieth session of Working Group VI	A/CN.9/1095 , paras. 100–101

6. Reliance on registry information (article 4(7))

38. While the convention does not prescribe the method for notification, compliance with article 4(3) typically involves identifying the persons within each prescribed class and determining their name and address. The identity, name and address of holders of any mortgage, hypothèque or registered charge, the shipowner and the bareboat charterer are recorded in the register of ships of the State of registration or in any separate register of security interests or bareboat charter-in register. By virtue of the requirement for those registers to be open to public inspection, which stems from the definition of “ship” in article 2(b) and the precondition in article 4(3)(b), the person giving the notice should be in a position to obtain this information from the relevant registry. The identity, name and address of holders of any maritime lien are recorded in the notice given to the court under article 4(3)(c).

39. In that context, the effect of article 4(7) is that the person responsible for notification is not required to consult any other source of information. In so doing,

the convention provides certainty for the person giving the notice of judicial sale, while avoiding needless challenges to the international effect of a judicial sale based on non-compliance with the notification requirements. Article 4(7) reflects the principle that the person to be notified should bear the risk of inaccurate information in the register, or in the notice given to the court, as that person has greater control over the accuracy and currency of the information.

40. Nothing in article 4(7) precludes the person giving notice from using other sources of information, including to comply with domestic law requirements. Moreover, article 4(7) does not require the person to search or inspect the register, nor oblige the relevant registry to provide access to the register (but see definition of “ship” in article 2(b) and the precondition in article 4(3)(b)). Article 4(7) also does not oblige the court of judicial sale to provide access to notices received from any holder of a maritime lien, although such a procedure might need to be legally enabled to implement the convention, particularly in those jurisdictions in which the person giving the notice is not the court of judicial sale. In jurisdictions in which the court of judicial sale or a judicial officer gives the notice, cross-border communication between authorities that is provided for under article 12 may assist the operation of article 4(7).

41. As noted above (see [A/CN.9/1110](#), para. 75), the term “person” in the chapeau of article 4(7) should be understood broadly to encompass the ship registry and bareboat charter registry.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , para. 18
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , para. 63
Report of the fortieth session of Working Group VI	A/CN.9/1095 , paras. 96–98

F. Article 5. Certificate of judicial sale

1. Purpose of the certificate

42. The certificate of judicial sale plays a central role in the overall operation of the convention regime, serving two crucial purposes. First, it secures the international effects of the judicial sale in that (a) its issuance triggers the basic rule in article 6, and (b) its production triggers action on registration under article 7 and the prohibition of arrest under article 8. Second, it operationalizes the safeguards under the convention in that those safeguards are translated into conditions for the issuance of the certificate under article 5. Nonetheless, the role of the certificate is limited to the purpose of the convention which, as noted in article 1, is to govern the effects of a judicial sale that confers clean title. In particular, the convention does not establish the certificate of judicial sale as a document of title.

43. Article 5 addresses a range of matters relating to the issuance, form, content and legal value of the certificate. It is complemented by article 9, which addresses jurisdiction to review the issuance of the certificate.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , para. 41
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , para. 70
Report of the fortieth session of Working Group VI	A/CN.9/1095 , para. 46

2. Issuing authority (article 5(1))

44. The certificate of judicial sale is issued either by the court of judicial sale (or other public authority that conducted the judicial sale) or by another competent authority of the State of judicial sale. The designation of the issuing authority is a matter for the law of the State of judicial sale. Competence to issue the certificate may be conferred on a single authority or on multiple authorities.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , para. 84
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 91
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 98–99

3. Procedure for issuance (article 5(1))

45. The competent authority issues the certificate of judicial sale to the purchaser “in accordance with its regulations and procedures”. Those regulations and procedures are a matter for the law of the State of judicial sale. In the context of article 5(1), they typically provide for a range of matters relating to procedure, including the time frame for issuance, whether the issuing authority acts on application (e.g. the certificate is issued at the request of the purchaser) or on its own motion (e.g. the certificate is issued automatically), whether a fee can be charged for issuing the certificate, whether the certificate can be issued to the purchaser’s representative or nominee, and the standard of review required to determine whether the conditions for issuance have been met. The regulations and procedures might also provide for the issuance of multiple certificates for the same judicial sale, as well as the issuance of certificates in paper or electronic form (see remarks on article 5(6)).

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , paras. 90–91
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 24–25
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , para. 100

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

46. A certificate of judicial sale is issued if the following conditions are met:

- (a) The judicial sale has reached completion;
- (b) The judicial sale has conferred clean title to the ship under the law of the State of judicial sale;
- (c) The judicial sale was conducted in accordance with the requirements of the law of the State of judicial sale;
- (d) The judicial sale was conducted in accordance with the requirements of the convention.

(a) Condition 1 – completion of the judicial sale

47. The term “completion” gives effect to the principle of finality, according to which the convention regime should only apply to judicial sales for which the procedure has been concluded and is no longer subject to ordinary review, even if additional formalities remain to be taken (e.g. action under article 7). The convention purposefully does not define “completion” since terms commonly used to describe finality, such as “final and conclusive”, “effective and enforceable” and “no longer subject to appeal”, might not find uniform meaning. Instead, consistent with the rule in article 4(1), the convention defers to the law of the State of judicial sale for determining when a judicial sale has reached completion.

(b) Condition 2 – conferral of clean title

48. Whether or not a judicial sale confers clean title is a matter for the law of the State of judicial sale. See remarks on the definition of “clean title”. The conferral of clean title could coincide with the completion of the judicial sale.

(c) Condition 3 – compliance with requirements of the law of the State of judicial sale

49. As noted above (para. 45), the regulations and procedures of the issuing authority determine the standard of review required to determine whether the conditions for issuance have been met. In determining whether condition 3 is met, the convention does not require the issuing authority to carry out a full review of the judicial sale. Such a requirement would be inconsistent with the principle of finality reflected in condition 1, as well as with the objective of the convention to leave the procedure of judicial sales to domestic law.

(d) Condition 4 – compliance with requirements of the convention

50. The final condition for issuance is concerned with compliance with the notice requirements in article 4(2) and following.

51. It is conceivable that the condition could encompass a review of whether the judicial sale and the ship correspond within the definitions of those terms in article 2. However, it does not encompass a review of whether the judicial sale falls within the scope of application of the convention under article 3, as its application necessarily assumes that the convention applies.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 90
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 65–69

<i>Document</i>	<i>Reference</i>
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 22–23, 26
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 92–97

5. Form and content of certificate (article 5(2))

52. The certificate of judicial sale is issued substantially in the form of the model contained in appendix II. A requirement to use a model form for certificates is not unusual in international conventions and promotes standardization and thus greater acceptance of the certificate when produced abroad. The model contained in appendix II sets out the basic layout for the content of the certificate. The requirement for the certificate to be “substantially” in the form of the model emphasizes that the convention does not mandate a particular design for the certificate nor the use of a particular language for the item headings or for filling in the corresponding blanks. The certificate of judicial sale will typically be issued in the language of the issuing authority and may be issued in multiple languages.

53. The certificate of judicial sale contains the information prescribed in article 5(2), which corresponds to the information itemized in the model, albeit with some slight differences. The certification in the headnote of the model corresponds to the information prescribed in subparagraphs (a) and (b) of article 5(2), which in turn is designed to match the conditions for issuance in article 5(1), despite being formulated in different terms. Item 4.2 of the model (“registry”) corresponds with subparagraph (f) of article 5(2) (“register of ships or equivalent register in which the ship is registered”), and thus it is sufficient for the certificate to identify the register or name the authority that maintains the register or its local office.

54. Both the model and subparagraph (k) of article 5(2) refer to the inclusion of the signature or stamp of the issuing authority or “other confirmation of authenticity of the certificate”. Confirmation of authenticity provides assurance as to the origin of the certificate (i.e., that it was issued by the issuing authority). The most common device used to confirm authenticity besides a signature or stamp is a seal. The convention does not mandate the use of any device other than a signature or stamp. Moreover, the reference to “other confirmation of authenticity of the certificate” is not intended to suggest any additional formality to authenticate the certificate, such as legalization (see further remarks on article 5(4)).

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , paras. 44–45, 47, 57
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 93
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 71–72
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 103–105
Report of the fortieth session of Working Group VI	A/CN.9/1095 , para. 109

6. Transmission of certificate to repository (article 5(3))

55. The certificate is issued to the purchaser, who will use it, as need be, to prompt action on registration of the ship under article 7 and to prohibit arrest of the ship under article 8. In addition, the certificate is transmitted to the repository. As with article 4(5)(b), article 5(3) is concerned with the fact of transmission and not with the modalities of transmission, such as the method used and person responsible for transmitting the certificate to the repository. Those modalities are left to the law of the State of judicial sale and the procedures put in place by the repository in performing its functions under article 11. See remarks on article 11.

56. In practice, it may be more convenient for a copy of the certificate to be transmitted to the repository. While article 5(3) refers to “the” certificate, it should not be understood as preventing a copy (including an electronic copy) of the certificate from being transmitted to the repository.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 106–107
Report of the fortieth session of Working Group VI	A/CN.9/1095 , para. 108

7. No legalization (article 5(4))

57. Consistent with the international nature of shipping, it is anticipated that the certificate of judicial sale will be produced in a State other than the State of judicial sale. That other State may have a practice of requiring foreign public documents to be legalized. “Legalization” is a term often used for the formality by which a diplomatic or consular agent of the State in which the document is to be produced certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp on the document. Legalization procedures can be cumbersome and time-consuming owing to the involvement of various authorities at different levels in both the State in which the document is issued and the State in which it is to be produced.

58. In the interests of expediency, article 5(4) exempts the certificate of judicial sale from legalization. It also exempts the certificate from any “similar formality” to legalization. The most notable example of such a formality is the addition of a certificate – known as an “Apostille” – issued under the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (1961) by the State in which the document is issued.

59. The effect of article 5(4) is that a registrar or other competent authority may not require a foreign certificate of judicial sale to be legalized or produced with an Apostille as a condition for taking action under article 7, nor may the court or other judicial authority do so as a condition for taking action under article 8. If the authority has doubts about the authenticity of the document produced, it can verify the issuance of the certificate by communicating with the issuing authority using the contact details included for that purpose in the certificate, as provided for in article 12, or compare the certificate with the certificate published by the repository. Nothing in the convention prevents the authority from rejecting a document purporting to be a certificate issued under the convention because it is not authentic. However, by virtue of article 9, it is not the role of the authority to ascertain whether the conditions for issuance of a certificate under the convention have been met or whether the certificate is otherwise valid.

60. [The operation of article 5(4) is subject to the declaration mechanism under article 20. See remarks on article 20.]

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , para. 45
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 33–34
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , para. 108

8. Evidentiary value (article 5(5))

61. The production of the certificate of judicial sale triggers action on registration under article 7 and the prohibition of arrest under article 8. For those provisions to be effective, the content of the certificate needs to be accepted by the authorities to which the certificate is produced. In other words, the content of the certificate needs to have evidentiary value.

62. By virtue of article 5(5), the information contained in the certificate of judicial sale is “sufficient evidence” of the matters certified. An authority to which the certificate is produced may not request additional information to identify the ship or to establish that the ship was sold by judicial sale, that the sale was conducted in accordance with the requirements of the law of the State of judicial sale and the requirements of the convention, or that the purchaser acquired clean title to the ship.

63. Article 5(5) does not require the information contained in the certificate of judicial sale to be treated as conclusive or irrefutable evidence. For example, it does not prevent an authority from considering other information as to the matters certified. In particular, it would not prevent a court in the State of judicial sale exercising jurisdiction under article 9 from considering information outside the certificate in hearing an application to avoid the judicial sale or to challenge the issuance of judicial sale certificate, nor would it prevent a court in another State Party from considering information outside the certificate in hearing an application invoking the public policy ground under article 10. This is confirmed by the inclusion of the words “without prejudice to articles 9 and 10” in article 5(5).

Reference to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-ninth session of Working Group VI	A/CN.9/1089 , paras. 109–112

9. Electronic form (articles 5(6) and 5(7))

64. The certificate of judicial sale may be issued electronically and cannot be rejected merely because it is in electronic form. While article 5(2) is formulated in medium-neutral terms, the convention makes special provision in articles 5(6) and 5(7) for the issuance and acceptance of electronic certificates. Those provisions are modelled on rules contained in the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).²

65. Nothing in the convention prevents a certificate from being issued in both electronic and paper form for the same judicial sale (i.e. multiple certificates). Nor does it oblige or authorize the competent authority to issue certificates in electronic form. Those matters are left to the regulations and procedures of the issuing authority under the law of the State of judicial sale.

² United Nations, *Treaty Series*, vol. 2898, No. 50525.

(a) Requirements for electronic certificates (article 5(6))

66. Article 5(6) is modelled on the rules in article 9 of the ECC, which establish functional equivalence between paper-based and electronic communications with respect to legal requirements of recordation, authenticity and integrity. Those requirements are translated into the conditions set out in subparagraphs (a) to (c), respectively. The term “electronic record” is not defined in the convention and should be given the same meaning as an “electronic communication” under the ECC or an “electronic record” under the UNCITRAL Model Law on Electronic Transferable Records (MLETR). Article 2 of the MLETR defines “electronic record” to mean “information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not”.

67. Subparagraph (a) requires information contained in an electronic certificate of judicial sale to be “accessible so as to be usable for subsequent reference”. This condition, which is modelled on article 9(2) of the ECC, establishes equivalence for the function of a paper document in recording information in writing (i.e. in a format that can be read and can thus allow the information to be recalled). As stated in the explanatory note to the ECC, the word “accessible” is intended to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained, while the word “usable” is intended to cover both human use and computer processing.³

68. Subparagraph (b) requires the use of a reliable method to identify the issuing authority. While the content of the certificate itself identifies the issuing authority by name, this condition, which is modelled on article 9(3) of the ECC, establishes equivalence for the function of a signature or stamp in confirming the authenticity of a paper document (i.e. that it was issued by the issuing authority). Unlike article 9(3) of the ECC, subparagraph (b) does not require the electronic certificate to indicate the authority’s intention in respect of the content of the certificate. In the context of the convention, identifying the authority issuing the certificate is sufficient both to identify the authority and to associate it with the content of the certificate.

69. Subparagraph (c) requires the use of a reliable method to detect any alteration to the electronic record after the time it was generated. This condition establishes equivalence for the function of the original of a paper document in allowing the integrity of the certificate to be confirmed (i.e. whether its content has remained unchanged since being issued). It is modelled on article 9(4)(a) read with article 9(5) of the ECC but has been reformulated to maintain consistency with subparagraph (b).

70. Subparagraphs (b) and (c) require the use of a “reliable method” to fulfil the functions described therein. Whether a method is reliable depends on the circumstances and not on the use of a particular technology. Relevant considerations include international standards and practices. In some jurisdictions, the issuing authority will be required by law to use an approved method to issue electronic certificates, whereas in others, the issuing authority can decide the method to use. In both cases, article 5(6) provides for the reliability of the method to be determined on a case-by-case basis, which necessarily implies an enquiry after the certificate is issued and only if the issue arises.

(b) Acceptance of electronic certificates (article 5(7))

71. If the requirements of article 5(6) are satisfied, the electronic certificate is a certificate of judicial sale for the purposes of the convention and must be accepted as such. For additional certainty, article 5(7) reinforces that principle by providing that an electronic certificate cannot be rejected merely because it is in electronic form. It

³ UNCITRAL, *United Nations Convention on the Use of Electronic Communications in International Contracts* (2007), United Nations publication, Sales No. E.07.V.2, para. 146.

is modelled on article 8(1) of the ECC, which embodies the principle of non-discrimination against the use of electronic means. Nothing in article 5(7) obliges a court or other authority of a State Party to give effect to an electronic record purporting to be a certificate of judicial sale issued under the convention if the court finds that the record does not comply with the requirements of article 5(6).

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , para. 92
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , para. 75
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 35–38
Report of the fortieth session of Working Group VI	A/CN.9/1095 , paras. 12–14

G. Article 6. International effects of a judicial sale

72. Article 6 contains the basic rule of the convention: a judicial sale conducted in one State Party which has the effect of conferring clean title on the purchaser has the same effect in every other State Party. Article 6 is triggered by the issuance of a certificate for the judicial sale under article 5. It requires no special procedure to give effect to the foreign judicial sale, such as confirmation by a competent court in the State in which the effects are sought to be produced. The judicial sale produces its effects automatically, i.e. by operation of law.

73. Article 6 is concerned with the effect of the foreign judicial sale in “conferring clean title”. Giving effect to the conferral of clean title will most commonly be manifested in action taken on the registration of the ship under article 7 and action on the prohibition of arrest of the ship under article 8. However, the operation of article 6 may be manifested in other ways (e.g. in the event of a dispute concerning ownership in the ship).

74. Article 6 and other provisions of the convention purposefully refer to “giving effect” to a foreign judicial sale and not to the “recognition” of that sale. As noted in the remarks on article 1, the convention is concerned with the effects of judicial sales and not with the recognition of judgments. The convention is only concerned with the sale as a legal fact produced under the aegis of a foreign legal system. It is a device that enforces private rights; where those private rights are adjudged by a court on the merits of a claim (e.g. against the shipowner), the judicial sale becomes the measure by which the judgment is enforced. To emphasize that it is not concerned with the recognition and enforcement of foreign judgments, the convention avoids the term “recognition”. Similarly, the convention contains no provision addressing its interaction with treaties on the recognition and enforcement of foreign judgments (cf. article 13), nor does it contain a provision preserving bases for recognizing foreign judgments under domestic law (cf. article 14).

75. If article 6 is triggered by the issuance of a certificate of judicial sale, it does not deal with the situation in which the certificate is subsequently invalidated by a court exercising jurisdiction under article 9. This is confirmed in article 15(2) which provides that, at most, the question of the international effect of invalidating a certificate of judicial sale is governed by the law applicable in the State in which the issue arises.

References to preparatory work

<i>Document</i>	<i>Reference</i>
Report of the thirty-fifth session of Working Group VI	A/CN.9/973 , paras. 27, 49
Report of the thirty-sixth session of Working Group VI	A/CN.9/1007 , paras. 46–47
Report of the thirty-seventh session of Working Group VI	A/CN.9/1047/Rev.1 , paras. 82–83, 89
Report of the thirty-eighth session of Working Group VI	A/CN.9/1053 , paras. 19–21
