United Nations A/CN.9/WG.VI/WP.87/Add.1

General Assembly

Distr.: Limited
13 February 2020

Original: English

United Nations Commission on International Trade Law
Working Group VI (Judicial Sale of Ships)
Thirty-seventh session
New York, 20–24 April 2020

Note Accompanying the Second Revision of the Beijing Draft

Note by the Secretariat

Contents

V.20-01334 (E)

I. Introduction

1. This note accompanies the second revision of the Beijing Draft contained in document A/CN.9/WG.VI/WP.87 and highlights some overarching issues for consideration by the Working Group at its thirty-seventh session.

II. Issues for consideration

A. Form of the instrument

2. The Beijing Draft was originally conceived as a treaty. At the thirty-sixth session of the Working Group, there was wide support for continuing working on the assumption that the draft instrument would eventually take the form of a convention, but the Working Group also agreed to take a final decision on this issue at a future session (A/CN.9/1007, para. 99). The second revision is presented in the form of a treaty and includes draft final clauses. At its thirty-seventh session, the Working Group may wish to take a final decision on the form of the instrument.

B. Geographic scope

3. No decision has been taken as to whether the instrument, if it takes the form of a treaty, will apply to judicial sales conducted in a State that is not party to the Convention. While the geographic scope of the instrument has not been considered in detail by the Working Group, some doubts have already been expressed about applying the recognition regime to such sales (A/CN.9/973, paras. 47, 52–53). The second revision is drafted on the basis that the recognition regime only applies between States Parties (see, e.g., new article 1). At its thirty-seventh session, the Working Group may wish to express its agreement with this approach.

C. Types of ships covered

4. A query has been raised within the Working Group as to whether the instrument applies only to the judicial sale of seagoing vessels, or whether it also applies to vessels used for inland navigation. While some have assumed that the instrument does not apply to the latter, others have expressed support for including the latter within scope. It has been noted that, if it does apply to vessels used for inland navigation, the instrument might overlap with the Convention on the Registration of Inland Navigation Vessels (1965) ("Geneva Convention"), in particular its Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels.[1] The Working Group has asked the Secretariat to analyse the relationship between the Geneva Convention and a future instrument and to present its findings for consideration by the Working Group at its thirty-seventh session (A/CN.9/1007, paras. 30–31).

1. Maritime treaties applying to seagoing vessels

5. The qualification of a ship or vessel as "seagoing" is made in several international maritime treaties to which the Working Group has referred in its discussions so far. For instance:

(a) International Convention Relating to the Arrest of Seagoing Ships (1952)[2] – the title of the Convention indicates that it applies to "seagoing" ships, although the terms of the Convention do not define the term "ship" nor expressly exclude inland navigation vessels from scope. Ultimately a matter of treaty interpretation, it has been

[1] United Nations, *Treaty Series*, vol. 1281, No. 21114.
[2] United Nations, *Treaty Series*, vol. 439, No. 6330.

argued that the Convention applies to both seagoing ships and inland navigation vessels;[3]

(b) International Convention on Arrest of Ships (1999)[4] ("Arrest Convention 1999") – while also not defining the term "ship", this Convention allows States to exclude its application to "ships which are not seagoing" (article 10(1)(a)). It also allows States to make a declaration that certain rules provided for in a "treaty on navigation on inland waterways" prevail over corresponding rules set out in the Convention (article 10(2));

(c) International Convention on Maritime Liens and Mortgages (1993)[5] – article 13 of this Convention states that, unless otherwise provided, its provisions shall apply to "all seagoing vessels".

6. In none of these treaties is the term "seagoing" ship or vessel defined. It has been argued that, in the context of the Arrest Convention 1999, the term depends on the use or purpose of the ship rather than its capabilities, such that a ship intended for navigation on inland waterways is not "seagoing" even if it is capable of navigation on the sea, and a ship intended for navigation on the sea is still "seagoing" even if it happens to navigate on inland waterways.[6] At the same time, attempts to define the term in international maritime treaties have been unsuccessful.[7] Indeed, the decision was taken by the International Working Group of the Comité Maritime International (CMI) not to limit the Beijing Draft to the judicial sale of "seagoing" ships on the basis that it might "create unnecessary conflicting interpretations".[8] But while there may be difficulties in agreeing on what a seagoing vessel is, there seems to be general agreement on the following two propositions: first, that seagoing vessels and vessels used for inland navigation are mutually exclusive; and second, that the term "ship", without further qualification, does not necessarily exclude vessels used for inland navigation.

2. Geneva Convention and its Protocol No. 2

7. The Geneva Convention is currently in force in nine States,[9] and is open to accession only by members of the United Nations Economic Commission for Europe (UNECE) under whose auspices it was concluded, as well as States admitted to UNECE with a consultative status. Of the States for which it is in force, seven have accepted Protocol No. 2, which applies to the "attachment" (including arrest) and "forced sale" (including judicial sale) of "any vessel used in inland navigation". Specifically, Protocol No. 2 deals with various matters related to judicial sales that are addressed in the draft instrument, namely notice requirements (article 21), the international effects of a judicial sale (article 19), and deregistration and registration of a ship following its judicial sale (article 22).

8. If the Working Group were to agree to include inland navigation vessels in the draft instrument – or at least not exclude them expressly – it would appear that there would indeed be some overlap between the draft instrument and Protocol No. 2. This is particularly so because:

---

[3] Francesco Berlingieri, *Berlingieri on Arrest of Ships: A Commentary on the 1952 and 1999 Arrest Conventions* (3rd ed., London, 2000), § I.34.

[4] United Nations, *Treaty Series*, vol. 2797, No. 49196.

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

[6] Berlingieri, § II.18.

[7] See, e.g., the preparatory work for the Convention on Limitation of Liability for Maritime Claims (1976) as published in CMI, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996* (Antwerp, 2000), pp. 41–46.

[8] CMI International Working Group, "Commentary on the 2nd Draft of the Instrument on International Recognition of Foreign Judicial Sale of Ships", CMI Yearbook 2011–2012 (Antwerp, 2012), p. 127.

[9] Austria, Belarus, Croatia, France, Luxembourg, Montenegro, Netherlands, Serbia and Switzerland.

(a) The definition of "ship" in article 2(i) of the present draft does not require the vessel to be "seagoing" (recalling the finding above that the term "ship" does not necessarily exclude inland navigation vessels); and

(b) The present draft acknowledges that the ship may be registered in the registry of ships or an "equivalent registry", which could be interpreted to include a registry in which inland navigation vessels are registered (noting that the Geneva Convention requires each State Party to keep a specific registry for inland navigation vessels (article 2(1)), while at the same time prohibiting the registration of the vessel in any other registry, including its registry of ships (article 3(3))).

9. Accordingly, the Working Group may wish to consider preserving the application of the Geneva Convention and its Protocol No. 2 among the States Parties thereto. Appropriate provision to that effect has been added to article 14 of the second revision for consideration by the Working Group.

D. Centralized online repository

10. The Working Group has agreed that a centralized online repository could be used to publish notices and certificates of judicial sales (A/CN.9/973, paras. 46 and 73). The repository mechanism is established by article 12 of the second revision, which remains substantively unamended from the first revision, and is operationalized by cross-references in articles 4(3)(b) and 5(3).

11. The Working Group has asked the Secretariat to "look further into options for possible repositories, including related financial implications" (A/CN.9/1007, para. 67). While this work is ongoing, a preliminary report is set out below. The Secretariat will provide the Working Group with a further report (including on the discussions with the International Maritime Organization (IMO) referred to in para. 16 below) at the thirty-seventh session.

1. Existing models

(a) Transparency Registry

12. The Transparency Registry is a central online repository for the publication of information and documents in treaty-based investor-state arbitration. The repository is established under the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"). The Secretary-General of the United Nations carries out the repository function through the UNCITRAL secretariat.[10]

13. The operation of the Transparency Registry entails personnel costs and costs associated with the establishment and ongoing maintenance of the online platform.[11] To date, these costs have been funded entirely by voluntary contributions from the European Commission and the Fund for International Development of the Organization of the Petroleum Exporting Countries (OFID).[12] The Transparency Registry is accessible online at www.uncitral.org/transparency-registry/registry/index.jspx.

(b) Other international repositories

14. As previously reported to the Working Group,[13] international registries and similar notification schemes are established under other international instruments, including:

(a) *International Registry for Aircraft Objects* – established under the Convention on International Interests in Mobile Equipment (2001) and the Protocol thereto on Matters Specific to Aircraft Equipment ("Aircraft Protocol"), the registry

[10] Rules on Transparency, article 8.
[11] A/CN.9/791, paras. 6–8.
[12] See A/CN.9/979, para. 15.
[13] A/CN.9/WG.VI/WP.84, para. 8(k).

is used primarily to register international interests in aircraft objects. The registrar function is carried out by Aviareto Limited – a company registered in Ireland – under contract with the International Civil Aviation Organization, which serves as "supervisory authority" under the Aircraft Protocol. At the fifty-second session of the Commission (Vienna, 8-19 July 2019), it was reported that the registry now hosts over one million registrations.[14] Registration of an international interest serves not only to give notice to third parties, but also to enable the creditor to preserve the priority of its registered interest against subsequently registered interests and unregistered interests. As such, registration serves not only an informative function, but also a legal function. The regulations issued under the Aircraft Protocol provide for fees to be levied for registry searches and certificates. The registry is accessible online at www.internationalregistry.aero;

(b) *Anti-dumping notification scheme* – at the thirty-fifth session, the Working Group was informed of the notification scheme under World Trade Organization (WTO) instruments with respect to trade remedies adopted by WTO Members, such as anti-dumping measures. The Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [15] establishes the Committee on Anti-Dumping Practices[16] and obliges WTO Members, among other things, to submit reports to the Committee every six month on anti-dumping actions.[17] The scheme is administered by the WTO secretariat, which publishes the reports on the WTO website;

(c) *IMO ship identification number scheme* – adopted by the International Maritime Organization (IMO) under regulation XI-1/3 of the International Convention for the Safety of Life at Seas (SOLAS), the scheme provides for the issuance of unique IMO numbers to a wide range of ships, including all ships of at least 100 gross tonnage and passenger ships and certain fishing vessels of less than 100 gross tonnage.[18] The scheme is operated by IHS Maritime & Trade (formerly Lloyd's Register, now IHS Markit) under an arrangement with the IMO, and comprises a global maritime database to support the issuance and verification of IMO numbers. The database is accessible online as a module within the IMO's Global Integrated Shipping Information System (GISIS): https://gisis.imo.org.

2. Use of the GISIS platform

15. The GISIS platform is maintained by the IMO and currently comprises 26 public modules that provide access to a wide range of information supplied to the IMO secretariat by national maritime administrations under various IMO instruments, as well as information supplied under inter-agency arrangements.[19] The Secretariat is currently in discussions with the IMO secretariat to explore options for the IMO to host a possible online repository under the draft instrument as an additional GISIS module. Preliminary discussions indicate that this arrangement would need to be approved by the IMO Council.

16. Use of the GISIS platform to host the online repository could offer a range of benefits, including visibility among stakeholders in the maritime industry. Moreover, leveraging off an existing online platform would help to reduce the costs of operating the repository. These costs depend in large part on the range of information to be

[14] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 229.
[15] United Nations, *Treaty Series*, vol. 1868, No. 31874, p. 201.
[16] Ibid., article 16.1.
[17] Ibid., article 16.4.
[18] The scheme is only mandatory for passenger ships of at least 100 gross tonnage and cargo ships of at least 300 gross tonnage: regulation XI-1/3, para. 1. For all other ships, the scheme is voluntary.
[19] For instance, one GISIS module comprises an inter-agency platform for information sharing on unsafe migration by sea, which was jointly set up with the International Organization for Migration (IOM) and the United Nations Office on Drugs and Crime (UNODC) and launched on 6 July 2015.

hosted (i.e., certificates and notices of judicial sale) and the number of judicial sales covered by the eventual instrument. In this regard, the Secretariat is unaware of any studies of the worldwide prevalence of judicial sales. The CMI has previously estimated that hundreds of judicial sales are conducted globally each year;[20] however, the number of judicial sales covered by the repository will likely be significantly lower, at least to begin with, given that only judicial sales conducted within a State Party are covered.

E. Certified copies and translations of the certificate

17. The second revision retains a certification requirement for copies and translations of the certificate of judicial sale. A similar requirement (for arbitral awards) is contained in article IV(1) and (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)[21] ("New York Convention"), although, unlike the New York Convention, the second revision only provides for production of certified copies and translations *upon request*. No certification requirement is contained in more recent UNCITRAL texts such as the Model Law on International Commercial Arbitration [22] (article 35(2)) and the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) (article 4(3)).

18. The Working Group may wish to consider whether it is necessary to retain the certification requirement. The Working Group may also wish to consider whether it is sufficient for the purposes of articles 7 and 8 that a (certified) copy of the certificate be produced, rather than the original. This option might be useful where the purchaser seeks simultaneously to deregister the ship in the State of registration and the State of bareboat charter registration, a scenario already discussed by the Working Group (A/CN.9/973, para. 48).

F. Conditions for giving international effect

19. At its thirty-sixth session, the Working Group agreed to limit the scope of the instrument to judicial sales that (already) provide clean title under the domestic law of the State of judicial sale (A/CN.9/1007, para. 43). At the same time, it was observed that the conditions contained in article 4(1) of the first revision for conferring clean title contained important safeguards that should be featured in the recognition regime under the instrument. It was therefore proposed to transform those conditions into conditions for giving international effect to the judicial sale, which is provided for in article 6 of the present draft (ibid., para. 46). Those conditions are: (a) that the ship was physically within the jurisdiction of the State of judicial sale at the time of the sale ("condition 1"); (b) that the judicial sale was conducted in accordance with the law of the State of judicial sale ("condition 2"); and (c) that the judicial sale was conducted in accordance with the notice requirements contained in the draft instrument ("condition 3").

20. Some hesitation has been expressed with condition 3, on the basis that it would allow or require the authorities of a State other than the State of judicial sale to scrutinize the range of activities contemplated in (now) article 4, most of which would have taken place outside that other State (A/CN.9/1007, para. 56). In particular, it has been noted that this would impose an unrealistic burden on the registrar in that other State, which could in turn undermine the effectiveness of the recognition regime under the instrument (ibid.). The same could be said for condition 1 (which would require the determination of facts more readily established in the State of judicial sale,

[20] See A/CN.9/WG.VI/WP.81, p. 3.
[21] United Nations, *Treaty Series*, vol. 330, No. 4739.
[22] United Nations publication, Sales No. E.08.V.4.

as already alluded to by the Working Group: A/CN.9/1007, para. 81) and condition 2 (which would require an assessment of foreign law).

21. The Working Group may wish to consider whether it is more effective for these conditions to be scrutinized by the authorities in the *State of judicial sale*, and thus whether they should be omitted from article 6. To assist the Working Group visualize this alternative:

(a) The chapeau of article 5(1) of the present draft has been amended to incorporate conditions 2 and 3, thereby requiring the issuing authority to scrutinize the conditions when deciding to issue the certificate of judicial sale. Article 5(1) already required the issuing authority to certify that these conditions had been satisfied; and

(b) Article 5(1)(b) of the present draft has been inserted to incorporate condition 1, thereby requiring the issuing authority to certify that the condition has been satisfied. Article 3(1) of the present draft has also been amended to limit the scope of the instrument to judicial sales of ships that satisfy condition 1.

22. Pursuant to article 9(1) of the present draft, any challenge to the issuance of the certificate of judicial sale would fall within the exclusive jurisdiction of the courts of the State of judicial sale. Moreover, pursuant to article 5(5) of the present draft, the particulars in the certificate of judicial sale, including those certifying that the conditions have been satisfied, enjoy conclusive effect in a State other than the State of judicial sale.

G. Function of the notice requirements

23. The second revision reduces the *content* of the notice requirements, reflecting the discussions at the thirty-sixth session of the Working Group. One unresolved issue is the *function* that the notice requirements serve. In the present draft, the (reduced) notice requirements function as a condition for giving international effect to a judicial sale, in the sense that the effect of a judicial sale of conferring clean title will not be extended abroad unless the judicial sale is carried out in compliance with the notice requirements. As noted above (para. 20), some hesitation has been expressed with the notice requirements serving such a function. The following alternative options have been put forward:

(a) The notice requirements could serve as a *condition for issuing the certificate of judicial sale*. As such, a failure to comply with the notice requirements would not give ground for avoiding the sale but would give ground for challenging the validity of the certificate, and thus the ability of the sale to benefit from the recognition regime under the instrument (A/CN.9/1007, para. 57);

(b) The notice requirements could serve as a *ground for refusal to give international effect to the judicial sale*. As such, a judicial sale that failed to comply with the notice requirements would not have international effect in a State other than the State of judicial sale if a court in that State determines that the ground for refusal applies (as provided in article 10);

(c) The notice requirements could serve as *a ground for avoiding the judicial sale*. As such, a judicial sale that failed to comply with the notice requirements would not have, or cease to have, international effect if the sale is avoided by a court in the State of judicial sale exercising jurisdiction under article 9 (as provided for in article 9(3));

(d) The notice requirements could serve as a *stand-alone provision*. As such, the instrument would not prescribe any legal effect for a failure to comply with the notice requirements; instead, it would be a matter for the domestic law of each State to prescribe the legal consequences of that failure.

24. While the Working Group has already expressed misgivings about alternative option (b) (A/CN.9/1007, paras. 58 and 85) and alternative option (c) (A/CN.9/1007,

paras. 59 and 70), it has not expressed a view on alternative options (a) and (d). Alternative option (a) could be implemented by moving the reference to compliance with notice requirements from article 6(1)(b) to the chapeau of article 5(1), as implemented in the present draft. Alternative option (d) could be implemented by deleting the reference in article 6(1)(b) altogether.

H. Operation of the grounds for refusal

25. The second revision gives effect to the proposal made at the thirty-sixth session of the Working Group to link and adapt the grounds for refusing to give international effect to a judicial sale, set out in article 10, to the obligations imposed on States other than the State of judicial sale, namely the obligation to register/deregister (article 7) and the obligation not to arrest (article 8). A question remains as to the residual operation of article 10, which applies to deny the basic rule in article 6 that a judicial sale conferring clean title under the law of the State of judicial sale will have that effect in all other States Parties. Accordingly, the Working Group may wish to pay particular attention to the interaction between articles 7(5), 8(4) and 10 in its consideration of the second revision.