

THE SCOPE OF APPLICATION OF THE UNCITRAL INSTRUMENT ON THE JUDICIAL SALE OF SHIPS*

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This paper tackles the Draft Instrument on the Judicial Sale of Ships that is currently being prepared at UNCITRAL, focusing mainly on the conditions for the judicial sale of a ship conducted in one State Party to have effects in another Contracting State (including the definition of “clean title”, the notion of ship, and problematic aspects of the sale). The article considers particularly the background of the UNCITRAL Instrument and the conditions (scope of application) for the domestic judicial sale of ships to have international effect under the Convention, paying special attention to one of the most important requirements to issue a certificate of judicial sale (conferring clean title to the ship).

Keywords: *judicial sale of ships; UNCITRAL; clean title; charge; purchaser; mortgage; ship; certificate of sale.*

1. INTRODUCTION

It often happens that a ship is involved in a situation of unpaid creditors ranging from mortgagees to different suppliers, keeping the ship and her owners in default. In this situation, creditors track down the ship in a jurisdiction where they may arrest it in order to recover their credit through judicial action. Once the creditors have obtained a favourable judgment, and while the owner remains in default, creditors then need to proceed with enforcement against the ship, which invariably leads to judicial sale by auction or, in common law jurisdictions, through a court-approved private sale, so that the creditors can be paid from the proceeds of the sale.

* This paper was drafted using the A/CN.9/WG.VI/WP.94 version of the Instrument.

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If the unpaid creditor or the mortgagee (usually an international financial institution) elects to enforce the claim through a judicial sale by auction, the sale is held in public in the law courts, and the ship is sold free and unencumbered to the highest bidder. When this “unfortunate” stage is reached, the most important thing is for the ship to fetch the best possible price for the creditors (registered and unregistered) as well as for the original owner.

The international recognition of judicial sales stems from the absolute need to ensure that when, following an arrest, a vessel is sold in a judicial sale to a third party, that party purchases the vessel free and unencumbered so that he may use the ship freely as an integral link in the chain of international trade without any fear that the vessel’s old creditors can interfere with his free use of the ship.

The judicial sale of a ship has, in most jurisdictions, two significant effects: firstly, to transfer the property of the ship to the new purchaser; and, secondly, to clear all charges and mortgages over the ship¹ and transfer them to the proceeds of the sale (removing the encumbrances of the ship). Both effects may be summarised with the expression “clean title”: “title” regarding the transfer of property and “clean” in respect of unencumbered charges. The ship notionally continues to exist in the form of the fund representing the sale proceeds standing in the court, a fund in which owners possess a residual interest in the (often unlikely) event of there being surplus monies after satisfaction of all the proven claims brought in actions against the *res*.² Nevertheless, if the proceeds are insufficient to pay all the creditors, the claim *in personam* against the shipowner remains.

The fact that the ship is sold free and unencumbered ensures in most cases that the purchaser may deregister the ship from its old flag and reregister it under new ownership under a new flag without any problems. This is intended to make it possible for the purchaser to sail worldwide without any worry about re-arrest.³ Commercial certainty requires confidence that the judgment and the subsequent judicial sale will “wipe the slate clean” (meaning a fresh start) for

¹ Taking into account that a maritime lien is a claim which gives a right against a ship which continues notwithstanding a change of ownership. However, in a private sale, the purchaser of an encumbered *res* (the ship), takes the *res* subject to the maritime lien, and it is of no avail to plead want of notice or knowledge. See *The Colorado* (1923), p. 102.

² *The Mandarin Container* [2007] HKCA 308.

³ No potential buyer will be remotely interested in purchasing a ship which has numerous debts and unless the vessel is sold free and unencumbered and a clean title is passed on to the buyer. Thus, in order to make the system attractive, the ship must be sold to the new buyer free and unencumbered from any previous debt, giving him a clean title. And this is the cornerstone of the Instrument. See *The Tremont* (1841) 1 W Rob 163 and *The Acrux* (1961) 1 Lloyds Rep. at 405.

that particular ship. Proper registration of ships is key to the sound governance of maritime safety, marine environment protection and marine technical issues.⁴

The recognition of these international effects are: (1) The Registry or the registrar⁵ – in the State where the ship is registered – deletes any mortgage or registered charge attached to the ship and deletes the ship from the register and issues a certificate of deregistration for new registration; and (2) the court dismisses, sets aside or rejects an application for arrest upon production of the certificate of judicial sale by the purchaser, or, when it has effectively been arrested, orders the release of the ship from arrest.

There are no uniform maritime rules on judicial sales (except for the poorly adopted Convention on Maritime Liens and Mortgages 1993; hereinafter: MLCM 1993).⁶ The court's orders for judicial sale are subject to domestic law. As such, they do not have any automatic extra-territorial effects, except for bilateral treaties on recognition among States, or, in the EU, the Brussels I Recast Regulation⁷ and the Lugano Convention.⁸ The court's practical ability to confer clean title is dependent on the cooperation of the administrative authorities (and the courts) in the place of the ship's registration in deleting any existing mortgage or other

⁴ Myburgh, P., Satisfactory for its Own Purposes: Private Direct Arrangements and Judicial Vessel Sales, *The Journal of International Maritime Law*, vol. 22 (2016), no. 5, pp. 355-369.

⁵ In provisions concerning registration, the Convention seeks to use terminology that is consistent with other maritime law conventions. Accordingly, the Convention uses the terms "register", "registrar" and "registry" as follows: (a) the term "register" refers to the record in which particulars of a ship, mortgage, *hypothèque* or (registered) charge are recorded; (b) the term "registry" refers to the entity which maintains the register; and (c) the term "registrar" refers to the person who administers the registry.

⁶ Among its 18 adhering States, there are no "financier" States (UK, USA, Japan and the Nordic countries) party to the Convention, "register or flag" countries (Panama, Liberia or Marshall Islands), "shipbuilder" countries (the Republic of Korea, China and Japan which have constructed 91.8% of world tonnage) and, except for Peru, there is no American State and only 3 European members. Of course, there are no common-law countries either. It has been pointed out that the reasons for this lack of success are the fact that this Convention cannot satisfy countries that recognise claims for supplies in their domestic law, such as the United States, or countries recognising privilege for tax claims, such as Japan, or the loss of the preferential status of port claims, or the higher priority of many unregistered claims over ship mortgages.

⁷ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. Article 39: "A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required".

⁸ Convention on the Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007.

registered interests in the ship and allowing deregistration or transfer of the registration of the ship.⁹

A Convention such as that presented by UNCITRAL (with the support of the CMI, the original proposer) favours not only the interests of the new purchaser, but also the financiers who need assurance that the ship they are about to finance is unencumbered, and for this to be certified from that moment they are the sole creditors. This certainty and the consequent increase in the price will also favour the rest of the creditors – especially the maritime lienholders – who will see how their options to recover their credit after the sale has increased.

After three years of intense discussions within UNCITRAL Working Group VI and after five revisions of the initially proposed text (the Beijing Draft), the WG decided to submit the text of the Convention on the Judicial Sale of Ships to the General Assembly for its adoption. In the summer of 2022, UNCITRAL decided to adopt the text, which will be added to those already drafted by this harmonising organisation in the field of maritime law, such as the Convention on the Carriage of Goods by Sea (1978), also known as the Hamburg Rules; the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008), also known as the Rotterdam Rules (both Conventions establishing a uniform and modern legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for carriage of goods by sea); or the Convention on the Liability of Operators of Transport Terminals in International Trade (1991), creating a uniform legal regime governing the liability of an operator of a transport terminal.

2. BACKGROUND OF THE UNCITRAL DRAFT INSTRUMENT ON THE JUDICIAL SALE OF SHIPS (“THE CONVENTION”)

The *Travaux Préparatoires*¹⁰ to the Draft Instrument go back to a paper given by Professor Henry Hai Li in 2007, which drew attention to the problems arising worldwide from the failure to give recognition to judgments in other jurisdictions when ordering the sale of ships. The CMI Executive Council (EXCO) held in Dubrovnik in May 2007 suggested a preliminary study on the judicial sales of ships as a future topic for the CMI’s Work Agenda. At the Athens Conference in 2008, Professor Henry Hai Li observed that the judicial sale of ships had

⁹ Myburgh, P., *Satisfactory for its Own Purposes...*, pp. 355-369.

¹⁰ A summary can be found at A/CN.9/WG.VI/WP.81 and in Stanković, G.; Kragić, P.; Vrbljanac, D., *Judicial Sales of Ships – A Rocky Road to Unification*, *Poredbeno pomorsko pravo = Comparative Maritime Law*, vol. 60 (2021), no. 175, pp. 18-26.

not been given appropriate attention by the international community and thus paved the way for a discussion on this matter lasting more than a decade.¹¹

Given these facts, EXCO proposed that an International Working Group conduct a preliminary study of this issue. The work undertaken by CMI commenced with a detailed questionnaire sent to the members of the committee of the Maritime Law Association. The results were discussed at different meetings, colloquia and working sessions held in, among other places, Buenos Aires (2010), Beijing (2012), where the Draft Instrument was agreed, Dublin (2013) and Hamburg (2014).¹² It was felt that an international instrument would fill the gap left by the MLMC 1993 and the Conventions on the Arrest of Ships (1952 and 1999) and would meet the commercial needs of the industry.

The CMI then began several approaches to the international organisations in charge of its possible drafting: firstly, to the IMO Legal Committee (in 2015) in view of its past involvement with the MLM Convention, intending to make a formal request to add this work to its agenda. China and the Republic of Korea agreed to sponsor this request, but the IMO did not accept the proposal to include this project on its agenda.¹³ CMI then approached the Hague Conference (HCCH), which was working on its project entitled the Recognition and Enforcement of Foreign Judgments. It was suggested that the CMI's Instrument could be accommodated within that work. It was decided, however, by the Commission not to proceed down that route.¹⁴

UNCITRAL was considered the appropriate forum to resolve issues involving pernicious effects on cross-border trade. It was noted that UNCITRAL has experience in closely linked issues such as transborder insolvency, maritime law¹⁵ and securities. The working methods of UNCITRAL, which permit the close involvement of international industry organisations, would facilitate the conclusion of an instrument broadly supported across industries. In 2017, CMI

¹¹ Li, H. H., A Brief Discussion on Judicial Sales of Ships, Documents of the CMI Athens Conference 2008, *CMI Yearbook 2009*, pp. 342-356.

¹² A summary of this previous work can be read at A/CN.9/923. Some of the colloquium documents are available at <http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships>.

¹³ The delegates considered it to be a matter of private and commercial law which therefore did not fall within the scope of the IMO. See <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/LEG-102nd-session.aspx>.

¹⁴ In this context, some delegations expressed the idea that an industry-specific topic might be better suited to UN bodies, such as UNCITRAL or UNCTAD. See <https://www.hcch.net/en/governance/council-on-general-affairs/archive/2017-council>.

¹⁵ Most recently, the Rotterdam Rules (2002-2008).

therefore requested that UNCITRAL (together with the sponsorship of Switzerland) add this topic to its work programme.¹⁶ At the 51st session of the Commission in 2018, UNCITRAL undertook work to develop an international instrument on the international judicial sale of ships and its recognition¹⁷ (under WG VI). CMI's previous work (the Beijing Draft) provided a useful starting point for UNCITRAL, indicating the direction that might be taken.

The drafting process of the Instrument has led to several sessions of WG VI. The 1st working session was held in May 2019; the 2nd session in November 2019; the 3rd session, originally scheduled to take place in April 2020 but postponed due to the COVID-19 pandemic, was conducted (virtually) in Vienna in December 2020; the 4th working session in April 2021; the 5th working session in October 2021; and the 6th session in New York in February 2022. The Draft Instrument that will be analysed below is the one that at the time of preparing this article was described in working paper A/CN.9/WG.VI/WP.94 (with the amendments made during the last working session in 2022).

Although the Beijing Draft was initially conceived as a Convention (and was presented in that form by CMI) during the first sessions, some delegations proposed that the Instrument take the form of a model law. However, there was comprehensive support for continuing working on the assumption that the Instrument would take the form of a treaty. The “final decision” is to present the Instrument in the form of a Convention.¹⁸

The current wording of the Instrument, after several revisions from the original Beijing Draft, seems to have the following structure:

- The first part dedicated to the purpose of the Convention (Article 1), together with an article (Article 2) on definitions – whose length has been reduced in each new version¹⁹ – and the scope of application of the Instrument (Articles 3 and 15).

¹⁶ See Report of the United Nations Commission on International Trade Law (3-21 July 2017) at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/PDF/V1705889.pdf?OpenElement>.

¹⁷ The Instrument does not deal with the recognition of the judgment or deed as such, but solely with matters of the recognition of the international effects of the judicial sale.

¹⁸ States Parties to this new Convention, which are also Contracting States to the MLM Convention 1993, such as Spain, will have to disable Articles 11 and 12 of the 1993 Convention when adopting the new regulation. At no time has the WG contemplated the possibility of drafting a Protocol to the MLM 1993 Convention, which, on the other hand, seems to be a wise decision in the interests of the greater adoption of this new Instrument without the hindrances of the 1993 Convention.

¹⁹ From the 22 initial definitions in the Beijing Draft to the current 11 definitions (A/CN.9/WG.VI/WP.94). During the 5th revision, the definitions were reordered in a new Article 2.

- A second part, named “pre-sale phase”, is devoted to issues concerning the notice of judicial sale to interested parties (and to the International Repository), given in accordance with the law of the State where the sale is conducted (Article 4 and Article 11).
- And a third phase, named “post-sale phase”, which contains most of the provisions of the Instrument, regulates various matters related to the central core of the text, the international effects:²⁰ (a) the certificate of judicial sale (Articles 5 and 11); (b) the international effects of the sale (Articles 6-8 and 10); and (c) the jurisdiction to avoid and suspend judicial sale (Article 9).

The Instrument leaves the judicial sale stage, of a clearly procedural nature, to the law of the State where the judicial sale is conducted.²¹

3. CONDITIONS FOR THE DOMESTIC JUDICIAL SALE OF SHIPS TO HAVE INTERNATIONAL EFFECT UNDER THE SCOPE OF THE INTERNATIONAL INSTRUMENT

The judicial sale of a ship has, in most jurisdictions, two significant effects: to transfer ownership to the new purchaser; and to clear all maritime liens and claims from the ship and transfer them to the proceeds of the sale. If the proceeds are not sufficient to pay all creditors, the *in personam* claim against the shipowner remains.²²

The definitions of the component elements of judicial sale and clean title are presented first instead of in alphabetical order as has been the practice since the Beijing Draft.

²⁰ The text is complemented with several more articles devoted to issues related to communication between Parties; relations with other international instruments; participation by regional economic integration organisations; and signature, ratification aspects, and entry into force.

²¹ From the beginning, the drafters of the Beijing Draft recognised the impossibility of harmonising issues on civil procedures in an international Instrument whose purpose is to attract the greatest number of States towards its ratification, focusing attention instead on the international recognition of the effects of the sale.

²² Any obligations resting upon the previous shipowner are not affected by the judicial sale and therefore would not be extinguished with the sale since these are not attached to the ship. Article 15 excludes from the scope of application of the Convention the procedure for or priority in the distribution of proceeds of a judicial sale; or any personal claim against a person who owned the ship prior to the judicial sale. Shipowners and creditors may claim each other's *in personam* claim according to the breaches and remedies they have agreed on. However, these claims do not affect the new purchaser, receiving a clean title to the ship. Some support has been expressed during the discussions in the WG for the view that because the Instrument no longer regulates the effects of the judicial sale in the State of judicial sale, the preservation of *in personam* claims against a former shipowner no longer has any substantive effect (A/CN.9/1007, para. 52). During the last

Both effects may be summarised with the expression used by the UNCITRAL Instrument “clean title”.

The conditions for the judicial sale of a ship conducted in a Contracting State to have international effects in other Contracting States have been repeatedly modified during the different revisions made by the Working Group. The latest revisions have considerably reduced the requirements on the scope of application of the Convention (which initially included the granting of a clean title), basically dividing the conditions into requirements for the application of the Convention and requirements for the issuance of a certificate of sale (including the notification conditions and the clean title to the ship).

Under the terms of the final text, the conditions for a judicial sale to have international effect under the scope of the application of the Convention are:

1. The judicial sale must be ordered, approved or confirmed by a court in a Contracting State (or other public authority), either by way of public auction or by private treaty carried out under the supervision and with the approval of a court (Article 2(a.i));
2. The judicial sale is conducted in a Contracting State (Article 3.1(a)) and in accordance with the law of the State of sale (Article 4.1);
3. The ship was, at the time of the sale, physically within the territory of the State of judicial sale (Article 3.1(a)); and
4. The proceeds of that sale are made available to the creditors²³ in accordance with the law of the State of sale (Article 2(a.ii)).²⁴

revision of the text (A/CN.9/WG.VI/WP.94), the WG supported the argument that the issue could be addressed by referring to the person “who owned or had proprietary rights in the ship”. The Working Group agreed to amend Article 14(b) accordingly. Additionally, the Working Group agreed to insert a new paragraph excluding from this Convention the effects, under applicable law, of the suspension or avoidance of judicial sales by a court exercising jurisdiction under Article 9.

²³ Sales in which the creditor is a public authority, such as a port authority, are included in the Instrument.

²⁴ The WG agreed to include the reference contained in the original Beijing Draft to the availability of the proceeds of sale for distribution to the creditors, ruling its distribution by the law of the State of judicial sale. The absence of concern for regulating the proceeds of the sale in the Convention is an obvious sign (a) of avoiding problems on the distribution rules; (b) that the Convention is thinking more of the shipowners (previous and subsequent purchasers) than of the creditors, to whom it leaves the distribution of their credits to the corresponding national legislation in the State of sale.

If these requirements are met, the judicial sale carried out in a State Party fall within the scope of the Convention. However, it is important to note that Article 3 was revised at the very last moment to remove the conferral of clean title as a matter of the scope of the Convention.²⁵ This condition was transferred to Article 5 in order for the certificate of judicial sale to be issued by the competent authority of the State of sale upon completion of the sale, whereby the sale must confer clean title to the ship on the purchaser,²⁶ expanding its international effects in every other Contracting State (Article 6).

3.1. The Judicial Sale Must Be Ordered by a Court (or Other Public Authority)

To enter into the scope of application of the Convention (after several changes in the definition), the judicial sale must be ordered, approved or confirmed by a court in a Contracting State (or other public authority), whether:²⁷

1. by way of public auction (other than those sales following seizure or confiscation of the ship by tax, customs, or other law enforcement authorities);²⁸ or
2. by private treaty carried out under the supervision and with the approval of a court²⁹ (in several jurisdictions, a sale by private treaty is recognised and

²⁵ A/CN.9/WG.VI/WP.94, para. 8.

²⁶ See Part 4 of this paper.

²⁷ Some delegations suggested defining the term “authority”, due to its being used in the Convention for different situations: (a) to circumscribe the bodies conducting a judicial sale for the purposes of the definition of “judicial sale”; (b) to define certain judicial sales excluded from the scope; (c) to circumscribe the bodies issuing a certificate of judicial sale; and (d) to identify the bodies authorised to correspond directly under Article 13. However, the WG accepted that the instrument needed to respect the variety of authorities engaged in judicial sales within national legal systems (A/CN.9/973, para. 83). In China, for example, the registration and deregistration of merchant ships fall under the responsibility of the institutions of Maritime Safety Administration (MSA) which are administrative organs mainly in accordance with the Regulations Governing the Registration of Ships, which can be deemed to have the nature of administrative law (See Hu, J. Z., Comments and Amendment Proposals on the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships, *China Maritime Law Association (CMLA)*, p. 3).

²⁸ A similar provision was introduced in the first revision of the Beijing Draft to address concerns expressed about applying the recognition regime to forced sales in tax, administrative and criminal matters (A/CN.9/WG.VI/WP.84, pp. 19, 90). Although the rationale was not explicitly articulated at that time, it seems that the underlying concern was to avoid interference with acts of public authorities exercising enforcement powers such as seizure or confiscation.

²⁹ This ultimately depends on the *lex fori* of the State of the judicial sale; and, in any case, this is a matter of including in the scope of the Convention only sales conducted or supervised by a court or public authority.

reference is made to this method of judicial sale). However, the WG has agreed to clarify that a sale by “private treaty” is not a private sale but rather a sale carried out under the supervision and with the approval of a court.³⁰

The former definition of “judicial sale” has been amended to omit the third alternative for a sale: “by any other way provided for by the law of the State of judicial sale”. In practice, however, most ships are sold by public auction or private treaty, so this alternative method was always residual.

In the last version of the text, the Working Group was invited to consider the application of the Convention to judicial sales conducted around the time of its entry into force for the State of judicial sale (transitional application of the sale). Three options were identified: (a) applying the Convention only to sales “conducted” after the entry into force; (b) applying the Convention to sales not entirely conducted but “completed” after the entry into force; and (c) applying the Convention to sales completed before the entry into force, but for which a certificate was issued afterwards.

Although it was widely recognised that Option (c) provided the highest degree of certainty and predictability, since the date of issuance of the certificate is documented and easily ascertainable, there were strong reservations about that option. Preference emerged within the Working Group for the prudent approach of limiting the application of the Convention only to those sales entirely “conducted” after its entry into force. The WG agreed to apply the Convention to sales conducted after the entry into force of the Convention for the State of judicial sale (Option (a)), allowing for notices emanating from States which have ratified, accepted, approved, or acceded to the Convention to be transmitted to the Repository for publication.

3.2. The Judicial Sale Must Be Conducted in a Contracting State (Article 3.1(a) and in Accordance with the Law of the State of Sale (Article 4.1)

The second condition for the domestic judicial sale of a ship to have international effect under the scope of the Convention – and for the issuance of a certificate of judicial sale – is that the sale must have been conducted in a Contracting State and in accordance with its own law on the judicial sale of ships.

The law of the Contracting State in which this particular sale is conducted is the law that determines if there is a clean title under the meaning of the Convention. If the law of the State of the judicial sale grants clean title to the ship, then the Convention applies;³¹ but even if the State of sale is a State Party, if the judicial sale

³⁰ A/CN.9/1007.

³¹ The majority of delegations opted, in view of the principle of reciprocity, to apply the recognition regime only to judicial sales conducted in a State Party to the Convention (Article 1), expressing a preference for a “closed” regime (the State of sale and the States of the

does not confer clean title (e.g. because such a sale does not extinguish all existing encumbrances or contracts), then that sale is outside the scope of the “Convention Zone” and no certificate of judicial sale according to Article 5 may be issued.

A) Conditions for Issuing a Certificate of Judicial Sale

Article 5 prescribes three conditions for issuing a certificate of judicial sale³² (not for the validity of the judicial sale, which must be prescribed by the law of the State of sale):

- a) the sale that conferred clean title to the ship on the purchaser has been completed;³³
- b) the sale has been conducted under the law of the State of judicial sale and in accordance with the requirements of the Convention;
- c) the sale has been conducted in accordance with the notice requirements of paragraphs 4.3 to 4.7 of the Convention (Article 4.2).

The certificate is issued: (a) *ex officio* or at the request of the purchaser (broad support was expressed for this suggestion); (b) in accordance with the regulations and procedures of the State of judicial sale; (c) according to Annex II of the Instrument; and (d) once the “sale is completed”, the ship acquired by the purchaser in accordance with the law of the State of sale.³⁴

Differing views were expressed on the two options presented during the previous working sessions concerning Article 5(1) for inserting an additional

effects must be Contracting States of the treaty – geographic scope). The reason for this regime is that it encourages wider acceptance of the Instrument, though it might, in practice, limit the ability of the judicial sale to be recognised (Articles 6 and 7 depend on the issuance of a certificate, and the competent authority in that State would not be bound by Article 5). However, in the 5th revision of the Instrument, Article 1 was revised to reflect the decision of the WG and now declares the principle that the Convention only governs the recognition of clean title. The geographical element has also been removed from the Article and no longer refers to the effects in another State Party in order to equally apply the regime of the judicial sale in the State of sale.

³² The presentation of the certificate entails its automatic recognition by the Registrar in charge of the deregistration of the ship. The effect is that the certificate is exempt from legalisation or other similar formality. The WG has noted that the certificate is a public document within the meaning of the provisions of the 1961 Convention (Apostille Convention) and, therefore, is exempt from any legalisation requirement among the more than 100 States Party to the Convention.

³³ The certificate is issued in accordance with the domestic law requirements of the issuing authority. The requirement that the certificate has been issued at the request of the purchaser has been removed from the last revision.

³⁴ It was clarified during the session that the notion of “completion” did not refer to the performance of all actions that a purchaser might wish to take in reliance on the judicial sale, such as the deregistration and reregistration of the ship. A/CN.9/1053, p. 23.

condition on the finality of the judicial sale where the certificate only be issued if the sale is no longer subject to any appeal within the time period applicable in accordance with the law of the State of judicial sale. Challenging the sale after the certificate of judicial sale has been issued would give rise to the kind of uncertainty that the future Convention aims to avoid. This state of uncertainty and disorder would therefore affect not only the new shipowner, but all the parties involved in the chain of events following the production of the certificate.

In practical terms, the issue of lack of finality is unlikely to arise if the court or other authority supervising the judicial sale is also the issuing authority, as it would normally have to be satisfied of the completion of the procedure.³⁵ The completion of the sale was already assumed by Article 5(1)(c), which required the certificate to record that the purchaser has acquired clean title to the ship.

Broad support was expressed for the view that the finality of a judicial sale was a matter for the law of the State of judicial sale. As a matter of Spanish law, for example, the court only issues the “adjudication decree” (full title for the annotation of the sale and transfer of ownership in the Registry) once the period given to the parties for their appeal has lapsed. Then, the adjudication decree is issued, and the purchaser might request the certificate by Article 5.³⁶

B) The Sale Must be Conducted in Accordance with the Notice Requirements

The proviso on the previous wording of Article 6 that the judicial sale must be conducted in accordance with the notice requirements in Article 4³⁷ (for the condition mentioned in the Draft from its first version, see A/CN.9/WG.VI/WP.84) was put into question given that the proviso would expose a judicial sale to challenge outside the State of judicial sale in a manner inconsistent with Article 9 (which conferred exclusive jurisdiction on the courts of the State of judicial sale to hear challenges relating to the judicial sale procedure) and Article 10 (which only provided for the international effect of the judicial sale to be refused on

³⁵ See A/CN.9/1047/Rev.1, para. 67. The issuance of the certificate triggers a series of serious and irreversible effects. This suggestion to add a condition that the certificate only be issued if the judicial sale is no longer subject to an appeal has implications for Article 5 and the final clause of Article 9.1 of the text. It also raises the question as to whether the international effects of a judicial sale pursuant to Article 6 should be postponed until after the time period for challenging the judicial sale has lapsed.

³⁶ After discussion, the WG agreed to amend the chapeau of Article 5.1 along the following lines: “Upon completion of the sale to the purchaser under the law of the State of judicial sale, the public authority designated by the State of judicial sale shall, in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that”.

³⁷ The notice requirements consist not only of giving the notice to listed persons (Article 4.3), but also of requiring a minimum content (Article 4.4 to Article 4.6).

public policy grounds), on the basis that it would leave to the authorities of the State of effect (other than the State of the judicial sale) the opportunity to scrutinise whether these requirements have been satisfied, most of which would have taken place outside its jurisdiction. This would impose an additional burden on the Registry (namely, the obligation to register/deregister the ship) and courts (regarding the obligation not to arrest) in those other States, which would require an assessment of foreign law and the determination of facts more readily established in the State of judicial sale. All of them could in turn undermine the effectiveness of the recognition regime under the Instrument.

Differing views were expressed during the sessions (specially sessions 38, 39 and 40) on the operation of the notice requirements, in one view, as a stand-alone requirement that applies to all judicial sales, regardless of whether they confer clean title on the purchaser, and not merely, in another view, as a condition for the recognition regime under the Convention (the Convention should not impose notice requirements on judicial sales to which the recognition regime does not apply; notification of these sales should be left entirely to the law of the State of judicial sale).³⁸

The prevailing view of the WG has been that non-observance of the notice requirements in Article 4 does not in itself constitute a breach of a treaty obligation by the State of judicial sale, but rather leads to the non-issuance of the certificate.³⁹ To avoid doubt, the WG agreed during the 40th session to replace Article 4.2 in order to clarify the position that a certificate under Article 5 may only be issued if notice of a judicial sale is given prior to the sale of the ship (in accordance with the requirements of Article 4).

3.3. The Ship Was, at the Time of the Sale, Physically within the Territory of the State of Judicial Sale

3.3.1. The Notion of “Ship”

For the Convention, “ship” means any ship or other vessel registered in a Registry that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale (Article 2.b).⁴⁰ A query has been raised within the WG

³⁸ A/CN.9/1053, para. 14.

³⁹ A/CN.9/1089, paras. 52 and 57.

⁴⁰ From the beginning, the WG expressly agreed to excluded from the scope of application of the Convention warships, naval auxiliaries and vessels or ships owned or operated by a State and used only on government non-commercial service (including warships or

as to whether the Instrument applies only to the judicial sale of seagoing ships or whether it also applies to ships used for inland navigation. If it did apply to ships or vessels used for inland navigation, the Instrument would 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.⁴¹

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, including the International Convention Relating to the Arrest of Seagoing Ships (1952); the International Convention on Arrest of Ships (1999); and the International Convention on Maritime Liens and Mortgages (1993). In none of these treaties is the term “seagoing” ship or vessel defined. In the context of those Conventions, the term depends on the use or purpose of the ship rather than its capabilities, so that a ship intended for navigation on inland waterways is not “seagoing” even if it is capable of navigation on the sea. A ship intended for navigation on the sea is still “seagoing” even if it happens to navigate inland.⁴²

The final agreement was to expand the definition to ships not only used for commercial navigation (as was suggested at the beginning of the draft process in UNCITRAL), but also to all those used for inland navigation. However, the WG decided to limit the scope of application of the Convention to “registered” ships and vessels (those registered in a Registry that is open to public inspection), in other words in a public Registry of a Contracting State. The broad definition of Article 2(b) may include pleasure and seaborne craft, ships under construction and inland navigation ships.

3.3.2. The Ship Must, at the Time of the Sale, be Physically within the Territory of the State of Judicial Sale

The Convention applies only if the ship is “(1) physically within the territory of the State of judicial sale; and (2) at the time of the sale” (Article 3.1). The term

naval auxiliaries). Article 3(2) of the Convention was revised in the last version to focus the enquiry on the use of that kind of ship “immediately prior to the time of judicial sale” rather than “at the time of judicial sale” (A/CN.9/1089, para. 48).

⁴¹ The Beijing Draft did not limit to judicial sale “seagoing” ships because it might “create unnecessary conflicting interpretations”. See A/CN.9/1007, para. 21.

⁴² Certain jurisdictions treat various marine structures such as oil rigs, drilling platforms, etc., which are not technically ships, as ships.

“physically within the territory of the State of judicial sale”⁴³ must be interpreted under two premises: firstly, the sovereignty of a State extends, beyond its land territory, to its internal waters and to the territorial sea. When a ship sails, every State is entitled to fly its flag (under the “genuine link” principle between the State and the ship) and the ship is subject to its exclusive jurisdiction on the high seas (Article 92 of the Law of the Sea Convention). However, this does not mean, in terms of the Instrument, that a ship sailing on the high seas, under the jurisdiction of its flag State, is “physically within its territory”. Consequently, this requirement must only be considered when the ship is in the internal waters or in the territorial sea (judicial sales so conducted will be within the scope of the Convention). Secondly, some doubt exists about whether the ship must be arrested or seized at the time of the sale, or whether, conversely, such a situation is not an essential condition for the judicial sale.⁴⁴

Divergent views were expressed during the sessions as to the meaning of the words “at the time of the judicial sale”. In some States, the ship needs to be physically located in the territory of the State of judicial sale from the start to the end of the judicial sale procedure, that is, at the time the notice of judicial sale is made and at the time ownership in the ship is transferred to the buyer. In contrast, in other jurisdictions (as expressed during the working sessions), the ship only needs to be physically located in the territory at the end of the procedure, as a ship might be allowed, with the authorisation of the public authority responsible for the sale, to continue sailing pending the actual judicial sale.

During the 4th revision, it was recalled that there had been general agreement in the WG that a ship is physically located within the territory of the State of judicial sale at the final stage of the procedure when the ship is actually awarded to the successful purchaser. It was added that the final stage of the procedure corresponds with the “completion of the sale”, as reflected in the agreed amendments to Article 5 (see Part 3.2.A). In both the expressed views, the WG agreed to

⁴³ Article 3.1(b) was revised in the third version of the text to replace the term “jurisdiction” with “territory” to align the different language versions as well as to stress the need for the presence of the ship within the territorial waters of the State of judicial sale and to avoid possible confusion with the exercise of extraterritorial “jurisdiction” by the flag State under the UN Convention on the Law of the Sea (1982).

⁴⁴ A relevant issue arises when the ship is under the control or custody of ship repair in the jurisdiction of the State of the judicial sale. Can it then be understood that the ship is “physically within the jurisdiction of the State of judicial sale” as required by Article 3? Would it be necessary for the court to seize the ship in order to fulfil this requirement? Does the ship repair have to release the ship in the event of a judicial sale ordered by the court (even if its claim has not been satisfied)? These are doubts that have not been clarified by the WG. However, they can be clarified in a future Explanatory Note on the Instrument.

retain the words “time of the judicial sale” in Article 3.1 rather than formulating a specific definition by reference to a moment in time or period of time, recalling that the relevant moment in time was to be determined by reference to the law of the State of judicial sale.

3.3.3. Judicial Sale if Specific Equipment on Board the Ship is not Owned by the Shipowner: The Ship as a Composite Asset

When a Convention addresses the definition of a ship, it often does so to merely exclude warships or ships owned or operated by a State. However, in certain circumstances, a proper and instrumental definition of a ship is required. This Convention on the judicial sale of ships is both an example and an opportunity to do this. And this is because the Convention states about the ship that, as a result of the judicial sale, any title to or right in the ship is extinguished.

Given that the ship is a “composite” asset (formed by a plurality of elements), it is important to distinguish, firstly, if this extinction of “rights” also includes the appurtenances, equipment or components on board the ship owned by someone other than the owner of the ship; and secondly, it is also important to know if the components owned by the shipowner that are encumbered with some type of registered security interest on behalf of a third party are extinguished with the judicial sale.

The definition of equipment varies in different legal systems.⁴⁵ A judicial sale in which the ship, as a whole, is not entirely owned by the shipowner may lead to being excluded from the scope of the Convention if the “ship” is not correctly defined, since some parts will not be able to be sold and will therefore be excluded from the distributions of the proceeds of the sale.

In the case of a judicial sale of the ship,⁴⁶ the owner of the ship’s equipment (or a lessor if the components are part of a leasing agreement) might wish to

⁴⁵ With regard to Spanish law, the term “ship” comprises structural components (those that cannot be separated from it without detracting from the entity itself) and belongings (assigned to serve the ship permanently). In the UK, the term used is appurtenances and it has been held that it includes anything belonging to the owner which is on board the ship (*The Eurostar* [1993] 1 Lloyd’s Rep. 106).

⁴⁶ A similar problem has been questioned in respect of the arrest of the ship. In that case “no practical problem will arise in case the ship is released from arrest within a reasonably short time, because the owner of the appurtenances would not have any immediate reason to act” (Berlingieri, F., *Arrest of Ships*, 5th edn., Informa Law, London, 2011, para. 7.28). It is generally accepted that a claim against the owner of a ship cannot be enforced on appurtenances owned by third parties, even though the manner in which third-party ownership may be proved varies.

remove them from the ship before the judicial sale (such as the ship's tackle, electronic and navigation systems, engines, cranes, safety boats, gear, furniture, etc.).⁴⁷ Although the rule varies from jurisdiction to jurisdiction, third-party ownership is protected in the case of judicial sale, vindicating in the court its right of ownership (acquired before the sale) by means of a "third-party better right".⁴⁸ In order to do this, interested third parties need to make their ownership (acquired before the seizure or the sale) known to the court (or the public authority conducting the sale) prior to the sale vindicating their property right. Since the Convention does not regulate these issues, the purchaser should observe how, during the course of the sale (or in some cases also afterwards), third parties request that some components not owned by the shipowner-debtor be removed from the ship (which in some cases means a withdrawal of bidders from the auction or a significant decrease in the price).

What happens to that equipment or instruments on board that are not owned by the shipowner who is subject to a judicial sale? What if a piece of essential equipment, say a ballast water treatment system, is only leased to the shipowner and treated by the court as third-party property? Should the court treat these items as the property of a third party? In such a situation, the willing purchaser may either (i) buy the system from its owners; (ii) back down from the purchase of the ship; or (iii) take over the lease (subrogating itself in the position of the previous owner). In the last case, does the purchaser obtain clean title and become entitled to a certificate of judicial sale in accordance with Article 5?⁴⁹ This is obviously a matter for the law of the State of the sale, and accordingly it is the court that decides on the destiny of such equipment.

⁴⁷ A problem may arise due to these owners not being aware of the sale procedure, since some of them are not the subject of notice. The Convention might have considered to incorporate in the notice provisions (Article 4) those owners/creditors of the components (and not only the owners of the ship), so when the judicial sale is made, those charges or encumbrances are recognised, and those holders might be notified.

⁴⁸ This is the situation also in Croatia, where the appurtenances owned by a third party are not included in the forced sale and their owner is entitled to remove them from the ship (Article 900 of the Croatian Maritime Code); England (in *The "Silia"* [1981] 1 Lloyd's Rep. 534, p. 537, the court held that "in the context of an action in rem the word 'ship' includes all property on board the ship other than that which is owned by someone other than the owner of the ship", e.g. equipment leased to the shipowner). The position is similar in France and Germany, and in Norway, albeit in more limited circumstances (Sect. 45 Maritime Code). In Italy, third-party ownership must be registered in the ship's inventory on a date preceding that of the arrest or attachment.

⁴⁹ See Kragić, P., *About the Concept of Convention on Judicial Sale of Ships*, *ETL*, vol. 55 (2020), no. 4, para. 18.

The existence of registered security interests over the ship's components on behalf of a third party raises doubts in some jurisdictions (e.g., Spain or Norway). When a ship is mortgaged, it is easy to ascertain what the mortgaged object is: the ship (the *universitas rerum principle*). The general rule in most jurisdictions is based on the notion that a ship with components or appurtenances should be considered as one single object for a mortgage, so that a judicial sale enforcing the mortgage can offer a complete and running "clean" ship to the market, for the benefit of those interested in a high price. It certainly makes sense that those parts of the ship that cannot be removed without causing damage to other parts of the ship should not be sold separately by a forced sale, and therefore should not be mortgaged separately. Nevertheless, doubts arise in respect of components when, pertaining to the mortgagor-shipowner or someone else (whether they are included or not in the ship mortgage), a security interest is registered over them – different from the mortgage – (such as a pledge), or even elements not permanently attached to the ship, belonging to the charterer.

In Spain, legal transactions on the ship (which may include judicial sales) include the components or parts of the asset and its belongings, but not its accessories (Article 62 Spanish Shipping Act; hereinafter: SSA). However, those components registered in the Registry of Movable Property in the name of a third party or whose domain has been acquired by it prior to the judicial sale are excepted (Article 62.2 SSA). According to Article 134 SSA, the ship mortgage includes both the integral parts and their belongings or appurtenances, but those assets registered in the Registry in the name of a third party are not included in the mortgage.

A first conclusion could lead us to believe that the property right over a component owned by a third party (for example, the engine, a crane, or certain navigation instruments) is not extinguished with the sale, which would lead to exclude from the scope of application of the Convention the judicial sale of a vessel with these conditions. However, another solution (and what was probably the intention of the drafters) would be for the ship to be sold without the components to which third-party rights are registered, with the ownership transferred free and unencumbered. In such a case, the judicial sale would be under the scope of application of the Convention (and the certificate of sale would be issued in accordance with Article 5).

A judicial sale enforcing the mortgage may offer a "clean" ship to the market for the benefit of those interested in a high sale price. This is apparently the aim of the Instrument, ensuring that the sale includes a fully functional ship, even if part of the ship equipment is not owned by the mortgagor. However, under consideration of the equipment within the price of the ship, then it may represent an "unfair/unjust enrichment" for the shipowner-seller of the ship, since

after the distribution of the proceeds, shall be able to bring forth the rest (which otherwise he would not have).⁵⁰

Components not included in the judicial sale as part of the ship would be outside the judicial process. Although it may create some obstacles to the judicial sale process, the ship's status as a ship would not be altered and its judicial sale, and the clean title of its ownership, will be transferred to the new buyer.

It was suggested during the early UNCITRAL sessions for the Instrument to foresee the issuance of a "qualified" certificate that specified the existence of the preserved rights, and then confers on the Registrar discretion on whether to de-register the ship following the judicial sale. This idea is based on the consideration that any registration obstacle can be overcome. A question might be asked about whether a certificate of sale, which records a charge over the ship (mortgage or a lessor's ownership over equipment), might be included in the scope of the Convention. Otherwise, to obtain a "clean" certificate, the purchaser would have to give some alternative security to the creditors.⁵¹ However, this idea was withdrawn in the final version of the Instrument.

4. JUDICIAL SALE CONFERS CLEAN TITLE TO THE SHIP ON THE PURCHASER UNDER THE LAW OF THE STATE OF JUDICIAL SALE

The purpose of this Instrument is not to recognise the judgment of a judicial sale of a ship in another State, but rather the recognition of the "international effects of a judicial sale" conducted in a State Party, as long as the sale produces an absolute clean title on the ship for the purchaser.⁵² In other words,

⁵⁰ Imagine a situation where the ship has the charterer's electronic equipment installed for offshore seismic surveys used to locate potential oil or natural gas reserves hidden below the ocean floor. It could seem logical to exclude appurtenances not owned by the mortgagor-shipowner from the scope of the mortgage. The equipment may be worth as much as the ship and can be easily removed.

⁵¹ See Kragić, P., *About the Concept of Convention...*, para. 18.

⁵² The following words of J. Sheen in the "*Cerro Colorado*" case will probably resonate in the reader: "From time to time every shipowner wants to borrow money from his bank and give as security a mortgage over his ship. The value of the security would be drastically reduced if, when it came to be sold by the Court there was any doubt as to whether a purchaser from the Court would get a title free of encumbrances and debts" [*The "Cerro Colorado"* (1993) 1 Lloyd's Rep. 58]. In other words, no charges or encumbrances of the nature of any security on the ship must remain attached to or be allowed to be enforceable against the ship after the ship is sold by way of judicial sale. Only if this condition is met will the judicial sale achieve the desired effect. Nobody wants to pay the market price for

the Convention is a “mirror” of how a judicial sale carried out in a Contracting State – conducted in accordance with its national legislation – should look.

(a) If the reflection obtained is the same (that is, if there is an utter coincidence in the total purge of credits – clean title) and under the requirements mentioned above, then that judicial sale will be able to expand its international effects to the purchaser in the rest of the Contracting States once the certificate provided for in Article 5 has been appropriately issued (the certificate is, in fact, the condition for the recognition of the sale): cancellation of registered charges and mortgages, change of ownership and release of the ship in the case of a subsequent arrest on charges prior to the sale.

(b) However, if the reflection obtained is not the same (that is, the judicial sale carried out under the law of the State of the sale, for any reason, does not grant a total purge of the credits, as provided by the Convention),⁵³ then the judicial sale, despite being valid, legal and effective in the State of the judicial sale, will not be able to expand its international effects, based on the Convention, to the rest of Contracting States (except, of course, for bilateral or regional recognition agreements between the States).

It seems clear that if the purchaser who has paid the price of the ship in a judicial sale is unable to acquire an absolute clean title to the ship (with no exceptions), the credibility of the judicial sale will be significantly reduced. As a result, not many of those who give offers will be willing to acquire ships from judicial sales, which, in turn, will affect the interests and benefits made available to the lienholders and the previous owner, having to resort through *in personam* claims against the debtors.

The following pages will analyse judicial sales that provide a clean title to the ship, especially what charges, rights or interest are extinguished with the judicial sale as an effect of the clean title, and which charges are not extinguished.

a ship when a risk exists that pre-existing claims may still be enforceable against the ship, particularly because a recovery against the previous owner would not be successful. See Li, H. H., A Brief Discussion on Judicial Sales of Ships, *CMI Yearbook 2009*, p. 342 (paper presented at the CMI Athens Conference 2008).

⁵³ In the first stages of the discussion, it was broadly reiterated that the instrument could accommodate so-called “qualified” judicial sales by which some rights and interests in the ship were preserved following the judicial sale. The reason is that in some States whose judicial sale does not have the effect of extinguishing all rights, charges and encumbrances it might not be possible to specify in advance (in order to apply the notice provisions of the Instrument) the types of sales that would result in the conferral of clean title, as this depends on the claims made in the proceedings that give rise to the judicial sale on a case-by-case basis (A/CN.9/973). However, the WG observed that it was not necessary for the instrument to accommodate “qualified” judicial sales. Accordingly, the WG agreed to omit this reference in the text (A/CN.9/1007).

4.1. The Role of Clean Title in Defining the Scope of Application of the Convention

While in some jurisdictions it is known at the beginning of the judicial sale proceeding that sale will result in the conferral of clean title on the purchaser, in other States this consequence is not always the case (for example, in those jurisdictions which allow subrogation, with the consent of the creditor, in the pre-existing charges or mortgages on the ship). Due to the fact that the Convention applies only to a judicial sale that confers absolute clean title on the ship, it would be difficult for those other States to discharge their obligations under Article 4, which requires notice to be given “prior to a judicial sale of a ship”. Different views may be considered in this regard:⁵⁴

1. the notice requirements apply regardless of whether, at the relevant time, it was known that the sale would result in the conferral of clean title;
2. the notice requirements serve as a condition for issuing the certificate of judicial sale, not as a stand-alone requirement for the applications of the Convention;
3. the conferral of clean title serves as a condition for giving a judicial sale international effect rather than to define the scope of application of the Conventions (as was the case in the early versions of the text).

Although the idea that clean title should continue to define the scope of application of the Convention prevailed at the beginning of the versions, the final text removed from Article 3 any reference to clean title as a requirement for the scope of application of the Convention. Instead, clean title is now a requirement for the issuance of the judicial sale certificate. Consequently, judicial sales for which clean title is not conferred on the purchaser under the law of the State of judicial sale fall outside the scope of the Instrument.

4.2. The Definition of “Clean Title” under the Instrument⁵⁵

A sale ordered by a court (or other public authority) transfers the legal and equitable title in the ship to the purchaser free of all claims whatsoever. Hewson illustrated the position in *The Acrux* in the following terms: “The title given by

⁵⁴ A/CN.9/1047/Rev.1, para. 39.

⁵⁵ The term “clean [property] title” appears in the last revision of the Instrument spread over four articles: definition (1b), the scope of application (3.1b), the certificate provisions (5.1c), and the international effects (6.1). Additionally, it appears in the official form of the notification and the certificate. It also appears, although not expressly, but under similar terminology, in Article 7 (action by Registrar), Article 10 (circumstances for no international effects).

such process is a valid title and must not be disturbed by those who have knowledge or who may receive knowledge of the proceedings in this Court. So far as all claimants against this ship before her arrest are concerned, their claims are now against the fund in this Court and not against the ship properly sold to an innocent purchaser free of incumbrances. Were such a clean title as given by this Court to be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper process of any competent Court. It would be prejudiced for this reason that no innocent purchaser would be prepared to pay the full market price for the ship and the resultant fund, if the ship were sold, would be minimised and not represent her true value". This was subsequently confirmed by J. Sheen in "*Cerro Colorado*" in which he said: "I wish to make it clear beyond doubt that the Admiralty Marshal selling by order of this Court gives the purchaser a title free of all liens and encumbrances". A sale by the court, therefore, overreaches all claims against the ship of whatever nature and gives the buyer an indefeasible and absolute title to the ship.

Article 2(c) of the Instrument – after the fourth revision of the text – accommodates only one option out of the two different alternatives envisaged in previous versions. Although there is no substantial difference between the two alternatives, both differ in some aspects: "clean title" on a ship means "[a] that any title to or rights and interests in the ship existing prior to its judicial sale have been extinguished and that any charge or mortgage has ceased to attach to the ship; or [b] title free and clear of any mortgage or charge." The first option clearly details all the elements of the notion of "clean title", although it includes terms that could be difficult to adopt in other legal systems. The prevailing view within the Working Group in the 3rd revision was in favour of retaining the second option, which was considered clearer, more concise, and better aligned with the terminology used in the Convention.

4.2.1. What is Included in the Term "Title"?

Both the current term "title" and the expression "any title to or rights and interests" in the previous version confer to the new purchaser property rights over the ship. In most jurisdictions, judicial sale constitutes a valid and effective legal basis for transferring ownership of the ship to the purchaser. This is the

first and most important effect of the judicial sale recognised by the Convention. All property rights over the ship (with the nuances mentioned in the definition of ship) are extinguished (unlike charges and mortgages, which simply cease to attach to the ship), without prejudice to the right of creditors to obtain full compensation from the proceeds of the judicial sale in accordance with the law of the State where the sale is conducted.

The question, however, is whether the term “title free and clear of any mortgage or charge” clears other types of existing rights that affect the ship, such as bareboat charters, retention of title agreements, conditional sales, or even national maritime liens (by virtue of Article 6 MLMC 1993). The chosen terminology, which seeks to include in the concept of “clean title” the largest number of rights and charges, gives the system a high degree of flexibility and space to expand its scope to new categories other than those listed in the definition, always provided that those charges have the same distinctive characteristics. Under this premise, it seems that the intention of the Convention is to recognise judicial sales which carry out a total purge of rights, interests, and charges (excluding from its scope of application those that do not).

4.2.2. Which “Charges” Cease to Attach the Ship under the Law of the State of Judicial Sale?

During the life of a ship, many charges/encumbrances may impact on it: maritime liens (crew salaries, supplies, port and pilot fees, debts to ship repairers, etc.); long term contracts over the ship (bareboat or demise charters and time or voyage charterparties); and charges over components of the ship (see Part 3.3). The entire extinction of all these charges and encumbrances and international recognition are the main aims of the judicial sale proposed by the Instrument (on the basis of the total purge of credits) since it will not otherwise be possible to issue a certificate recognising such a judicial sale. So, all sales (by auction or by private treaty) that do not confer an absolute clean title to the purchaser fall out of the scope of the Instrument, although the Convention does not prejudge their validity according to the law of the State of judicial sale; they will simply fall out of the scope of the Convention.

The Instrument uses the terms “mortgages/*hypothèques* and charges” as all-inclusive terms for all the encumbrances that may affect the ship and which must be the target of the purge. It is essential to determine the meaning given by the Convention to both terms:

1. **Mortgages** or *hypothèques* are included in the “clean title” definition. For the judicial sale to have an extinguishing effect on mortgages, these must be:

- (a) affected on the ship;
- (b) registered in the State in whose register of ships or equivalent register the ship is registered.

During the first versions of the text, a third condition was observed on the mortgage. It must be:

- (c) recognised as such by the law applicable in accordance with the private international law rules of the State of judicial sale. However, to limit the term “mortgage” to any mortgage “recognised as such by the law applicable in accordance with the private international law rules of the State of judicial sale”, especially when the term is used to define an obligation directed to States that are not the State of judicial sale, could cause problems of recognition.⁵⁶

Thus, although some support was expressed for retaining this subparagraph, there was a majority for its deletion after the third and fourth revisions of the Instrument.⁵⁷

It must be noted that the Instrument – until the very last moment – only referred to the word “mortgage”, although Article 2(d) defined “mortgage” as “any mortgage or *hypothèque*”.⁵⁸ It was observed that even though the term “mortgage” was defined in the English version of the text to mean “any mortgage or *hypothèque*”, it would still be useful to refer to “*hypothèque*” alongside “mortgage” in the definition of “charge”. The agreed proposal in the 38th session was that the formulation “mortgage or *hypothèque*” should be used throughout the text.⁵⁹

2. The term “**charge**” is defined⁶⁰ as “any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment

⁵⁶ The reason was that “clean title” would thus not be recognised under the Convention if the law of the State of judicial sale did not recognise a mortgage registered abroad. It was observed that, in any event, it was unnecessary for the Convention to address the recognition of foreign mortgages as it was not concerned with the distribution of proceeds or other matters in which the issue of recognition might be consequential.

⁵⁷ A/CN.9/WG.VI/WP.94, para. 7.

⁵⁸ The wording should really reflect a balance between civil law and common law terms, and it would therefore conveniently get back to the reference of both mortgage/*hypothèque* in Article 2 and in the relating footnotes.

⁵⁹ A/CN.9/WG.VI/WP.94, para. 7. Consequential amendments have been made to the definition of “clean title” and to Articles 4(3)(b), 4(7)(b) and 7(1)(a).

⁶⁰ The definition of “charge” remains unchanged from the 2nd revision of the text, and at its 38th session the WG agreed to keep the text unaltered, although some amendments to the definition of charge might need to be considered in view of comments made during the previous sessions in connection with the definition of “clean title”.

or otherwise, and includes a maritime lien, lien, encumbrance,⁶¹ right of use or right of retention” (Article 2.e). In other words, the term is intended to cover all kinds of private rights and security interests that could be enforced *in rem* against the ship. The WG agreed that the term “charge” should be given a broad meaning.⁶² The problem of the examples listed in the different versions of the Draft, as in other international Instruments when listing rights, is whether all of them may become readily translatable into other languages and legal systems.

The Instrument, under the expression “right whatsoever and howsoever arising”, seems to adopt a “functional approach” to purgeable credits: whatsoever (referring to their nature) and howsoever arising (referring to their origin), on the condition that they may be enforced against the ship. This approach chosen by the Convention could respond, as the Cape Town Convention did,⁶³ to a “functional approach” that groups legal solutions by their function (claims which may be asserted against a ship), not by their form (liens, pledges, charges, encumbrances, registered or unregistered, etc.), against the so-called formalist approach, which obviates the function to focus only on the formal configuration of legal figures (it unites and provides equivalent treatment to different legal transactions and allows for the simplification of the existing dual scheme of securities over ships in common law and civil law). This leaves to domestic legislation the task of determining which credits fulfil this function, regardless of the formal configuration of the legal figures that have been granted by national legislation.

The Instrument **requires two conditions** for these charges to be considered within the scope of the clean title effect on the Instrument:

- (a) these charges (in the forms listed below) may be asserted against a ship (the expression refers to the scope of the action – actions *in rem*, not *in personam*);

⁶¹ 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 overlaps between definitions, the WG agreed to proceed on the understanding that the term “charge”, as used in the Instrument, did not include mortgages (A/CN.9/1007, para. 14).

⁶² A/CN.9/1007, para. 13.

⁶³ The UNIDROIT Convention on International Interests in Mobile Equipment (2001), commonly known as the “Cape Town Convention”, along with the Protocols about particular assets encumbered with consensual security interests – airframes, aircraft engines and helicopters, railway rolling stock and space assets – has revealed itself as one of most successful transnational instruments in the international scene of uniform private law (mid-2021, it already counts 83 Contracting States). On this Convention, and its possible application to maritime security interests, see Rodríguez Delgado, J. P., *Is the Preparation of a Future Protocol to the Convention on International Interests in Mobile Equipment Concerning Ships and Maritime Affairs a Good Idea?*, *The Journal of International Maritime Law*, vol. 24 (2018), no. 3, pp. 213-225.

(b) the means of implementing these actions (their enforcement): by arrest, attachment, or otherwise admitted by the law of the State of the judicial sale.

Despite this apparent victory of functionalism, the Convention completes the definition of “charge” by listing a number of specific claims that may fall within the definition (a *numerus apertus* approach). Thus, the following fall within the term “charge”: maritime liens, liens, encumbrances, rights of use and rights of retention. In the 3rd revision of the WG, it was agreed to introduce a definition of the term “registered charge” specifying the relevant record (Article 2.f)⁶⁴, similar to what was envisaged in the original Beijing Project (since the reference to “Registered charges” appears in Articles 4.1 and 4.7 for notification purposes and in Article 7.1 on the cancellation effects).⁶⁵

Article 2(e) includes in the definition of “charges” maritime lien, lien, encumbrance, right of use or right of retention:

1. **Maritime liens** are defined by the Instrument as “any claim recognised as a maritime lien or privilège maritime on a ship under applicable law” (Article 2.g).

The term “maritime lien” considered by the WG, which remains unchanged from the 2nd revision of the Beijing Draft, is used (a) for defining the term “charge” (which in turn is used to define the term “clean title”); and (b) for defining the kind of entities/persons to whom the notice of judicial sale is to be given (maritime lienholders in Article 4).⁶⁶

A maritime lien is a special property right over a ship given to a creditor by statute as security for a debt or claim (while permitting the ship to proceed on her way in order to earn the freight or hire necessary to pay off the aforementioned claim) arising from some service rendered to the ship to facilitate her use

⁶⁴ “Registered charge” means any charge that is registered in the register of ships or equivalent register in which the ship is registered or in any different register in which mortgages or *hypothèques* are registered. The definition was revised during the last session to simplify the reference to registers in the State of registration other than the register of ships.

⁶⁵ “Registered charges” (meaning “any charge entered in the Registry of the ship that is the subject of the judicial sale”) were removed in previous revisions in an effort to minimise the number of definitions. However, broad support was expressed by the WG for reinserting a definition of the term “registered charge” that would specify the relevant Registry. In the Beijing Draft, a registered charge was limited to charges entered in the relevant ship Registry, whereas the corresponding provisions of the MLM 1993 Convention apply to registered charges of the same nature as mortgages and *hypothèques*. In the fourth revision of the Draft, the term was revised to simplify the reference to registries in the State of registration other than the registry of ships

⁶⁶ A third element, referring to the persons that could file a claim challenging the international effects of the sale (Article 10), amongst which were the lienholders, was withdrawn during the 3rd revisions of the text.

in navigation or from an injury caused in navigable waters.⁶⁷ This right gives the lienor's claim priority over most other claims, notably ship mortgages, breaking the principle *par conditio creditorum*.

Based on which applicable law is the claim recognised as a maritime lien? Is it in accordance with the conflict of law rules (in applying private international law rules) of the State of judicial sale or with the law of the State of judicial sale? The original wording limited "maritime liens" to all cases recognised by "the law that is applicable under the rules of private international law of the State of the judicial sale". During the working sessions, 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.⁶⁸ Although some expressed that reference to the rules of private international law serves to clarify that the court should not automatically exclude maritime liens not recognised 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, the majority 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 recognised 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 Instrument, the Secretariat suggested that such a limitation should be retained for the purposes of defining the persons entitled to notice (Article 4),⁶⁹ but not to define "clean title" – and thus the definitions of maritime lien and charge – conferred by a judicial sale. This "dual-use" might be addressed in all instances of the Instrument by defining the term "maritime lien" by reference to those maritime liens that are recognised solely "under applicable law".

For this reason, it has been decided to define, in its current wording, the term "maritime lien" through reference to the maritime privileges recognised by "the applicable law", omitting reference to "rules of private international law" from the definition.

The problem regarding maritime liens is that the court of the State of judicial sale, when applying its national law to conduct the judicial sale of the ship and consequently to purge/cease all maritime liens that are attached to the ship, it must previously have recognised them as such. In this process of recognition of

⁶⁷ Force, R., *Admiralty and Maritime Law*, Federal Judicial Centre, Washington, D.C., 2004.

⁶⁸ A/CN.9/1007, para. 19.

⁶⁹ A/CN.9/WG.VI/WP.90, p. 3.

maritime liens, the court applies, firstly, its domestic law on maritime liens and, secondly, its conflict of law rules (in some jurisdictions, such as in the UK, it will be the *lex fori* – English law⁷⁰ – but in others, such as in Spain, the law of the flag of the ship – usually foreign law).

Maritime liens, privileged or not, have an incidence in three moments of the judicial sale of a ship: (1) as a sufficient claim for the arrest of the ship and its subsequent judicial sale (a situation beyond the scope of the Instrument); (2) as a purgeable credit as a consequence of the judicial sale of the ship in accordance with the law of the State of sale; (3) as a purged credit recognised in the State of the effect of the sale, to recognise the effects of the clean title and, if appropriate, proceed to the refusal of the arrest filed by an unsatisfied – and probably unnotified – maritime creditor.

The problem arises, in this last point, once the ship has been judicially sold to the purchaser, and an application for the arrest of the ship is then filed in a court of a State party other than that of the State of the sale. What happens if a maritime lien is recognised in the State of the judicial sale, but not in the State of the arrest? The court recognises the clean title effects entitled by the certificate. The court of this other contracting State will have no objection to the recognition of the extinguishing effect of the liens over the ship since, as a Contracting State of the Convention, the recognition of the certificate of sale is “automatic”.

2. Right of use over the ship – the term “right of use” present in the definition of “charge” does not appear to be defined by the Instrument, and this omission could lead to interpretation problems.⁷¹ During the 37th session, it was debated if the definition of “charge” should also include, as an effect of the purge, the bareboat leasing contracts (hereafter: bareboat charter)⁷². In the opinion of some delegations and observers, the fact that the term “charge” already includes the term “right of use” suggests that the bareboat charter, as a right of use that it is, should be purged to be included within the effects of the judicial sale. However:

⁷⁰ Tetley, W., Maritime Liens in the Conflict of Laws, in Nafziger, J. A. R.; Symeonides, S. C. (eds.), *Law and Justice in a Multistate World*, Transnational Publishers Inc., New York, 2002, pp. 439-457. See also *The Halcyon Isle* [1980] 2 Lloyd’s Rep. 325.

⁷¹ Some delegations wanted to include *expressis verbis* in the definition of “charge” the “bareboat charter that, according to the law of the judicial sale, survives such sale” or, alternatively, add jointly with the right of use “including bareboat charter that survives the sale”. However, in our opinion, although this is possible, it will not solve the problem.

⁷² Several provisions of the Convention refer to the “bareboat charterer”, “bareboat charter registration” and the “bareboat charter registry”. However, none of those terms is defined in the Convention.

– if the reference to right of use in the current definition of “charge” can be extended to any agreement related to the use or lease of the ship, whether contained in a charterparty or otherwise, then the definition also covers the bareboat or demise agreements or time/voyage charterparties, and those contracts will cease to attach to the ship after the judicial sale. In other words, the purchaser will not be bound by these previously agreed contracts. In this respect, the term “bareboat charter” is included, by way of *numerus apertus*, among those “[...] rights whatsoever and howsoever arising which may be asserted against a ship”, in the definition of “charge”.⁷³

– but, if the intention of the Convention, due to the term being expressly excluded from the list, is to exempt such contracts (so the bareboat agreement – or time/voyage charterparties – must not be considered as a “right of use”), then the registered bareboat would survive to the sale in some countries (such as in Spain, see the section below) and the purchaser will assume the existing bareboat agreement.⁷⁴

4.3. Judicial Sales and the Interests of Bareboat Charterers

The debt for which the arrest and the subsequent judicial sale of a ship may occur, in the case of a bareboat charter, may arise from the shipowner or the charterer. In the shipowner’s case, sale is normally required by the secured mortgagees (generally, financial institutions due to the non-payment of the mortgage) or by the ship repairer if the bareboat agreement imposes this duty on the shipowner. In the charterer’s case, the sale is claimed by unregistered creditors – maritime lienholders – generally as a consequence of unpaid crew salaries, supplies, unpaid port fees, etc.

An issue that the WG has sparsely addressed is whether or not the bareboat charter may be considered a right/claim under the “clean title” effect of

⁷³ Thus, Kragić, P., *About the Concept of Convention...*, para. 17, who views the bareboat rental as a “charge”, considers the bareboat charter a charge. This argument is supported by Clause 25(b) BARECON which provides that in the event of the owners being deprived of their ownership of the ship by compulsory acquisition or requisition for title, the charter is deemed terminated. Although BIMCO introduced two new clauses into the BARECON form dealing with termination and repossession, neither the termination provisions of Clause 28 nor the repossession provisions expressly apply to termination by reason of compulsory acquisition or requisition for title.

⁷⁴ Thus, the contractual relationship could be considered to grant the bareboat charterer the right to use the ship greater than the right of the purchaser after the judicial sale. That right may be effective after the sale to the new owner. Some delegations proposed introducing a clarification in the Explanatory Note explaining that the notion of “right of use” in the definition of “charge” should also include bareboat charter.

the Convention, or if, on the contrary, we are dealing with a “contract” that survives the judicial sale.⁷⁵ Is the purchaser bound, in some jurisdictions, to honour the existing bareboat charter (and therefore cannot take possession of the ship after the sale), or might he invoke the Convention and request from the State where the judicial sale has been conducted a certificate that confirms its “clean title”, including the bareboat, over the ship he has purchased?⁷⁶ As a result, innocent bareboat charterers may find themselves in a vulnerable position if the contract is terminated due to the judicial sale. Therefore, when entering into a bareboat charterparty, charterers may wish to ask for adequate security from the shipowner and/or ensure that adequate insurance policies are in place to cover such risks.⁷⁷

In terms similar to the MLMC 1993,⁷⁸ the Instrument states (Article 7.2) that in cases where the ship is registered in a State Party under a bareboat charter (which is not the Registry of the original flag, due to the temporary change of flag), and, at the request of the purchaser or subsequent purchaser, the competent Registrar or other competent authority of a State Party in which the ship was granted bareboat charter registration (so, we are referring to the second Registry) will delete the ship from the bareboat charter register and issue a certificate of deletion.

However, a new difficulty arises in this case, which is that both Registries, the first or the original Registry and the second Registry (the bareboat Registry), must be in the Contracting States, since otherwise they will not automatically recognise the certificate, in accordance with Article 5, submitted by the new purchaser. In that case, if the bareboat Registry is not in a State Party (which is likely to be the case if Liberia, Panama or other important flags do not ratify the Instrument), it

⁷⁵ It has been supported by the doctrine that any bareboat leasing contracts on the ship must be considered cancelled after the judicial sale (Franco Arias, J., Artículos 480 a 486, in Rueda Martínez, J. A.; Arroyo, I. (eds.), *Comentarios a la Ley 14/2014, de 24 de julio, de Navegación Marítima*, Aranzadi, Cizur Menor, 2016, p. 1444); there are also opposing positions (Berlingieri, F., *The 1993 Convention on Maritime Liens and Mortgages*, *Lloyd's Maritime and Commercial Law Quarterly*, Part 1 (1995), p. 71).

⁷⁶ Kragić, P., *About the Concept of Convention...*, pp. 350-360, para. 17.

⁷⁷ When the judicial sale of a ship takes place, most important, for the interest of the parties, is that the ship is sold on time and at the best possible price, due to the high daily cost (port fees, maintenance, inspections, etc.).

⁷⁸ The 1967 Convention, Article 11.1 provides that “No charter party or contract for the use of the vessel shall be deemed a lien or encumbrance for the purpose of this Article”. The *Travaux Préparatoires* of the MLMC 1993 makes a similar statement in Article 12 intended to clarify that the rule whereby all “charges” after a judicial sale cease to attach to the ship does not imply that an existing bareboat agreement was not binding on the purchaser. The CMI suggested that this sentence should be deleted.

will be necessary to enforce the decision across borders by means of an exequatur or other international judicial cooperation, which will undermine part of the effect of the Convention and take us back to square one.

This provision is based on the fact that the bareboat charter is terminated with the sale. However, if in the State of the sale such a proceeding does not extinguish the contractual relationship between the shipowner and the charterer, the bareboat may continue to exist, in which case the sale will not be under the Convention's effects.

During the WG discussions, it was noted that in some jurisdictions (e.g. Spain, Japan and Germany), the rights of bareboat charterers survive a judicial sale;⁷⁹ however, even in these jurisdictions most sales would result in the conferment of clean title⁸⁰ (obviously, this is only applicable to these kinds of jurisdictions). In other legal systems, registered bareboat charters may be considered as a "right" ("interest" or "right of use"), which is obviously cleared with the judicial process, awarding the purchaser a ship free of any charge.

As far as Spanish law is concerned, "in the event of disposal of the ship [by virtue of a legal transaction in which are included judicial sales], the purchaser shall be subrogated in the existing and registered bareboat agreement, as long as this is registered in the Registry of Moveable Assets, or its existence is effectively known at the moment of the purchase" (Article 196 SSA). Consequently, the bareboat charter would not be extinguished with the sale despite the contractual clauses that may exist. The bareboat agreement is not to be considered as a claim or "right in rem" extinguished by the judicial sale (although this statement is also debated by some authors).

In Spain, therefore, bareboat agreements do not necessarily terminate with the judicial sale, so a sale carried out in this country, or in similar jurisdictions, may present some particularities with the text of the Convention.

Judicial sale of a Spanish flag ship conducted abroad – if the judicial sale is granted abroad, the court of the sale, if, under its own legislation the "bareboat charter" is considered a "right of use" purgeable with the sale, issues a certificate intending to prove the extinction of the effects in Spain (because under the

⁷⁹ A/CN.9/1007, para. 44.

⁸⁰ Article 11 of the 1967 Convention on Maritime Liens and Ship Mortgages established, in terms similar to those already mentioned, that "No charter party or contract for the use of the vessel shall be deemed a lien or encumbrance for the purpose of this Article". In the *Travaux Préparatoires* of the MLMC 1993, a similar statement was made in Article 12 intending to clarify that the rule whereby all "charges" after a judicial sale cease to attach to the ship did not imply that an existing bareboat agreement was not binding on the purchaser. The CMI suggested that this sentence should be deleted.

legislation of the State of the sale, the bareboat charter is considered a “charge”). When the purchaser intends to cancel the temporary record in the Spanish Registry, upon presentation of the certificate, the Registrar notifies the existence of a registered bareboat contract, and the possible subrogation in it. However, and since the Convention would override any national conflicting provisions, the new owner will not be bound by the existing bareboat charter (despite the aforementioned Article 196 SSA).

Judicial sale of a foreign flag ship in Spain – if the judicial sale is conducted in Spain, the complete extinction of the credits depend on the understanding of the Spanish courts of the “bareboat charter”.

(A) If this is considered a “right of use” and it is included within the term “charge” of the Convention, given the content of Article 196 SSA – and being in Spanish legislation the law applicable to the sale – it does not end with the judicial sale, as we have explained. For this reason, the court does not issue the certificate mentioned in Article 5, and the effects of this sale are not capable of being expanded internationally. This does not prevent, however, the validity of the judicial sale and the valid transfer of property over the ship in favour of the purchaser.⁸¹

(B) If the bareboat contract is not considered a “charge” according to the Convention, then its survival beyond the sale is not important. The court may issue a clean title certificate of the sale. With the certificate, the purchaser could request the cancellation in the Registry of the temporary flag state of the ship. The Registry of this Contracting State, upon presentation of the certificate, will proceed to cancel the previous registration. This judicial sale falls under the scope of the Convention.

It seems clear that (1) the qualification of the bareboat charter as a “right of use” included in the term “charge” is the central issue in solving the problem we have referred to and (2) that the said consideration depends on the laws of the State of judicial sale.

The inclusion of the term “bareboat charter” in the definition of “charge” will probably solve the problem in the application of the Convention. However, in Spain, and under these circumstances, certain sales, to the extent that the

⁸¹ In these kinds of situations, Spain (and other jurisdictions, like Germany or Japan) will not provide a purchaser-friendly scenario in which a ship judicial sale is carried out. If the bareboat charter is considered a “charge” for the effects of the Convention, under the term “right of use”, and the purchaser wishes to assume this existing contract to continue to receive income from the chartered ship, this judicial sale would not be subject to the scope of the Convention.

bareboat charter survives, would be outside the scope of application of the Convention⁸². In any case, this could induce some States not to ratify the Convention since, if the text mentions that bareboat charter must be considered a purgeable “charge” under the effect of the Convention, some jurisdictions will be forced to amend their internal legislation and adapt their rules to the uniform text in order to maintain the application of the Convention when there is an existing bareboat at the time of sale. It is very possible that, after such a discussion, the laws of the respective States that recognise the well-established Roman principle “*emptio non tollit locatum*” would want to modify their laws and explicitly rule that a judicial sale extinguishes all bareboat charters over the ships. Nevertheless, there will be an imbalance between the internal legislation – in which the bareboat survives the sale – and the international Convention that will only be applicable if the bareboat contract is not mandatory for the new purchaser.

Despite all the above, some authors have mentioned that these types of situations are very uncommon in practice,⁸³ because if it is the owner who bears the debt subject to the judicial sale, it will be rare for the sale of the ship to be carried out, because sometimes the bareboat charterer pays the rent directly to the bank instead of to the owner (as a loan guarantee), which makes the owner’s debts to mortgage creditors unusual.⁸⁴

⁸² In March 2022, the Government approved a Draft Bill to amend some provisions of the Spanish Shipping Act. One of this modification is the termination of bareboat charters in the case of the judicial sale of the ship (Article 196). This amendment already makes it clear that the Spanish legislation opts for a clean title effect (absolute purge of claims) of the judicial sale of a ship (including bareboat charters), which places Spain in a suitable position to adopt the Convention. If this provision is adopted, Spain would be, from that moment, amongst those States in which judicial sale not only purges all charges and encumbrances on the ship but also extinguishes bareboat contracts, thereby becoming a purchaser-friendly scenario in which to proceed to the judicial sale of ships.

⁸³ A question that remains is the possible primacy of the contractual clauses that may exist in it. Thus, for example, clause 25 BARECON establishes that in the event of the owners being deprived of their ownership of the ship by compulsory acquisition or requisition for title (it would be necessary to see if the judicial sale is included here), the charter is deemed terminated. Although BIMCO has introduced two new clauses into the BARECON form dealing with termination and repossession, neither the termination provisions of clause 28 nor the repossession provisions expressly apply to termination by reason of compulsory acquisition. Does the will of the parties then prevail over the text of Article 196 SMNA? Given the non-mandatory nature of the Spanish rules about bareboat charter, the answer should be affirmative here.

⁸⁴ However, this practical point of view forgets the claims against the owner of the ship ruled by the Pollution Conventions (CLC, SNP, BUNKERS), placing the liability for damage on the owner of the ship. Additionally, the registered owner of a ship will be required to hold insurance for the ship for those situations. So, the victims of the pollution damage (the State or damaged people) will have an action against the owner of the ship.

4.4. Charges and Mortgages “Assumed by the Purchaser”: Reasons for Exclusion

Many jurisdictions consider the possibility that in the judicial sale of a ship the purchaser may subrogate, with the consent of the creditors, in the pre-existing charges or mortgages on the ship.⁸⁵ In other words, a judicial sale will extinguish all mortgages, liens, charges, or encumbrances attached to the ship before the sale, except those that the purchaser agrees to assume. Considering this possibility, the Beijing Draft (assuming the wording of Article 12 MLMC 1993) initially excepted, on the clean title effect, charges and mortgages that were “assumed by the purchaser” from the clean title acquired.

There was an intensive debate during UNCITRAL’s first sessions to find a solution for the challenge provided by some jurisdictions in which judicial sales allowing the purchaser to assume mortgages or charges prior to the sale were conducted, which could lead to an absolute free and unencumbered title not being passed on to the purchaser, in which case certain debts would survive the judicial sale. As a result, it was agreed that the Convention would only apply to those judicial sales which conveyed a clean title and would not apply to those sales which, for whatever reason that existed under the law of a particular State Party, did not convey a clean title on the purchaser.

In addition, this subrogation in the previous mortgages would only benefit the mortgagee, generally international financial institutions, who would agree to finance the successful bidder instead of being paid back with the proceeds of the sale. The mortgagee sees his credit satisfied and benefits from the subrogation (whose priority is ranked after the rest of the maritime liens). In contrast, lienholders will see how their credits are more difficult to collect due to the price to be paid by the successful bidder being reduced by the capital amount covered by the security.

The problem arising from this exclusion on the scope of the Convention is that the court does not know until the last moment of the judicial process whether the purchaser will assume the previous mortgages/charges, while already at that procedural moment the Convention has to be applied (all related to the notice to the interested persons and the International Repository)⁸⁶. So, the court

⁸⁵ Among others, Spain, Croatia, Nigeria, Estonia, Sweden, Turkey, etc. See Cooper, K. (ed.), *Getting the Deal Through – Shipping 2019*, Law Business Research Ltd., London, 2018.

⁸⁶ Article 11 establishes the Repository mechanism, which is operationalised by the transmission requirements in Articles 4.5(b) and 5.2. In the fourth revision, the WG reaffirmed that the role of the Repository under the Convention would be limited to publishing information that it received, and that the convention would impose no duty on the Repository to ensure

could be faced with the paradox of applying the notice procedure of Article 4, to later excluding its application because the purchaser has subrogated in the previous encumbrances, and, therefore, the sale will be excluded from the scope of application of the Convention (and the issuing Authority will not issue a “clean title certificate”). However, if the court follows the notice requirements and if subsequently the sale is produced without the purchaser’s assumption of the previous charges, the sale will be placed within the scope of the Convention.

However, it may happen that the court does not assume the notice requirements of the Convention because at that stage it is not known whether or not the sale is within its scope. If the sale finally confers clean title because the purchaser does not assume the previous claims, the Convention could consider a sort of “official” recognition of that domestic notification process (if, of course, it meets most of the requirements of Article 4 – although there will be some, such as publicity to the International Repository, that will never be satisfied).

The CMI has repeatedly proposed,⁸⁷ to avoid misunderstandings, to clarify in a future Explanatory Note that the Convention applies to judicial sales concluded in States where the court confers clean title. This would also clarify that the Convention should allow States to ratify the Convention even if, under their law, certain situations could lead to a sale where some charges or encumbrances would survive, with the consequence that such sales would not be “Convention Sales” and would not be sold with the benefit of a certificate.

5. CONCLUDING REMARKS

Judicial sales of ships and distribution of the proceeds to creditors represent the final chapter of any successful *in rem* admiralty proceedings against an arrested ship. In theory, this process should be straightforward: the ship is sold by auction to a third party, the proceeds of the sale are paid to the creditor (the plaintiff in the proceeding) in the amount of the judgment, and any surplus is paid back to the defendant. However, judicial sales are complicated by the existence of multiple creditors against a ship, including mortgages and maritime liens.

A real risk exists when the judicial sale has not been appropriately publicised, and unnotified and unsatisfied creditors may attempt to re-arrest the ship,

the accuracy or completeness of published information that could give rise to liability on its part for failure to do so (A/CN.9/1089, para. 91). The IMO secretariat will make a further provision disclaiming responsibility with respect to published information.

⁸⁷ CMI, Meeting Notes for the 38th Session of UNCITRAL Working Group VI Judicial Sales.

resulting in potential uncertainty among the possible purchasers to present a proper offer in sale proceedings. The total value of claims often exceeds the value of the ship, and judicial sales can become intricate disputes over priorities.

Finally, new problems may arise when such judicial sale is intended to be recognised in another State other than where the sale was conducted, firstly for registration and secondly, in the case of the arrest of the ship for credits prior to the sale, for its immediate release.

To try to alleviate this possible deterrent effect of the aforementioned problems, judicial sale has to extinguish all existing claims against the ship and grant a clean title – “free of any charges and encumbrances” – to the purchaser of the ship in a judicial sale. Only then will it be possible to secure the best possible price for the ship, thereby procuring the largest possible fund for the benefit of all parties. The clean title effect over the sale (ensuring that the purchaser may deregister the ship from its old flag and reregistered it under a new one without any problems, and that the purchaser sails worldwide without any worry of re-arrest) will achieve a greater number of bidders and, therefore, a higher price for the ship. However, some relevant aspects exist in different jurisdictions which may mean that these “clean” judicial sales fall outside the scope of the Convention, especially in those jurisdictions admitting judicial sales in which the charges and mortgages may be assumed by the purchaser, or in those in which the bareboat charters are not extinguished with the judicial sale, and not forgetting the legal problems in judicial sales over ships with components affected by rights from third parties.

Finally, this title must be capable of being recognised and enforced worldwide to allow the transfer of registered ownership and to avoid subsequent and unjustified re-arrest of the ship. The certificate by the court (or other public authority designated by the State of judicial sale) at the request of the purchaser makes this title capable of being recognised and enforced throughout, at least, all the Contracting States (at a minimum, both in the flag State of the ship and in the States of the re-arrest of the ship for extinguished claims).

Consideration by the WG of a notification step and an international and online Repository in Article 11 associated with the IMO Global Integrated Shipping Information System (GISIS) to which notices, and certificates issued under Articles 4 and 5 must be sent, may satisfactorily solve this old claim among unnotified lienholders.

The purpose of this Instrument is not to recognise a judgment of judicial sale of a ship in other States (international instruments already exist for this commitment), but rather the “international effects of a judicial sale”, as long as that sale produces

an absolute clean title on the ship to the purchaser. In other words, this Convention is a “mirror” in which domestic laws must be reflected, a mirror to which the judicial sales carried out in a Contracting State – conducted in accordance with its national legislation – must look. If there is an absolute coincidence in the granted clean title, then that judicial sale will be able to expand its international effects on the purchaser in the rest of the States Parties. Nevertheless, if the judicial sale of the ship conducted under the law of the State of the sale, for whatever reasons, does not grant a total purge of the credits, as intended by the Convention, then that sale, despite being totally valid and effective, will not be able to expand its international effects in the rest of the Contracting States (except for bilateral/regional recognition agreements).

The future Convention must strike a fair balance between the rights of the existing creditors and the rights of the purchaser in the judicial sale.⁸⁸ The adoption of uniform rules to govern judicial sales will: promote international harmonisation and unification of the law in this area; reduce legal obstacles, contributing to economic and legal certainty; increase the prices of the sales; and significantly safeguard the interests of *bona fide* purchasers (adequate protection is also afforded to all the affected parties including maritime lienholders).

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Sažetak:

**PODRUČJE PRIMJENE UNCITRAL-ova INSTRUMENTA O
SUDSKOJ PRODAJI BRODOVA**

Ovaj se rad bavi Nacrtom konvencije o sudskoj prodaji brodova koji je trenutačno u izradi u sklopu UNCITRAL-a, a uglavnom je usmjeren na uvjete sudske prodaje broda i pravne učinke, koje takva sudska prodaja provedena u jednoj državi ugovornici proizvodi u drugoj državi ugovornici (uključujući definiciju »čistog vlasništva«, pojam broda i pojedine problematične aspekte prodaje). U radu se pozornost usmjerava na pozadinu UNCITRAL-ova Nacrta konvencije o sudskoj prodaji brodova i na uvjete koje sudska prodaja u jednoj zemlji mora ispuniti kako bi proizvela međunarodni pravni učinak prema toj konvenciji (pitanje opsega primjene). Posebna se pažnja posvećuje jednom od najvažnijih uvjeta, a to je izdavanje Svjedodžbe o sudskoj prodaji (stjecanje čistog vlasništva na brodu).

Ključne riječi: *sudska prodaja brodova; UNCITRAL; čisto vlasništvo; teret; kupac; hipoteka; brod; svjedodžba o prodaji.*