DRAFT CONVENTION ON THE JUDICIAL SALE OF SHIPS: A CHANCE FOR THE REVOLUTIONARY USE OF THE INTERNET FOR NOTIFICATION AND OTHER ISSUES

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The article gives an overview of the current draft of the Convention on the judicial sale of ships, which since the beginning of drafting has struggled to reach a compromise between, on the one hand, protection of the purchaser's interest forundisturbed ownership of the ship and, on the other hand, protection of the creditors' interests through a fair judicial sale process respecting basic legal principles. The matters under scrutiny are notification and the status of public and legal remedies available to the aggrieved parties. The article deals with proposals which, had they been accepted, might have achieved a more suitable balance of interests.

Keywords: *Convention on judicial sale of ships; notification; claims by public authorities; legal remedies; balance of interests.*

ABBREVIATIONS

"Certificate" – Certificate of Judicial Sale

"Convention" – Draft Convention on the Judicial Sale of Ships

"State of Sale" – State of Judicial Sale

"State of Recognition" – State in Which the Effects of Sale are Sought

"State Party " – State Party to the Convention

"WG" – United Nations Commission on International Trade Law Working Group VI (Judicial Sale of Ships)

"CMI WG" – CMI Working Group V1 at UNCITRAL

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1. INTRODUCTION

1.1. The global economy connects people and businesses all over the world, creates a myriad of interstate transactions and moves goods round the planet across countries' borders. All interactions and exchanges emerging from the activities of global trade have to be governed by some rules. Disputes – which inevitably occur – have to be resolved by authorised bodies, including courts, and their decisions/judgments have to be enforced.

1.2. On the other hand, the globally connected world is divided among sovereign states that have supreme authority within their respective territories. In order to establish an internationally functional legal regime, the courts of nation states in dealing with international transactions must apply foreign laws, recognise foreign judgments and respect internationally agreed rules (i.e. conventions, treaties, protocols, etc.).

1.3. Throughout history, maritime law has developed unique concepts which reflect the international nature of shipping. Ships sail the open seas and in the territorial waters and ports of different countries, and come under the jurisdiction of different states. Financing and operating a ship produces a number of obligations, created in different countries by contracts and in tort. Claimants might be financiers and suppliers of goods and services or third parties that have suffered damage from shipping accidents. Liability for such claims is assumed by various persons on the ship's side: the owner; the operator; the manager; the bareboat, time or voyage charterer; the master; the agent, and others (in some circumstances the mortgagee, the ship repairer or the subcontractor), which could complicate liability issues.

1.4. In order to secure claims related to the debts made in relation to a ship, maritime law recognises action *in rem*, which allows creditors to arrest the ship, have her sold by a court and satisfy their claims from the proceeds of sale. For a successful sale, there must be a willing buyer to pay a price against the expectation of obtaining clean title to the ship. This means a ship cleared of any claims or encumbrances that could in the future hinder her smooth trading. Such a warranty should not be restricted to the State of Sale, but should be extended to other countries where the ship might call.

1.5. In a judicial sale, a balance has to be struck between the interests of the shipowner, the creditors and the purchaser. All must have the chance to protect their respective interests in a fair process based on internationally recognised legal standards. The effects of the sale must be internationally recognised, because the ship constantly moves through different jurisdictions. Such recognition can be done either: (i) through international comity; (ii) under a bilateral interstate agreement; or (iii) under an international convention.

1.6. At the CMI's Executive Council meeting in Dubrovnik 2007, which considered potential future projects, it was suggested that a preliminary study on the judicial sales of ships should be carried out. The project developed under the following time line:[1]

- In 2008, at the CMI Athens Conference, it was accepted that a working group on the judicial sale of ships (IWG) would be established.
- In 2009, the IWG commenced preparing a questionnaire for National Maritime Law Associations (NMLAs).
- In May 2010, the questionnaire was circulated to NMLAs.
- In October 2010, replies received from 23 NMLAs were discussed at the CMI Colloquium in Buenos Aires.
- In August 2011, IWG circulated to NMLAs the first draft of the Instrument on Recognition of Foreign Judicial Sales of Ships (First Draft).
- In September 2011, the First Draft was amended at the CMI International Sub-Committee (ISC) meeting in Oslo.
- In May 2012, the Second Draft with IWG comments was circulated to NMLAs.
- In October 2012, at the CMI Conference in Beijing, the Second Draft was amended, which become known as the Beijing Draft.
- In September 2013, at the ISC meeting in Dublin, it was agreed that IWG would prepare a final report, with the draft convention and commentary.
- In June 2014, at the CMI Conference in Hamburg, the Beijing Draft was amended, and was adopted as the Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (Final Draft).
- In July 2017, UNCITRAL at the 50th session supported CMI's proposal (previously rejected by IMO) to include the judicial sale of ships in its programme, but required additional information.
- In February 2018, CMI held a colloquium in Malta, where the idea of bringing forward an international instrument on the judicial sale of ships received support from a large audience consisting of participants representing all segments of the shipping industry and professions involved in maritime law issues.

[1] For more information, see 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. 11-35.

- In June/July 2018, at its 51st session held in New York, UNCITRAL decided to add the judicial sale of ships to its work programme. Working Group IV was assigned the task of preparing a draft instrument.
- In May 2019, the WG commenced in New York its work on the draft instrument.

2. ARTICLES CONCERNING NOTIFICATION IN VARIOUS DRAFTS

2.1. The Beijing Draft

2.1.1. In the Beijing Draft,[2] the following features of interest for the subject of notification (marked in italics below) were:

Article 3. Notice of Judicial Sale

"1. Prior to a Judicial Sale, the following notices, where applicable, shall be given, in accordance with the law of the State of Judicial Sale, either by the Competent Authority in the State of Judicial Sale or by one or more parties to the proceedings resulting in such Judicial Sale, as the case may be, to:

(a) The Registrar of the Ship's register;

(b) All holders of any registered Mortgage/Hypothèque or Registered Charge;

(c) All holders of any Maritime Lien; and

(d) The Owner of the Ship.

3. The notice required by paragraphs 1 and 2 of this article shall be given at least 30 Days prior to the Judicial Sale and shall contain, as a minimum, the following information:

(a) The name of the Ship;

(b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than 7 Days prior to the Judicial Sale; and

(c) Such particulars... as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

[2] https://undocs.org/en/A/CN.9/WG.VI/WP.82.

4. The notice specified in paragraph 3 of this article shall be in writing, and given in such a way not to frustrate or significantly delay the proceedings concerning the Judicial Sale:

(a) Either by sending it by registered mail or by courier or by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2; and

(b) By press announcement published in the State of Judicial Sale and in other publications published or circulated elsewhere if required by the law of the State of Judicial Sale.

5. Nothing in this article shall prevent a State Party from complying with any other international convention or instrument to which it is a party and to which it consented to be bound before the date of entry into force of the present Convention.

6. In determining the identity or address of any Person to whom notice is required to be given other parties and the Competent Authority may rely exclusively on information set forth in the register in the State of Registration and if applicable in the State of Bareboat Registration or as may be available pursuant to article 3(1)(c).

7. Notice may be given under this article by any method agreed to by a Person to whom notice is required to be given."

Article 5. Issuance of a Certificate of Judicial Sale

"1. When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State of Judicial Sale and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser..."

Article 7. Recognition of Judicial Sale

"3. Where a Ship is sold by way of Judicial Sale in a State, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State of Judicial Sale and no Court other than a competent Court of the State of Judicial Sale shall have jurisdiction to entertain any action challenging the Judicial Sale."

Article 8. Circumstances in which Recognition may be suspended or refused

"Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

(c) Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be manifestly contrary to the public policy of that State Party."

2.1.2. In sum, according to the Beijing Draft, notices were to be given: (i) "in accordance with the law of the State of Judicial Sale"; (ii) to listed notifying parties; (iii) at least 30 Days prior to the Judicial Sale; (iv) containing "as a minimum" information listed by the draft itself; (v) with "additional notice of the actual time and place of the Judicial Sale when known, but, in any event, not less than 7 Days prior to the Judicial Sale"; (vi) "in writing"; (vii) by an appropriate means [registered mail or by courier or by any electronic or some other means]; (viii) by press announcement published in the State of Sale and in other publications published or circulated elsewhere if required by the law of the State of Sale; (ix) by complying with any other international convention or instrument binding the State of Sale; (x) by any method agreed to by a notifying party.

2.1.3. Any claim, complaint or objection with respect to the notification process was for the exclusive jurisdiction of the courts of the State of Sale.

2.1.4. What happens if any of the notification requirements are not met? In such a case, according to Art. 5 (cited above under 2.1.1.), the State of Sale would not be authorised to issue a Certificate. However, if, notwithstanding the failure to meet the notification requirements, the State of Sale issues a Certificate, the State of Recognition may refuse to recognise the judicial sale, by refusing to give effects to the (issued) Certificate, on the grounds that it will be "manifestly contrary to... [its]... public policy".

2.2. First Revision of the Beijing Draft

2.2.1. Fraud [committed by the purchaser] was added to the grounds for declining the effects of judicial sale, together with a list of qualified applicants and a repository of notices and certificates introduced. In the First Revision of the Beijing Draft[3] (First Revision), the requirement for "additional notice of the actual time and place of the Judicial Sale" was left out,

Article 3. Notice of judicial sale

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

4. The notice shall also be:

(a) …

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

Article 10. Circumstances in which judicial sale has no effect

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

[3] https://undocs.org/en/A/CN.9/WG.VI/WP.84.

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

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

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

(c) The sale was procured by fraud [committed by the purchaser]."

Article 12. Repository

"1. The repository of notices given under article 3 and certificates issued under article 5 shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

2. Upon receipt of a notice or certificate under this Convention, the repository shall promptly make it available to the public."

2.2.2. The Note by the Secretariat explained:

"*Publication of notices and certificates in a centralised repository*: The Working Group has agreed that a centralised online repository could be used to publish notices and certificates of judicial sales... At the same time, some reservation has been expressed as to the potential cost of such a mechanism... Article 12 of the first revision, which is operationalized by cross-references in articles 3(4)(b) and 5(3), is drafted on the basis of article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (which establishes a Transparency Registry that is maintained by the Secretariat). International registries or similar notification schemes are established under other international instruments."[4]

References to the conditions for the issuance of the Certificate were put in square brackets for further consideration.

Article 5. Certificate of judicial sale

"1. When a ship is sold by way of judicial sale [and the conditions required by the law of the State of judicial sale and by this Convention... have been met], the authority designated by the State of judicial sale... shall... issue a certificate of judicial sale... recording that the ship has been sold to the purchaser in accordance with the law of the State of judicial sale... and the notice requirements in article 3 free of any mortgage or charge..."

[4] Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft, Note by the Secretariat, 10 September 2019, A/CN.9/WG.VI/WP.84, p. 5.

2.3. Second Revision of the Beijing Draft

2.3.1. The Second Revision of the Beijing Draft[5] (Second Revision) replaced the words "given to" in Art. 3 with the word "transmitted". In Art. 5(1) reference to "the conditions" left by the First Revision in square brackets was modified and made more specific by replacing the words "conditions required... by this Convention", with "the notice requirements in article 4":

Article 4. Notice of judicial sale

"3. The notice shall also be:

…

(b) Transmitted to the repository referred to in article 12 for publication."

Article 5. Certificate of judicial sale

"1. When a ship is sold by way of judicial sale that is conducted in accordance with the law of the State of judicial sale and the notice requirements in article 4, the public authority designated by the State of judicial sale shall... issue a certificate of judicial sale... recording that:

(a) The ship was sold in accordance with the law of the State of judicial sale and the notice requirements in article 4."

2.3.2. Art. 6 made the international effect of a judicial sale conditional on "the notice requirements in article 4" being met. The relevant text was put in square brackets:

Article 6. International effects of a judicial sale

"1. A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser [provided that:

…

(b) The judicial sale was conducted in accordance with the law of the State of judicial sale and the notice requirements in article 4.]"

2.4. Third Revision of the Beijing Draft

2.4.1. In the Third Revision of the Beijing Draft[6] (Third Revision) reference to the law of the State of Sale in Art. 6 was deleted, but the condition of meeting "the notice requirements" remained (as the square brackets were removed):

[5] https://undocs.org/en/A/CN.9/WG.VI/WP.87.

[6] https://undocs.org/en/A/CN.9/WG.VI/WP.90.

Article 6. International effects of a judicial sale

"A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser, provided that the judicial sale was conducted in accordance with the notice requirements in article 4."

2.4.2. In the opening paragraph of Art. 5, reference to the law of the State of Sale and the notice requirements under Art. 4, as preconditions for the issuance of the Certificate, were removed. The obligation to "record" in the Certificate that the ship was sold "in accordance with the notice requirements in article 4" remained.

Article 5. Certificate of judicial sale

"1. At the request of the purchaser [and upon production of any documents necessary to establish the completion of the sale][and upon expiry of any time limit for seeking ordinary review of the conduct of the 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:

(a) The ship was sold in accordance with the law of the State of judicial sale and the notice requirements in article 4."

The article dealing with rejection of recognition of foreign judicial sales was substantially simplified. The only ground for denying recognition boiled down to violation of public policy, and limitation of the applicants was removed. Who is qualified to seek denial of recognition (i.e. giving effect to a Certificate) becomes wholly a matter of the *lex fori*.

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

"A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be [manifestly][7] contrary to the public policy of that other State Party."

[7] At the 40th session of Working Group VI (Judicial Sale of Ships), New York, 7-11 February 2022, the square brackets were removed, copying some other conventions. Arguably, in judging a particular, concrete case, that adverb would not have much influence on the decision whether an act is or is not contrary to public policy. It will always be for a court to decide what amounts to "manifestly". In any case, *de minimis non curat praetor.* A judge would look at the substance, i.e. whether the contradiction has serious consequences for the parties or legal principles as a whole. An act is or is not against a public order, no matter whether manifestly or obscurely.

2.5. Fourth Revision of the Beijing Draft

2.5.1. In the Fourth Revision of the Beijing Draft[8] (Fourth Revision), reference to the law of the State of Sale was moved to paragraph 1bis:

Article 4. Procedure and notice of judicial sale

"[1bis. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, including as regards notification...]:

1. Notwithstanding paragraph 1bis, if a certificate is to be issued in accordance with article 5, prior to the judicial sale of a ship, a notice of the sale shall be given to:

…

2. The notice shall be given in accordance with the law of the State of judicial sale, and shall contain, as a minimum, the information mentioned in the model contained in Appendix I to this Convention.

3. The notice shall also be:

(a) Published by press announcement in the State of judicial sale [and, if required by the law of the State of judicial sale, in other publications published or circulated elsewhere]; and

(b) Transmitted to the repository referred to in article 11 for publication."

Article 5. Certificate of judicial sale

"1. 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:

(a) The ship was sold in accordance with the law of the State of judicial sale and the notice requirements in article 4."

Article 9. Jurisdiction to avoid and suspend judicial sale

"[5. The effects of avoidance of a judicial sale shall be determined by applicable law]."

2.6. Fifth Revision of the Beijing Draft

2.6.1. The Fifth Revision of the Beijing Draft[9] (Fifth Revision) provides that the judicial sale shall be conducted in accordance with the law of the State of Sale, but in a separate paragraph imposes that notwithstanding the governing

[8] https://undocs.org/en/A/CN.9/WG.VI/WP.92.

[9] https://uncitral.un.org/sites/uncitral.un.org/files/wp.94_-_advance_copy.pdf.

law requirements, a notice of sale shall be given according to the requirements of the Convention. Among them is the obligation to publish the announcement of sale in the press or other publication available in the State of Sale, but now regardless of whether or not such a requirement exists in the law of the State of Sale. Notices should be given or translated into the working language of the repository (i.e. English). In Art. 5(1)(a) specific reference to Art. 4 was replaced by the words "the requirements of this Convention".

Article 4. Notice of judicial sale

"1. The judicial sale shall be conducted in accordance with the law of the State of judicial sale, which also determines the time of the sale for the purposes of this Convention.

2. Notwithstanding paragraph 1, for the purposes of article 5, a notice of judicial sale shall be given prior to the judicial sale of a ship in accordance with the requirements of paragraphs 3 to 7.

5. The notice of judicial sale shall also be:

(a) Published by announcement in the press or other publication available in the State of judicial sale; and

[6. If the notice of judicial sale is not in a working language of the repository, it shall be accompanied by a translation into such a working language of the information mentioned in Appendix I.]"

Article 5. Certificate of judicial sale

"1. Upon completion of a judicial sale that conferred clean title to the ship under the law of the State of judicial sale and was conducted in accordance with the requirements of that law and the requirements of this Convention, the competent authority of the State of judicial sale shall... issue a certificate of judicial sale... substantially in the form of the model contained in Appendix II which contains:

(a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of this Convention."

2.7. Takeaway Points

2.7.1. Even though the Convention provides that notification is governed by the law of the State of Sale, it adds some requirements of its own. The requirements of the Fifth Revision concern (i) the notifying parties; (ii) the minimum content of the notice; (iii) publication by the press; and (iv) transmission to the Repository. The courts of the State of Sale have exclusive jurisdiction to hear claims for:

2.7.2. avoidance of the sale, and other State Parties have the ultimate defence of rejecting a judicial sale that is contrary to their respective public policy.

2.7.3. The questions are: (i) whether a failure to publish the notice of a judicial sale through the Repository should be considered a manifest violation of public policy; (ii) whether this would be the case only if the claimant previously unsuccessfully tried to obtain relief from the courts of the State of Sale; (iii) whether possible different approaches of national courts in treating the failure of notification through the Repository is a matter of concern.

3. THE REPOSITORY

3.1. The idea of the Repository was raised by the WG in May 2019, but the concept of the technical organisation of the Repository was not developed and presented to the WG until October 2021. In the meantime, discussion about the implications of notification through the Repository were put on hold. IMO's report of October 2021 clarified that the Repository's website would be added to the IMO's Global Integrated Shipping Information System (GISIS).

There will be no additional costs for setting up, maintaining and operating the website. The member states will directly manage the content of the website, which implies their responsibility for publishing notices through GISIS, at the same time relieving IMO of any liability with respect to publication.

3.2. The Note by the Secretariat on the Fifth Revision states:

"31. At its thirty-eighth session, the Working Group reaffirmed that the role of the Repository under the draft convention would be limited to publishing information that it received and that the Convention would impose no duty on the repository to ensure the accuracy or completeness of published information that was capable of giving rise to liability on its part for failure to do so".[10]

It is further explained that in case of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency), which establish a "repository" of information published under the rules, and, in the case of the United Nations Convention on the Law of the Sea (1982) (both looked at as precedents for the introduction of the Repository in the First Revision), disclaimers of responsibility of the Secretariat with respect to published information are posted on the websites where the information is published. The Note recalls that:

[10] Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft, Note by the Secretariat, 30 November 2021; A/CN.9/WG.VI/WP.94, https://uncitral.un.org/sites/uncitral.un.org/files/wp.94_-_advance_copy.pdf.

A similar disclaimer is published by the IMO secretariat on the GISIS website, to which the attention of the delegates was drawn.

3.3. If IMO only provides a technical facility for digital notification, and the authorities designated in each country by the respective State Party directly manage the content of the website (integrated in the GISIS) dedicated to the judicial sale of ships, then the member states could be held responsible for notification on the website and bear the consequences of failure to post notices through the Repository as requested by the Convention.

3.4. Therefore, the authorities in charge of notification in the State Party should: (i) upload notices on the website; and (ii) check whether those notices have been properly displayed on the Internet.

4. NOTIFICATION AS A CONDITION, ITS CONTROL AND REMEDIES

4.1. What happens if a breach of notification rules set up by the governing law or the Convention occurs?

4.2. A claim or complaint for a breach of the rules governing notification must be submitted to the courts of the State of Sale. They have "exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale".[11] The courts of other State Parties shall decline jurisdiction in respect of any claim or application to avoid a judicial sale of a ship conducted in another State Party or to suspend its effects.[12]

4.3. What happens if such a claim is rejected by the courts of the State of Sale, and a Certificate is issued to the purchaser?

4.4. In the above scenario, the claimant's option is to apply to the courts in the State Party in which the purchaser attempts to use the Certificate in order to achieve certain legal effects – to deregister/register the ship or avoid her arrest.

4.5. The claimant's argument would be that giving effect to the Certificate "would be [manifestly] contrary to the public policy of that" State of Recognition, because of the violation of the governing law and/or requirements of the Convention. The claimant would argue, *inter alia*, that the Certificate was issued

[11] Art. 9(1) (Fifth Revision).

[12] Art. 9(2) (Fifth Revision).

contrary to Art. 5 of the Convention, which allows the issuance of the Certificate **provided only** that the judicial sale was conducted in accordance with the requirements of the law of the State of Sale and the Convention respectively. As the said condition was not met, issuance of the Certificate was illegal. Therefore, giving effect to such a Certificate would be contrary to the public policy of the State of Recognition, because the Convention by ratification has been incorporated in the legal system of the State of Recognition. Even more, the Certificate confirms that the ship was sold in accordance with the requirements of the law of the State of Sale and the Convention, which was not the case. Therefore, such a statement is false and misleading.

4.6. The problem for the claimant with respect to notification under the law of the State of Sale might be the burden of proof. The claimant has to prove before a court in the State of Recognition that the notice was not delivered to him, because, say, there is no proof that a proper attempt at delivery – required under the law of the State of Sale – was made, or that the receipt of the registered mail containing the notice of sale was not signed by an authorised person, or that the address was wrongly indicated, or an obsolete address used, or that the mail was sent abroad directly, instead of through diplomatic channels, and so on and so forth. Some legal entities use a PO Box address on a remote island, etc., which – as practice proves – might cause difficulties in obtaining acknowledgement of receipt if such acknowledgement is required.

4.7. On the other hand, it is very easy to find out whether or not a notice has been posted on the Internet via GISIS. It takes just a look at the computer screen.

4.8. It could be assumed that a court of the State of Recognition would be less inclined to accept the public policy argument concerning the alleged violation of a mail delivery rule of the Sate of Sale if the notice of sale were available on the Internet (on the GISIS website). Access on the Internet would provide an opportunity for the interested parties to find out about the sale, regardless of any alleged breaches of notification rules and procedure prescribed by the law of the State of Sale that might lead to a complicated dispute with an outcome dependent on the interpretation of a foreign law and the assessment of evidence.

4.9. During the drafting process, there was strong interest to ensure that certain standards of notification (with respect to notifying parties, content of the notice and the means of delivery) would be established and respected in practice. The question is about who would control the notification process. Now, according to the Fifth Revision, control is left to the exclusive jurisdiction of the courts of the State of Sale, with the final supreme control of the State of Recognition in the form

of public policy defence. Clearly, decisions of the courts of the State of Recognition on the application of the public policy rule would depend on the facts of each case, and the judges' interpretation of public policy standards, which would ultimately lead to a conclusion about whether or not the effect of a Certificate is manifestly contrary to public policy.

4.10. A solution to the notification dilemmas – which might provide some uniformity in the application of the public policy defence, increase confidence in the notification system and improve the level of control – could be found in adding failure of notification to the grounds for the rejection of recognition of a Certificate issued without proper publication on GISIS. On the basis of this argument, the following proposal was put forward by the Croatian delegation:

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

"A judicial sale of a ship shall not have the effect provided in article 6 in a State Party other than the State of judicial sale if a court in the other State Party determines that":

a) a notice or certificate has not been made available to the public according to Art. 11 [i.e., through GISIS];

b) the effect would be <u>otherwise</u> [manifestly] contrary to the public policy of that other State Party.

The inserted word "otherwise" (in Art. 10(b)) would allow the courts of the State of Recognition to apply Art. 10 to any other case (fraud, etc.), including cases of other breaches of notification requirements.

4.11. This solution would strengthen the role of the Repository, unify the answer to failure to notify through GISIS, and give some comfort to the State Parties which leave the notification process completely to the State of Sale (to its law and courts). In the view of a delegate to the WG, the Repository would have the role of a notice board on which notices are pinned. Such a description might lead to the understanding that the Repository is merely an auxiliary method of notification. On the other hand, the importance of the Repository might be strengthened: by (i) attaching concreate legal consequences to the failure to post notices on its platform; and by (ii) giving jurisdiction for applying those consequences not only to the courts of the State of Sale, but to the courts of other State Parties as well. Unlike the other notification requirements, the obligation of notification on GISIS is not governed by the specific rules of domestic law and is very easily verifiable. Breach of that obligation could be given a clearly defined and straightforward remedy – rejection by the courts of the State Parties to recognise the international effect of a Certificate.

4.12. Using GISIS for notification is very important for the Convention, because a number of unregistered claimants such as unpaid crewmembers (scattered round the world from the Philippines to Indonesia, Ukraine, Russia, etc.) or suppliers (from various of the world's ports) have to learn about the sale to be able to notify their claims to the court of sale in order to qualify for distribution of the sale proceeds, and for receipt of subsequent "classical" notifications with regard to the various stages of the process of sale that will be given in accordance with the domestic law of the State of Sale.

4.13. The proposal to amend Art. 10 (specified in 4.10. above) was not accepted in a debate within the CMI WG for the judicial sale of ships. It was argued that the article was subject to much deliberation, following which it was concluded that the only rightful ground for a State Party not to give effect to a judicial sale held in another State Party should be that giving such effect would violate its public policy. Every practitioner knew, it was said, that if any additional ground were added to the rights of a State Party other than public policy for denying effect to a judicial sale, an unscrupulous creditor would attempt to do so even if only to put pressure on the innocent buyer. This was precisely what happened in a recent case.[13] We must avoid giving an unscrupulous creditor who knew he was wrong and who knew he had no rights against the vessel under new ownership something to latch on to. In countering this argument, it could be said that an unscrupulous creditor would have no room to manipulate or manoeuvre round the proposed additional ground for denying the international effect of a sale, as it is very easy to establish whether or not a notice was published on GISIS. Besides, such an unscrupulous creditor could raise an argument about the failure to publish a notice of judicial sale before a court in the State of Recognition, under the public policy defence, regardless of the fact that

[13] In the Bright Star case, the ship Trading Fabrizia registered and mortgaged under the Maltese flag was sold in 2018 in Jamaica by judicial sale. The buyer registered the ship in Liberia under the name Bright Star. The mortgagor was not paid out from the proceeds of sale but a sum sufficient to satisfy the mortgage debt was put aside as security. The mortgagor arrested the ship in Malta. In June 2019, the Maltese court of appeal held that the arrest was lawful, because Malta could not recognise the Jamaican judicial sale since the Jamaican court had to apply Maltese law relative to the mortgage (*lex bandi*) in its entirety (mortgages under Maltese law constitute executive titles and may be enforced immediately without the need to institute lengthy court proceedings) and thereby the mortgagor should have been paid from the proceeds of the vessel's sale. Malta cannot acknowledge that the Jamaican judicial sale made the ship "'free and unencumbered' and this is in line with the principle of reciprocity". The question is: had the Convention been in force, and had Jamaica issued a certificate of sale, would the Maltese court have found that the effects of the sale were contrary to public policy, because Maltese law as governing law of the mortgage was not applied?

the failure of publishing on GISIS is not specified as a separate ground for declining recognition of the Certificate.

4.14. However, at the WG 40th session (New York, 7-11 February 2022), it was reiterated that, unlike some other conventions that have repositories, the Repository under the Convention would perform purely an informative function, and therefore the publication of instruments by IMO would have no particular legal effect.[14] It was further agreed that the presentation of the functionality of the Repository as a module of GISIS (where the State Parties would directly manage the content of the site) should not be reflected in the Convention. It was suggested that the Convention should avoid being too prescriptive so as to accommodate future changes to how GISIS is delivered.[15]

4.15. Therefore, if in an "exceedingly rare" case a notice of judicial sale were not published on the GISIS module created for the Repository, the aggrieved party would seek protection of its interests before the courts in the State of Sale. If it fails, then the last resort would be an application to a court in the State of Recognition against giving effect to the Certificate, on the grounds that it would violate public policy. Then it would be up to the courts in the State of Recognition to decide whether – in the circumstances of the case – failure to post a notice on the Repository's site with the GISIS is manifestly contrary to domestic public policy. In addition, the courts in the State of Recognition would have to decide whether a prior attempt to seek protection before the courts in the State of Sale is, in the circumstances of the case, a prerequisite for entertaining the case of a public policy defence.

4.16. Revision of Art. 4(2) made at the WG 40th session (New York 7-11 February 2022) and the reasons given in the Draft Summary[16] are probably a peculiar way to puzzle the court in the State of Recognition, faced with the issue described in 4.15. above, about the intention of the drafters. Namely, after it was recalled that non-observance of the notice requirements in Art. 4 would not in itself constitute a breach of a treaty obligation by the State of Sale, but rather lead to the non-issuance of the certificate, the WG agreed – in order to avoid this doubt – to replace article 4(2) with the following:

"Notwithstanding paragraph 1, a certificate under article 5 may only be issued if notice of a judicial sale is given prior to the judicial sale of a ship in accordance with the requirements of paragraphs 3 to 7".

[14] 40th session of Working Group VI (Judicial Sale of Ships), New York, 7-11 February 2022, A/CN.9/WG.VI/XL/CRP.1/Add.3, 9 February 2022, para. 18.

[15] *Ibidem*, para. 15.

[16] 40th session of Working Group VI (Judicial Sale of Ships), New York, 7-11 February, 2022A/CN.9/WG.VI/XL/CRP.1/Add.5, 11 February 2022, Art. 4(3).

Interpretation ensuing from this intervention and its explanation leads us to conclude that non-observance of the notice requirements (which includes its transmission to the Repository) would not in itself constitute a breach of a treaty obligation, but rather lead to the non-issuance of the Certificate, but that subsequent issuance of the Certificate (in spite of the non-observance of the notice requirements) would constitute a breach of the Convention. The reason for this conclusion lies in the fact that the Certificate "may **only** be issued if a notice 'was given' prior to the judicial sale... in accordance with the requirements [set up by the Convention]". Now, it is hard to see how violation of such an explicit requirement could be treated any other than as a breach of a treaty obligation. Therefore, if a failure to give a notice did not directly (according to the explanation) constitute a breach of a treaty obligation, it would do so indirectly if the Certificate were subsequently issued. It is hard to see the difference because the Convention is all about giving international effect to the Certificate. Any failures or breaches are irrelevant, unless the Certificate is issued. However, there is no sanction in the Convention for issuing a Certificate without meeting the Convention requirements.[17] Would this constitute a violation of the public policy of the State of Recognition, and prompt its court to deny international effect to the Certificate?

5. JURISDICTION FOR AVOIDANCE AND SUSPENSION OF JUDICIAL SALE

5.1. In the Third Revision, Art. 9 dealt with the exclusive jurisdiction of the courts of the State of Sale for claims aimed at avoiding the judicial sale of a ship. Later the question arose about jurisdiction for deciding on the effects of an avoidance judgement passed by a competent court in the State of Sale. In an attempt to resolve the issue, the Fourth Revision added paragraph 5 specifically addressing the effects of avoidance. The paragraph was put in square brackets for further consideration.

Article 9. Jurisdiction to avoid and suspend judicial sale

"1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim... to avoid a judicial sale of a ship...

2. The courts of a State Party shall decline jurisdiction in respect of any claim... to avoid a judicial sale of a ship conducted in another State Party...

[17] The proposal cited in section 4.10. above suggested a specific one for the courts in the State of Recognition with regards to notification via the Repository because of its importance.

[5. The effects of avoidance of a judicial sale shall be determined by applicable law.]"

5.2. The problem with the solution embodied in paragraph 5 (of Art. 9) was that it contained a non-defying statement. Namely, if every legal issue is resolved by an applicable law, which is determined by the court that has jurisdiction over the case, the proviso does not answer the question about which court would determine the applicable law. It appears to be a circular definition. As the judicial sale is governed by the law of the State of Sale, and the courts of that state have exclusive jurisdiction for claims for the avoidance/suspension of judicial sale, the proper question was not which law should govern the effects of the avoidance, but **which court will have jurisdiction to determine the effects (or consequences) of the avoidance or suspension?** The court which has jurisdiction would choose the applicable law in accordance with the *lex fori* (the choice of law rules).

5.3. For the above reasons, an amendment to Art. 9(5) was suggested by the Croatian delegate within the CMI WG, worded as follows:

Article 9. Jurisdiction to avoid and suspend judicial sale

"[5. The effects of avoidance or suspension of a judicial sale shall be determined by a court in the State of judicial sale or any other State Party, provided such a court according to the *lex fori* has jurisdiction to hear the case.]"

[~~5. The effects of avoidance of a judicial sale shall be determined by applicable law~~].

5.4. The CMI WG took the opposite position, and proposed an amendment which linked the applicable law to the State of Sale (giving its courts exclusive jurisdiction to determine the effects of avoidance), with the words in italics:

Article 9. Jurisdiction to avoid and suspend judicial sale

"[5. The effects of avoidance of a judicial sale shall be determined by applicable law in the State of judicial sale]."

The explanation was as follows:

CMI is firmly of the view that it should be the State of judicial sale which has exclusive jurisdiction over any challenge to the validity of such a sale and consequently it is the domestic law of the State of judicial sale that should decide what is to happen in the unlikely event that such a state avoids a judicial sale or suspends a judicial sale. Therefore, and for this reason, Article 9(3) and 9(4) should be deleted as had been done by the Secretariat in footnote 26 of document A/CN.9/WG.VI/WP.92.[18]

[18] See 6.7. below.

5.5. Leaving aside the dilemma about giving jurisdiction over the effects of avoidance of a judicial sale exclusively to the courts of the State of Sale, Art. 9(5) as amended by CMI made logical sense. By replacing the existing non-defying statement it clearly determined the state and which courts or other authorities would decide on the effects of the avoidance. Previously, this was not the case. As a matter of drafting, the question is whether a reference to the applicable law is needed at all. Any law applied will be the applicable law. The point is which state (through its courts or other authorities) will choose the applicable law (according to its choice of law rules). The amendment resolved the issue, and made reference to the applicable law redundant. Therefore, it was suggested by the Croatian delegation to take out the reference to applicable law:

"The effects of avoidance of a judicial sale shall be determined ~~by applicable law~~ in the State of judicial sale"

and, alternatively, to move the rule on jurisdiction for effects of avoidance of a judicial sale to Art. 1 (with the words in italics), where – *sedes materiae* – it belongs:

Article 9. Jurisdiction to avoid and suspend judicial sale

"1. The courts of the State of judicial sale shall have exclusive jurisdiction to hear any claim or application to avoid a judicial sale of a ship conducted in that State" and to determine the effects of avoidance "or to suspend its effects, which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale referred to in article 5".

5.6. In addition, referring to the Secretariat notes, CMI proposed the deletion of paragraphs (3) and (4) of Art. 9,[19] which read:

Article 9. Jurisdiction to avoid and suspend judicial sale

"[3. A judicial sale of a ship shall [not have][cease to have] the effect provided in article 6 in a State Party if the sale is avoided in the State of judicial sale by a court exercising jurisdiction under paragraph 1 by a judgment that is no longer subject to appeal in that State.]

[4. The effects of a judicial sale of a ship provided in this Convention shall be suspended in a State Party if, and for as long as, the effects of the sale are suspended in the State of judicial sale by a court exercising jurisdiction under paragraph 1.]"

On the issues concerning Arts. 9(3) and 9(4), the Secretariat noted that the WG engaged in a detailed discussion at its 38th session of the legal consequences

[19] The reasons are cited in 5.4. above.

that would flow in the "exceedingly rare" event of a judicial sale being avoided after the issuance of the certificate of judicial sale and that different options were put forward for further consideration. As an alternative, it was suggested that the Convention should not seek to find a solution, and therefore that the provisions dealing with the issue should be deleted and replaced by a provision acknowledging that the issue is a matter for the domestic law of the State concerned. To reflect this, Art. 9(5)[20] was inserted for consideration by the WG. The Secretariat asked the

WG whether Arts. 9(3) and 9(4) should also be deleted, and whether Art. 9(5) should be retained.[21]

5.7. Under the CMI proposal [of deleting paragraphs (3) and (4), but retaining paragraph (5) of Art. 9 by linking the applicable law to the State of Sale], the issue [of the effects of avoidance] was no longer "a matter for the domestic law of the State concerned". It became an issue for the domestic law of the State of Sale. With this solution, the Convention would have gone beyond recognition of the judicial sale as such (through acceptance of the Certificate), and extended its scope to recognition of foreign judgments that determine the effects of avoidance of a judicial sale. Such judgments might order the deregistration of a ship from the register of the State of (post-sale) Registration, and would have to be recognised and enforced in that state (of post-sale registration). Could that be done under the Convention, provided the courts of the State of Sale had been given exclusive jurisdiction over the effects of avoided judicial sales?

5.8. If so, the interested party would be in position to resist deregistration of the ship only on the grounds of public policy. For example, this could be done by arguing that deregistration would infringe the rights of the innocent purchaser and, in the circumstances, would violate public policy. The State of Recognition would have to consider two questions: (i) whether the avoidance, as such, violates public policy; and (ii) whether the remedies ordered by the judgment (that rightfully avoided the sale) would in the State of Recognition produce effects that are against public policy?

5.9. An additional problem might be a declaratory judgment for the avoidance of sale, without setting up any remedies. The question arises as to which court the owner stripped of ownership of the ship by avoided judicial sale will

[20] See 5.1. above.

[21] United Nations Commission on International Trade Law Working Group VI (Judicial Sale of Ships) 39th session, Vienna, 18-22 October 2021; Draft Instrument on the Judicial Sale of Ships: Annotated Fourth Revision of the Beijing Draft, Note by the Secretariat, 9 August 2021, A/CN.9/WG.VI/WP.92, https://undocs.org/en/A/CN.9/WG.VI/WP.92.

apply, say, for the deletion of the ship from the register in which the purchaser registered her: to the court in the State of Sale or to the court in the State where the ship has been registered upon the Certificate.

5.10. At the WG 40th session (in New York 7-11 February 2022), the dilemma concerning who will have jurisdiction to decide on the effects of an avoided/suspended judicial sale returned to the very core of the matter. Should exclusive jurisdiction be given to the courts of the State of Sale, or should the courts in other State Parties be allowed to hear cases concerning the consequences of avoided/suspended judicial sales in the State of Sale?

5.11. Firstly, it was agreed to delete Arts. 9(3) and 9(4), which provided that the international effect of the Certificate shall cease/be suspended if the judicial sale is avoided/suspended by a court in the State of Sale. Therefore, the consequences of the avoidance/suspensions of a judicial sale shall not depend exclusively on the courts of the State of Sale. A court in another State Party might be called to decide what will happen in respect of the international effects of a Certificate issued for a judicial sale later avoided or suspended.

5.12. Then the focus moved to Art. 9(5) stipulating that the effects of the avoidance of a judicial sale should be determined by applicable law. As already said (5.2.), that was a non-defying statement, and, clearly, the Convention had either to specify the applicable law (in fact without resolving the jurisdiction issue, i.e. which court would apply it) or delete that proviso. In one view, the law of the State of judicial sale should apply, and it was proposed to amend the provision to make that clear.[22] Another view stressed that the effect of avoidance might be at issue in another State in which the judicial sale was sought to be recognised or given effect.[23]

5.13. Ultimately, broad support was expressed for leaving it to the law applicable in whichever State the issue was raised, if such a provision was felt necessary.[24] This reflects the thinking behind the proposal mentioned in 5.3. above. Eventually, it was agreed to delete Art. 9(5) which, it was said, did not belong to Art. 9 dealing with jurisdiction, and not applicable law. The solution to the issue was not found in a provision explicitly stating that the effects of the avoidance or suspension of a judicial sale shall be determined in any State Party by a court that according to the *lex fori* has jurisdiction to hear the case, but rather by

[22] 40th session of Working Group VI (Judicial Sale of Ships), New York, 7-11 February 2022; Draft summary, Addendum, [Amendments to A/CN.9/WG.VI/XL/CRP.1/Add.3] A/CN.9/WG.VI/XL/CRP.1/Add.4 10, 10 February 2022, para. 4.

[23] *Ibidem*.

[24] *Ibidem*.

a new rule making it clear that the Convention does not govern the effects of the avoidance/suspension of a judicial sale. The rule will be inserted as a new paragraph in Art. 14.

6. APPLYING THE CONVENTION TO SHIPS REGISTERED IN A NON-MEMBER STATE

6.1. A question arises about how the Convention would be applied to ships registered in a Non-member State, but sold by judicial sale in a Member (Party) State? The definition of "Ship" requires her registration in a registry that is open to public inspection, but not necessarily situated in a State Party:

"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."[25]

6.2. This means that a ship registered in a Non-member State might be arrested and sold by judicial sale in a Member State, which – under the Convention – will issue to the purchaser a Certificate. Such a Certificate might not be recognised and given effect in the State of Existing Registration (not a party to the Convention).

6.3. In such a situation, the purchaser might attempt to use the Certificate to register the ship in a State Party and trade her under protection of the Certificate against arrest by the registered owner or any other registered or unregistered creditor or claimant.

6.4. It seems that a safeguard against such an outcome is sought in Art. 7. It is suggested that a State of Intended Registration will register a ship against the Certificate only if a certificate of deletion from the previous register is presented to the intended register. This interpretation is based on the fact that the action of deletion of the ship and the issuance of a certificate of deletion is placed in the listing order before (therefore as a prerequisite for) the action of her registration.

Article 7. Action by the registrar

"1. At the request of the purchaser... and upon production of the certificate of judicial sale..., the competent registrar... of a State Party shall, in accordance with the law of that State...:

...

(b) Delete the ship from the register and issue a certificate of deregistration for the purpose of new registration;

[25] Art. 2(b).

(c) Register the ship in the name of the purchaser...;"

6.5. The problem is that a ship could be provisionally registered for a relatively long period of time and sail under such a provisional certificate of registration, protected by the Certificate against arrest.

6.6. For example, the Marshall Islands have terms for provisional and permanent registration, and – in addition – for the registration of vessels sold at admiralty auction:

"**Provisional registration**:

• Registry issued for six months

Required documents for <u>provisional</u> registry:

• Registration application

• Bill of Sale[26] … (three copies)"

Required documents for <u>permanent</u> registration:

• Original bill of sale duly notarised

• Builder certificate (if new construction)

• Original deletion certificate duly notarised.[27]

SECTION 5: Registration of Vessels sold at Admiralty Auction

B. Required Documents to be submitted with the Application for Registration of Vessels at Admiralty Auction Documentation requirements for initial registration are the same as those outlined in Sections 2B and 2C of this Chapter, except for the following:

1. Proof of Ownership: as Proof of Ownership, three (3) certified copies of the Marshall's Bill of Sale or three (3) certified copies of the Court Order certified by the Admiralty Court may be submitted.

2. Transfer of Title/Certificate of No Liens: as proof of Free from Liens or Encumbrance, the three (3) certified copies of the Marshalls' Bill of Sale or the three (3) certified copies of the Court Order are acceptable vehicles for the transfer of title free from liens.[28]

[26] Proof of Ownership may be demonstrated by one of the following: (a) Bill of Sale or Certificate of Ownership and Encumbrance. Proof of ownership is usually the Bill of Sale transferring title to the present owner. A Certificate of Ownership and Encumbrance from the current flag State registry is also acceptable if no change in ownership occurs.

[27] Ship Registration under the Marshall Islands, https://www.scribd.com/document/502912090/SHIPS-REGISTRATION-UNDER-MARSHAL-ISLANDS.

[28] Republic of the Marshall Islands Vessel Registration and Mortgage Recording Procedures Maritime Administrator Jun/2018 MI-100, www.register-iri.com/wp-content/uploads/MI-100.pdf.

6.7. Therefore, the purchaser who has purchased a ship at a judicial sale might, for the purpose of provisional registration, present to the registrar the Certificate instead of a Marshalls' bill of sale. The question is whether for the purpose of provisional registration the registrar (provided the Marshall Islands become a party to the Convention) would accept the Certificate as an adequate document of title. If it did, the ship would be (provisionally) registered under the flag of the Marshall Islands and properly certified for international trade for six months.

6.8. Upon "Proof of Ownership in the form of a duly legalized or certified by the Deputy Registrar Bill of Sale, Auction Document or Builder's Certificate",[29] Belize issues provisional certificates of registry valid for six months. "During this time" it is explained that "the shipowner or his representative is expected to gather all documents necessary for permanent registration".[30] For permanent registration, a "Duly Legalized Original Deletion Certificate from the previous registry"[31] is required, together with the "Original or certified true copy of a duly legalized Bill of Sale, Judicial Sale Instrument or Builder Certificate".[32]

6.9. In the Party States, the Certificate would protect the ship sailing under a provisional certificate of registration against claims that had arisen before the sale. These would include claims registered in the original register.

6.10. The options are: (i) to keep the draft in the current form, and leave it to the various jurisdictions involved in concrete cases to resolve the situation with the provisional registration of a ship; (ii) restrict the application of the Convention to ships at the time of sale registered in a State Party; (iii) disallow the provisional registration of a ship on the basis of a Certificate (pending the permanent registration on presentation of a certificate of deletion) if the State of Existing Registration is not a State Party.

7. PROTECTION OF PRIVATE CREDITORS DELETED

7.1. The Second Revision excluded from the scope of the Convention judicial sales triggered by seizure or confiscation of the ship by law enforcement authorities.

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[29] Immarbe International Merchant Marine Registry of Belize, https://immarbe.com.ua/ships-en.html.

[30] *Ibidem.*

[31] *Ibidem.*

[32] *Ibidem.*

Article 3. Scope of application

"2. This Convention shall not apply to:

[(a) The judicial sale of a ship following seizure or confiscation of the ship by tax, customs or other law enforcement authorities;]"

7.2. The Third Revision deleted that exclusion [Art. 3(2)(a)], which raised questions about the status and treatment of public *vis-à-vis* private claims. It was suggested that it would be appropriate to apply the Convention even in cases where the sale had been initiated by seizure or confiscation of the ship by the law enforcement authorities, **provided** "the proceeds of sale are made available to the creditors", which was a requirement encapsulated in the definition of judicial sale:

Article 2. Definitions

"(c) "Judicial sale" of a ship means any sale of a ship:

(i) Which is ordered, approved or confirmed by a court 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; and

(ii) For which the proceeds of sale are made available to the creditors."

7.3. This means the Convention applies to the judicial sale of ships initiated by seizure or confiscation of the ship by law enforcement authorities if the balance of proceeds (if any) left after the public authority has satisfied its public claim and is not returned to the shipowner but is rather distributed to private creditors. Public claims might, under the governing law of the sale, have different priorities and rights to different shares than private (commercial) claims. Obviously, in previous drafts, there was a clear intention to leave sales initiated by public authorities for the purpose of collecting public claims (which might be privileged over private and commercial claims, and therefore distort the standard distribution of proceeds under maritime law) outside the scope of the Convention.

7.4. The Croatian delegation proposed an amendment to the definition of "Judicial sale", which would admit commercial claims of a public authority (for example, port or mooring dues claimed by a State-owned port), but not claims for public debts (such as custom/tax fines or criminal punishment by property confiscation). In addition, it proposed amending subparagraph (ii) to cover the regular practice of deducting some costs and expenses related to the sale procedure. The proposal was:

"Judicial sale" of a ship means any sale of a ship for the purpose of enforcing recovery of private or commercial claims:

"(i) Which is ordered, approved or carried out by a court or other public authority by way of public auction or private treaty carried out under the

supervision and with the approval of a court, or any other way provided for by the law of the State of judicial sale; and

(ii) For which the proceeds of sale are made available to the creditors" save for the costs and expenses related to the sale's procedure, regularly covered under the applicable law from the proceeds of sale;

7.5. The proposal was opposed on the grounds that it is hard to come across a case where a vessel has been sold by State authorities for tax or other purposes. Even if such a sale occurs, the protection of an innocent purchaser should have priority. However, in the first place it was not explained why paragraph 2(a) of Art. 3 – which provided that the Convention would not apply to "the judicial sale of a ship following a seizure or confiscation of the ship by tax, customs or other law enforcement authorities" – was introduced in the Draft. Its removal, together with the omission to limit the claims of public authorities to those "commercial" in nature (which would rank and be dealt with according to maritime law standards rather than public law priorities), would make a judicial sale potentially favouring public claims subject to the Convention. Clearly, this contradicts the initial approach intended to give international effect to the Certificates issued for judicial sale where distribution of the sale proceeds to the creditors is governed by maritime law, and protects creditors related to the ship's operation and financing matters.

8. ATTEMPT TO MAKE THE CERTIFICATE CONCLUSIVE EVIDENCE OF SALE

8.1. The Third Revision removed the square brackets around Art. 5(5), making the Certificate conclusive evidence of the particulars contained therein, including the statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of the Convention.

Article 5. Certificate of judicial sale

1. When a ship is sold by way of judicial sale... the public authority designated by the State of judicial sale shall"; at the request of the purchaser, and "in accordance with its regulations and procedures, issue a certificate of judicial sale";

"5.... the certificate of judicial sale shall constitute conclusive evidence of the particulars therein..."

8.2. At the 37th WG session, the question was raised about when the Certificate should be issued, and whether that very moment should be regulated by the Convention. The question was linked to the idea of finality of the sale.

Several submissions suggest the inclusion of an additional condition that the certificate only be issued if the judicial sale is no longer subject to challenge. Those submissions observe that the issuance of the certificate triggers a series of serious and irreversible effects, and that the subsequent invalidation of the certificate would lead to complications. The suggestion has implications for Art. 5(6) and the final clause of Art. 9(1). It also raises the question as to whether the international effects of a judicial sale pursuant to Art. 6 should be postponed until after the time for challenging the judicial sale has lapsed.[33]

8.3. National legal regimes and their respective procedural systems for contesting decisions passed by a state authority vary significantly. Same distinguish between ordinary and extraordinary remedies (later filed against effective and enforceable judgments) that could be used under specified conditions. Therefore, it will not be easy to give a Convention definition of the time for issuing the Certificate, without serious intrusion into national laws of State Parties.

8.4. It is logical for a State of Sale to issue the Certificate at the moment the decision on sale becomes effective and binding, which means when registration in its own Ship Register (changing the owner, or deregistering the ship) could be done. At that point, the decision on sale produces legal effects, i.e. is enforceable – in the sense of being capable of causing changes to the registration of a ship.

8.5. In the Secretariat Note of 30 November 2021,[34] the evidentiary value of the Certificate was renamed from "conclusive" to "sufficient", leaving an aggrieved party to seek protection of its interests before the courts of the State of Sale (on the grounds of violation of domestic law or the Convention) or the courts of the State of Recognition (on the grounds of violation of public policy).

Article 5. Certificate of judicial sale

"4. Without prejudice to Articles 9 and 10, the certificate of judicial sale shall be sufficient evidence of the matters contained therein.

[33] United Nations Commission on International Trade Law Working Group VI (Judicial Sale of Ships), 37th session, Vienna, 14-18 December 2020, Synthesis of comments submitted on the second revision of the Beijing Draft, Note by the Secretariat, 16 October 2020, A/CN.9/WG.VI/WP.88, para. 55.

[34] United Nations Commission on International Trade Law Working Group VI (Judicial Sale of Ships), 40th session New York, 7-11 February 2022, Draft Convention on the Judicial Sale of Ships: Annotated Fifth Revision of the Beijing Draft, Note by the Secretariat, 30 November 2021.

9. CONCLUSION

9.1. During the drafting process, the drafters struggled to strike a proper balance, through a compromise, between, on the one hand, making the Convention practical and functional in order to give the purchaser certainty that it will obtain undisturbed ownership over the ship against the price it paid, and, on the other hand, the need to protect the interest of the creditors by making sure that the basic principles of law would be applied in the process of sale.

9.2. In that sense, the matters of notification of sale and the status of public claims and legal remedies were deliberated. The draft versions went through changes accordingly.

9.3. The notification process has been left to the authorities of the State of Sale, its law (with the imposed minimum content of the notice and list of notifying parties by the Convention) and its courts (to provide relief to aggrieved parties against wrongful notification).

9.4. Relatively late in the drafting process, details of the Repository emerged, but nevertheless created a chance for a possible reasonable compromise: the State Parties would leave the process of notification to the State of Sale, but would retain control over notification via the Repository, and deny the international effect of the Certificate under Art. 10 if such notification were missing. This would mean that whatever protection might be provided to the interested parties under the law governing the notification, the State Parties would be sure that the sale will be notified on the Internet and therefore available across the globe, because otherwise the State Party would not give effect to the Certificate.

9.5. Removal of the protection of private creditors by leaving procedures related to seizure or confiscation of the ship by tax, customs or other law enforcement authorities within the scope of the Convention, together with omission to limit the claims of public authorities to those "commercial" in nature (which would rank those claims, and treat them according to maritime law standards, rather than public law priorities), would make judicial sale possibly (largely) favouring public claims subject to the Convention.

9.6. Remedies available in the State of Recognition to the aggrieved parties boil down to manifest violation of public policy. It is possible that courts in different states will take different positions in cases where the notification of sale failed to be published via the Repository.

9.7. How often in daily practice situations would arise when the unaccepted proposal given during the drafting process would have come into play remains to be seen, if and when the Convention comes into force.

Note: The article was submitted for publication after the 40th session of UNCITRAL's Working Group VI: Judicial Sale of Ships, held in New York, 7-11 February 2022.

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Sažetak:

NACRT KONVENCIJE O SUDSKOJ PRODAJI BRODOVA – PRILIKA ZA REVOLUCIONARNO KORIŠTENJE INTERNETA ZA OBAVJEŠTAVANJE I NEKA DRUGA PITANJA

U izradi nacrta Konvencije, velika je pažnja bila posvećena obavještavanju putem izravne dostave na adresu osoba koje imaju pravni interes vezan za prodaju broda i javno putem medija. Pri prodaji broda, obavještavanje je od iznimne važnosti jer pravni interes može imati niz neupisanih (neregistriranih) vjerovnika. Državi u kojoj se prodaje brod omogućilo bi se oglašavanje putem Interneta na stranicama GISIS-a podržavanih od IMO-a, što bi pridonijelo da obavijesti vezane uz sudsku prodaju broda budu dostupne u realnom vremenu na svakom mjestu diljem svijeta. Postavilo se pitanje, kakve bi trebale biti pravne posljedice propusta u oglašavanju putem GISIS-a? U ovom se radu predlaže da takav propust, koji je lako provjerljiv pogledom na ekran računala, bude razlog za nepriznavanje međunarodnog pravnog učinka potvrdi o sudskoj prodaji broda. U radu se razmatra i nadležnost za odlučivanje o posljedicama poništenja sudske prodaje odlukom

sudova države prodaje. Prijedlog je da o tome odlučuju sudovi država članica Konvencije na čijem području poništenje prodaje treba proizvesti pravne učinke (npr. ispisati brod upisan u upisnik države članice temeljem poništene potvrde o sudskoj prodaji broda), radije nego sudovi države koji su prodaju poništili. U ovom drugom slučaju, Konvencija bi preuzela na sebe priznanje stranih sudskih presuda, a ne samo priznanje potvrde o sudskoj prodaji broda. Rad se osvrće na brisanje iz nacrta odredbe po kojoj se Konvencija ne bi primjenjivala na slučajeve kad brod zaustave javna tijela radi namirenja javnih potraživanja, kao i na pitanje kada država prodaje može izdati potvrdu o sudskoj prodaji.

Ključne riječi: *Konvencija o sudskoj prodaji brodova; dostava; javna potraživanja; pravni lijekovi; uravnoteženje interesa.*