



## COMITE MARITIME INTERNATIONAL

### *Meeting Notes for the 39<sup>th</sup> Session of UNCITRAL Working Group V1 Judicial Sales*

*Vienna 18<sup>th</sup> - 22<sup>th</sup> October 2021*

21<sup>st</sup> September 2021

#### *Scope*

The CMI IWG on the international effects of judicial sales has considered the Annotated Fourth Revision of the Beijing Draft as circulated by the UNCITRAL Secretariat in the document bearing identification number *A/CN.9/WG.VI/WP.92*. The IWG has also considered the Report of Working Group V1 (Judicial Sale of Ships) on the work of its thirty-eighty session (Vienna, 19<sup>th</sup>- 23<sup>rd</sup> April 2021) document bearing identification number *A/CN.9/1053*

As it had done following the publication of the First Revision, Second and Third Revision of the Beijing Draft, the IWG has considered that it could be of benefit to annotate and share some preliminary considerations through these meeting notes in preparation for the 39<sup>th</sup> Session of UNCITRAL Working Group V1 on Judicial sales in Vienna between the 18<sup>th</sup> and 23<sup>rd</sup> October 2021.

By way of general comment, the CMI would like, once again to show its appreciation to the Secretariat for the sterling work it has again done in the preparation of the 4<sup>th</sup> Revision of the Beijing Draft. The 38<sup>th</sup> meeting was held in a hybrid form with the Secretariat being present in Vienna and with the Chair and all the delegations participating virtually. The CMI understands only too well the challenges of communicating with delegations in this virtual format particularly in the context of delegations come from very different time zones. Indeed the work and efforts which have gone into this important work have been executed against the limitations presented by the Pandemic and it is quite

extraordinary how notwithstanding these challenges such advances have been made with every meeting.

The CMI is very satisfied indeed with the progress made leading to the 4<sup>th</sup> Revision. In fact it is the opinion of the CMI that this 4<sup>th</sup> Revision containing the several views as expressed over the various meetings by numerous state and NGO delegations and expertly drafted by the Secretariat, has provided various solutions to the concerns which have been raised by some delegations and we have before us a draft instrument which seeks to achieve what the Beijing Draft, what the original drafters of the CMI and what international trade demands. That being, that a sale held in a state party which gives a clean and unencumbered title to the purchaser, resulting in a certificate of judicial sale being issued by the state of judicial sale, is given full effect in other state parties. All of this whilst the procedural laws of the state of judicial sale remain totally respected and even enhanced by the document

On a review of the entire document CMI is of the view that potential stumbling blocks have been overcome and that what is required at this juncture is the fine tuning of the document by taking final decisions on the matters which still remain in square brackets.

With this in mind these notes have been drafted to deal specifically with the remaining issues in square brackets.

1. **Article 2 Definition of Public Authority.**

Footnote no. 2 reminds us that there had been a suggestion for the term “Public Authority” to be defined. There is a danger in doing so due to the different contexts in which these two words are used in the Convention.

The CMI is therefore of the view that for the purposes of Article 2 (c) (i), the words “*legally empowered to do so*” are introduced between the words “*authority*” and “*either*” so that the first line reads as follows:

***“Which is ordered, approved or confirmed by a court or other public authority, legally empowered to do so, either by way of public auction...”***

2. **Article 2(e) (ii)**

The CMI agrees with the recommendation of the Secretariat that the words in square brackets in sub paragraph (ii) can be deleted.

3. Article 2 (e) (ii) and 2 (i)

Re Article 2 (e) (ii), the CMI is of the view that there is no need for the words in square brackets.

Re Article 2 (i), the CMI is of the view that since there are some jurisdictions which provide for separate registers for their mortgages and hypothecs the words in square brackets should be retained.

4. Article 2 (h)

The CMI is of the view that the word “purchaser” does not need any definition, however is happy to accept the definition as drafted.

5. Article 2 (j)

The CMI has no objection to the addition of the words in square brackets if this is of assistance to some States.

6. Article 4 Procedure and notice of judicial sale

The CMI recalls the very stimulating debates during the 37<sup>th</sup> and 38<sup>th</sup> sessions and the interesting points and observations raised by a number of delegations which noted some challenges associated with sales which did not confer a clean title and would never qualify for a certificate under the Convention, thus not needing to satisfy any of the notification requirements as provided for in the Convention as well as questions which related to the “time” when the sale is considered as having taken place.

***Article 4 1 bis***

The CMI congratulates the Secretariat for providing clarification in the form of Article 1 bis which it believes clarifies matters satisfactorily.

The CMI has one minor recommendation which would in its view eliminate any lingering (if any) doubts which is the addition of the words: “*To which this Convention applies*” between the words “*sale*” and “*shall*” in the first line of Article 1 bis so that Article 1 bis reads as follows:

*“The judicial sale, to which this Convention applies, shall be conducted in accordance with the law of State of judicial sale, including as regards notification.”*

#### ***Article 4 (1)***

CMI is grateful to the Secretariat for formulating appropriate wording to the Chapeau of Article 4 (1). For the same reasons expressed above, the CMI is of the view that it may be helpful to include the words “***to which this Convention applies***” so that the first line of Article 4 (1) reads as follows:

“ *Notwithstanding paragraph 1 bis, prior to the judicial sale of a ship **to which the convention applies** and a certificate issued in accordance with article 5, a notice of the sale shall be given ...”*

#### ***7. Article 4 (1) (e) (i)***

The CMI has noted the comments at footnote 13 and is of the opinion that the current wording provides very well for a bare boat charter registration scenario.

#### ***8. Article 4 (3)***

The Secretariat has invited us to consider whether the words in square brackets are necessary given the content of 4 (2). The CMI is of the view that the scenario envisaged by the words in these square brackets is already catered for by Article 4 (2).

#### ***9. Article 5***

The CMI has noted the work done by the Secretariat to reflect the amendments agreed upon during the thirty eighth session. In line with the suggested wording to Article 4 (1) bis and the chapeau of Article 4 (1) it would like to suggest the following additional wording which may assist in ensuring that there is no uncertainty.

“Upon completion of the ***judicial*** sale to the purchaser ***to which this Convention applies***, 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...”

#### ***10. Article 5 (6) and (7) and Article 5 bis***

These paragraphs are in square brackets and footnote 18 refers us to footnote 26. The CMI is indeed conscious of the interesting debate which was held during the 37<sup>th</sup> session. It appeared evident during that debate that the only Court which can or should decide on what happens in the extremely unlikely event that that same court avoids a judicial sale in terms of Article 9, is that same Court according to its laws.

Reference to anything else is likely to risk a possible conflict with the domestic laws of some countries.

CMI is of the view that the Working Group should accept the recommendation of the secretariat and therefore delete Article 4 (6) and 4 (7) and accept the content in square brackets of Article 9 (5).

In view of the CMI's preference to eliminate paragraphs (6) and (7) of Article 5, it agrees with the Secretariat's recommendation that the current Article 5 *bis*, be incorporated as paragraphs of Article 5.

With regard to the related issues contained in Article 7 (3) and Article 8 (3), the CMI is aware of the fact that the law of a number of jurisdiction require certified translation of documents not in the official language of the Court of the State concerned. The CMI is not opposed to retaining Article 7 (3) and Article 8 (3).

#### **11. Article 7 (1)**

The Chapeau of Article 7 (1) has the words "*but without prejudice to article 6*" contained in square brackets. We have considered the content of footnote 23 and recall the debate that was had in the 36<sup>th</sup> session. The CMI is of the view that the addition of the words "*but without prejudice to article 6*" is clear after one considers the explanatory note in footnote 23.

CMI would like to suggest that this explanation be maintained in any explanatory notes or narrative which may be published together with the Convention

#### **12. Article 7 (2), (3) and (4)**

Re 7 (2), in order to maintain consistency with Article 7 (1), the CMI is of the view that the words in square brackets need to be maintained.

Re 7 (3), in order to avoid uncertainty the CMI would like to suggest that the following sentence be added to the end of the paragraph: "*Certified translations should be authenticated in accordance with the law of the State of judicial sale.*"

Re 7 (4), in order to avoid confusion the CMI would like to suggest that the following words be added to the last sentence: "*issued by the public authority designated by the State of Judicial sale to issue the certificate.*"



13. Article 9 (3), (4) and (5)

Reference is made to paragraph 10 above in which CMI expressed the view that Article 9 (5) in square brackets should be maintained.

Conversely and for the same reason that it should be the State of judicial sale which has exclusive jurisdiction over any challenge to the validity of such a sale, 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. Therefore and for this reason, Article 9 (3) and 9 (4) should be deleted as is being suggested by the Secretariat in foot note 26.

In addition to the above the CMI is of the view that this article also needs to provide for the transmission of the notice of avoidance or suspension to the repository. The CMI would propose the addition of the following paragraph:

***“ If after the public authority designated by the State of judicial sale has issued a certificate of judicial sale to the repository pursuant to Articles 5.3 and 12, the courts of the State of judicial sale avoid the judicial sale or suspend its effects pursuant to Article 9.1, the public authority shall promptly transmit to the repository referred to in article 12 the decision of the court of judicial sale to avoid or suspend the judicial sale.”***

14. Article 10

The CMI has considered this matter. It has found that the word "*manifestly*" in square brackets is a term quite commonly used in context with the notion of public policy in international instruments regulating issues of comity between State parties and is used there to emphasize the principle (which may well otherwise apply) that a State party may only refuse to comply with the effect regulated by the respective Convention (in our case the clean title transfer to the new owner), only if there are compelling reasons to do so. It is considered in the legal community that the term "*manifestly*" in the context of public policy is a clarification that sets the bar higher and safeguards that the threshold is kept for very exceptional cases. We are of the view that the word "*manifestly*" should remain in the text and the brackets deleted.

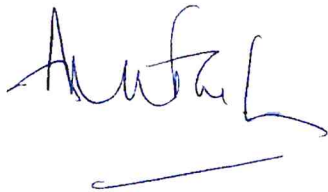
15. Article 14.

The CMI has considered carefully the content of footnote 30 and agrees that it would be of benefit if there were the addition of paragraph ( c) to Article 14 to the effect that:

*“(c) Nothing in the convention shall prevent the recognition of a judicial sale under domestic law.”*

**16. Article 14 bis**

The CMI does not have any particular views on the position of this article. It is happy to agree to the position as it stands in this fourth revision.

A handwritten signature in blue ink, appearing to read 'Ann Fenech', with a horizontal line underneath.

Ann Fenech Co-Chair IWG

For and on behalf of the IWG  
on the International Recognition of Judicial Sales