

CROATIAN DELEGATION

Comments on the 4th revision of the Beijing Draft

Introduction

1. The past sessions of the Working Group have made a significant progress towards a simple, practical and ratifiable Convention. However, at this stage – before the function of GIGIS and legal consequences of notifications on that platform are defined – there are still a certain number of points and alternatives worthy considering, always having the main goal in mind – to produce a Convention attractive for ratification. That could be achieved by striking the right balance between, on the one hand, *the International Comity* – the necessity to recognise foreign judgements, and, on the other hand, *the Sovereign Control* – the right of nation states to control the foreign courts' decisions [on the of grounds violation of (i) the conditions set up as the scope of the Convention, and/or (ii) their public order.]

Legal effects of notification through the Repository

2. The notification issues have consumed a lot of time of the WG. There is a strong filing that all interested persons should be “properly” notified. For that reason the Convention prescribes: notifying parties; governing law for the process of notification (that of the *State of judicial sale*); minimum content of the notice; jurisdiction for notification's disputes. However, Article. 6 *International effects of a Judicial sale* in the 4th revision does not condition any more the international effect of judicial sale by the words “*provided that the judicial sale was conducted in accordance with the notice requirements in article 4.*”, which was the case in the 3rd revision.
3. Some delegations were not happy with the outcome that *the State of recognition* would not have any control over the process of notification. A couple of proposals that would give some control to *the State of recognition* over the notification process were discussed in attempt to alleviate the situation in which *the State of Recognition* has to rely entirely on the courts of *the State of judicial sale* (thereafter *the State of sale*) for the matters concerning notification.
4. One of the proposal is to use *the Repository*, not only as a tool for publication of notices, but as well as a tool for giving *the State of recognition* some control over the notification. The proposal seems to be a **very simple and elegant compromise**.

5. The current revision (4th) of *the Beijing Draft, inter alia*, provides:

Article 4. Procedure and notice of judicial sale

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 12 for publication.

Article 12. Repository

- 1. The repository of notices given under article 4 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.

6. First of all, there is a strong sentiment for deletion of *subparagraph (a)*, of paragraph 3 of Article 4., which calls for the press announcements, because that should be a matter for the law of *the State of sale*. Furthermore, nowadays the electronic press with a growing number of portals that have a limited number of followers, might make press announcement quite ineffective to reach the nationwide audience. The provision that the notice should be published in other publications or circulated elsewhere, *if required by the law of the State of sale*, is obviously superfluous.
7. It is striking that in the current text the failure to follow the obligation of transmitting the notice to *the Repository* has no sanction at all. The answer to the question: “*What happens if the State of judicial sale fails to transmit the notice to the Repository?*” is: “***Absolutely nothing***”.
8. Publication of notices on Internet through a *Repository* is a revolutionary innovation for the international conventions. However, it is a high time that the modern information technology is put to use by the international treaties. Today a piece of information is available at any spot in the world through a number of devices, including cheap and widespread mobile phones. For example, in case of this Convention, a sailor back home in the Philippines would be able to follow news about the ship he served on, but did not get his salary, and find out that the ship was arrested and put on sale. He would advise the local representative of ITF accordingly, who would arrange for inclusion of the sailor’s claim in the application for distribution of funds from the proceeds of sale.

9. The proposed compromise would work as follows: the process of notification is governed by the law of *the State of sale*, and controlled by its courts, but the Convention, as a minimum, should allow *the State of recognition* to check whether the notice was properly published on *the Repository's* platform. This means that *the State of recognition* would get comfortable on notification, because it would be sure that the notice has been easily available *urbi et orbi* to all interested (i.e. notifying) parties, regardless of how imperfect, unsatisfactory or flawed the notification rules under the governing law are, or how controversial the process of notification in particular case has been (even though, at the end approved by a court of *the State of sale*). For notification through *the Repository* the principle of *caveat creditor* would apply, as the creditor would have to take care of its own interest (i.e. to follow the information on the ship related to the claim.)
10. Therefore, the proposal is to amend Article 10 by adding subparagraph (a):

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) [paragraph (2) of] Article 12 of the Convention has been violated

(b) the effect would be [manifestly] contrary to the public policy of that other State Party

11. Even though a great breakthrough on *the Repository* has been made by IMO's acceptance to add it to its *Global Integrated Shipping Information System (GISIS)*, some technical, legal and financial matters for establishing and running the Convention's digital information platform have to be solved. It seems that IMO is somewhat reluctant to assume liability for publishing on the platform. The question is, who will be liable if a notice transmitted by *the State of sale* to *the Repository* was not timely posted on the platform. The problem seems easy to overcome. The notification is a responsibility of *the State of sale*. Therefore, the obligation of *the State of sale* to transmit the notice to *the Repository* might be enhanced in the sense that *the State of sale* has an additional duty to check whether or not the transmitted notice has been duly posted on the platform. If the notice has not appeared on the platform within an agreed period of time (say by noon on next day) *the State of sale* would contact *the Repository* and advise it of the omission in posting.
12. In spite of the progress made with IMO with respect to *the Repository*, the Convention is still drafted under the premises that *the Repository* "*would perform a 'passive' function of publishing notice and certificates*"; that it should not "*replace the actual delivery of the notice to each person listed in*" the appropriate article of

the Convention; that “*the repository should perform purely an informative function, and therefore that the publication of notices and certificates should have no particular legal effect*”.

13. It is not known when the arrangements with IMO with respect to *the Repository* will be finalized and whether that will have happened before the Convention is adopted. However, the ratification process might take quite some time, possible years, and in the meantime, issues concerning establishing, administrating and funding *the Repository* might be resolved. Therefore, it will be tactically convenient to introduce subparagraph (a) in the current Draft, and its coming into force make conditional on (i) setting up a fully functional Repository, and (ii) giving a notice thereof to *the State Parties*, by the depositary of the Convention (the Secretary-General of UN).
14. Such approach would motivate and intensify efforts for upgrading the capacity of *the Repository* up to the expected task, and would avoid the need for amending the Convention at a later date, if and when the adequate *Repository* is established.
15. Adopting the Convention in the current form would freeze desirable development in respect of *the Repository's* role for a considerable period of time.

Information to be published by the Repository

16. The current draft provides only for publications of the notices and certificates by the Repository.

Article 12. Repository

1. The repository of **notices** given under article 4 and **certificates** issued under article 5 shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

17. It seems convenient to publish in addition some other useful information, such as those about avoidance and suspension of sale.

Article 12. Repository

1. The repository of notices given under article 4 and certificates issued under article 5 shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

2. The State of judicial sale shall transmit to the repository, and repository shall publish

- (a) notice issued under article 4;
- (b) certificate issued under article 5;
- (c) notice of cancelation of the Certificate, if the Judicial sale has been avoided according to article 9, paragraph 3;
- (d) notice of suspension of the Certificate, if the judicial sale has been suspended according to article 9, paragraph 4;

3. The interested parties may refer the competent authorities of the State Parties to the notifications indicated in paragraph 2 of this article.

Grounds for rejection of recognition

18. The only remaining ground for rejection of recognition of *the Certificate of sale* is the public order of *the State of recognition*.

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] contrary to the public policy of that other State Party

19. It is worth considering enlarging the ground for rejection to the pillar conditions for application of the Convention, which are:

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:
 - (a) The **ship was physically within the territory** of the State of judicial sale at the time of the sale; and
 - (b) Under the law of that State, the judicial sale confers **clean title** to the ship on the purchaser.

The grounds for rejection therefore would be:

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) **articles 3 and/ or [paragraph (2) of] Article 12 have been violated**
- (b) the effect would be otherwise [manifestly] contrary to the public policy of that other State Party

20. For Article 3. the matter boils down to the question which court shall have jurisdiction to determine whether these two conditions *sine qua non* for application of the Convention have been met. Questions whether the ship was present in *the State of sale* and whether a Certificate confers a clean title, as it declares on its face value are no doubt a matter of public order of *the State of recognition*, as ratification of the Convention made its rules a part of its domestic law.
21. For example, if a *Certificate of sale* has been issued in a state, let us call it *Banana Republic*, after the argument of physical presence of the ship within its territory has been lost in the local court, and an interested party opposes to recognition of the Certificate by providing a host of evidence (global positioning records of movements the ship, information from other ports, log books, witnesses and so on) on whereabouts of the ship, what the court of *the State of recognition* will do?

Decline jurisdiction, on the grounds that the question of presence of the ship is a matter for the court in *the State of sale* or call in the public order protection, if it finds out – upon the presented evidence – that it could not – by reasonable standards – accepted that the ship was within the territory of *the State of sale*, regardless of the rules of *the Banana Republic*, and their interpretation by the competent court in that country.

Public claims

22. The 2nd revision had a provision aimed at preventing application of the Convention, (i.e. its recognition regime) to forced sales in tax, administrative and criminal matters.

Article 3. Scope of application

2. This Convention shall not apply to:

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

23. The above paragraph was removed, because the definition of *Judicial sale* was amended to limit it to those sales for which *the proceeds are made available to the creditors*.

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;

24. Under the current draft tax, custom, other law enforcement authorities may arrest or detain a ship for, say, alleged smuggling and ask a court or some other public authority to sell her by way of public auction or by private treaty carried out under the supervision and with the approval of a court. If, by virtue of the law of *the State of sale*, all the proceeds of sale go to, say, the custom administration to cover the fine or penalty for smuggling, the Convention will apply because *the proceeds of sale are made available to the creditors*. In this example to the custom administration, which could be qualified as a creditor. If, beside the custom administration, there were some private creditors, which are not compensated at all because the custom administration claim had a priority, or if a single dollar – that exceeded the custom administration claim – trickled down to a private creditor, the Convention would apply and *the State of sale* would be in position to issue a *Certificate of sale* to the purchaser.
25. Therefore, a proposal has been given to limit the claims *to private or commercial claims*, in which case only the commercial claims of a state authority would be recognised and very likely ranked under the classical principles of the maritime law. That would be claims, say, for port, canal, and other waterway and pilotage

dues or damages to the state owned ports etc., but not the claims for *public debts* (like custom/tax fines or criminal punishment by confiscation of property). In addition, it was proposed to amend subparagraph (ii), to cover regular practice of deducting some costs and expenses related to the sale procedure. (Added text underlined)

“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; 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;

Definition of “Charge”

26. It seems worthy to include *expressis verbis* in the definition of Charge *bareboat charter that, according to the law of judicial sale, survives such sale* (which is the case in some jurisdictions). Arguably, the existing reference to “*right of use*” covers the *bareboat charter*, because that contract entitles *the bareboat charterer to use the ship*, but – for the avoidance of doubt – the amendment will be useful.

Article 2. Definitions

For the purposes of this Convention:

- (a) “Charge” means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use including bareboat charter that survives the sale or right of retention but does not include a mortgage;

Definition of “Ship”

Article 2. Definitions

- (i) “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

27. At the 37th session, the notion “*any ship or other vessel*” was qualified by the word “*registered*”, which – as the debate revealed – would include only registration of the ship with a public register (opened to inspection of public at large). The proposal was put in the square brackets. The question is, whether the ship or craft should be registered (in a public registry) in a *State Party* or registration in any *other State* (not party to the Convention) would suffice? If later is the case, the Certificate might not help in deregistration of the ship, but would be of assistance if the ship is arrested (or arrest is attempted) in a *State Party* after a *Judicial sale*,

for claims that had existed prior to the sale (and have been extinguished by the sale).

Scope of application

28. The question was raised, whether the provision

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:
 - (b) Under the law of that State, the judicial sale confers clean title to the ship on the purchaser.

(i) covered cases where a *concrete* judicial sale of a *particular* ship produced a clean title, or (ii) it was a general statement, which required *generally* that all and any judicial sale – under the law of the *State of sale* – would produce the clean title. In the latter case, if the words are taken literally, it would mean that a State which law of the judicial sale does not always inevitably “*confers clean title to the ship on the purchaser*”, but has the option of conferring qualified titles (for example, burdened by a bareboat charter that survives the sale), could not technically be a party to the Convention., The provision could be redrafted to read:

- (b) The State of judicial sale, after completion of a particular sale, issued Certificate confirming clean title to the ship on the purchaser.

Definition of “Certificate”

29. Throughout the Draft reference is made to “*certificate of judicial sale*” or “*certificate of judicial sale referred to in article 5*” or “*certificate*”. It would be convenient to define “Certificate”, and write the word throughout the Convention with capital “C”.

Article 2. Definitions

For the purposes of this Convention:

- (a) “Certificate” means certificate defined in article 5 below;

Certificate – time for issuance

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 ...

30. At the 37th WG session, the question was raised when the Certificate should be issued, and whether that very moment should be regulated by the Convention? Would that moment be at the point when the sale is final, non-appealable, enforceable, etc.? National legal regimes and their respective procedural systems *for contesting decisions* passed by a state authority, vary significantly. Therefore, it will not be easy to give a Conventional definition of the time for issuing the Certificate, without a serious intrusion into national laws of *the State Parties*.
31. Anyhow, it is logical that a *State of sale* shall issue the Certificate, at the moment in time when the decision of sale would allow registration of the sold ship in its own Ship's register (regardless, whether the purchaser intends to make registration in the national or a foreign register). At that point, the decision on sale produces legal effects, i.e. is enforceable – in the sense of being capable of producing changes to the registration of a ship.

Avoidance and suspension of judicial sale

32. In Article 9 the Convention provides not only for the jurisdiction for avoidance and suspension of the sale, but in paragraphs 3 and 4 for the effects of avoidance and suspension.

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 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.

2. The courts of a State Party 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.

[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.]

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

33. First of all, the *exclusive jurisdiction* of courts of *the State of sale* to hear any claim or application to avoid a judicial sale of a ship or to suspend its effects (which shall extend to any claim or application to challenge the issuance of the certificate of judicial sale) does not prevent a court in *the State of recognition* to determine whether a Certificate violets the public policy of its state, which would include violation of conditions set up in Article 3 (as depicted in the example in item 21 above).
34. It seems that paragraph 4 should be retained regardless of the advice that no case *“has been identified in which the effects of the sale have been or may be suspended after completion. Presumably, if a sale is suspended before completion, no certificate of judicial sale will be issued (article 5(1)) and therefore the judicial sale will have no international effect under the convention (article 6)”*. It could be supposed that a case might happen where the ship was sold, the Certificate issued and a short time thereafter it was discovered that a fraud or duress was committed during the sale. The interested party may ask for an injunction for suspension of the Certificate, until the allegations and charges have been heard and decided by a court.
35. Paragraph 5 is welcomed, and it is the only logical solution for what could be a very complex case, which the Convention could not resolve by its rules.

CONCLUSION

It seems that the past session has made a substantial progress towards desirable features of the Convention.

However, the full potential of the Convention is hindered by the IMO reluctance to assume legal obligation and liability for running of the GISIS.

In the circumstances, the best way forward is to complete drafting of the Convention by introducing articles giving legal effect to publishing of the notices and certificates (their cancelation or suspension) by the Repository, and make their coming into force subject to Secretary-General of UN announcement to the State Parties that those provisions shall be activated (due to upgraded capacity of the Repository).

Such approach would take opportunity to pave a path for a modern approach, which would bring practical benefits to the interested parties and a

legal certainty in application of the Convention. No doubt, it would enhance appeal for its ratification.

The time during the period required for ratification process could (under the proposed suggestion) be used for completing necessary work to resolve all the issues standing in the way of creating a Repository that would meet the needs of a brand new convention, drafted in an advanced digital era. In addition, adopting the Convention would not be a finished business, which would freeze its potentials for a foreseeable future, but rather an incentive to organize the Repository properly, making the Convention suitable for the contemporary world and the future. The history is accelerating. We have to catch up.