

**The Work of the United Nations Commission on
International Trade Law (“UNCITRAL”)
Working Group VI (“WG VI”) on Judicial Sale of Ships and
its First Revision of the Beijing Draft**

Purpose

1. This paper seeks to brief the Hong Kong Fleet Operation Advisory Committee (“Committee”) on the progress of discussion by UNCITRAL WG VI on judicial sale of ships. It also highlights four fundamental issues raised by WG VI in its first revision of a draft convention on the recognition of foreign judicial sales of ships (also known as the “Beijing Draft”), which was approved by the Comité Maritime International (“CMI”) Assembly in 2014.

Background

2. In preparation for the fiftieth session of UNCITRAL, CMI submitted a proposal (“CMI Proposal”) for possible future work on cross-border issues related to the judicial sale of ships. The CMI Proposal outlined certain problems associated with the non-recognition in one State of the judicial sale of a ship that emanated from another state. In particular, the CMI Proposal noted that a failure to recognize the clean title acquired by the purchaser under the law of the State of sale led to difficulties in deregistering the ship from its presale registry and gave rise to the risk of subsequent arrest of the ship for presale claims.
3. The CMI Proposal expressed the view that these problems could be addressed by a simple, largely procedural and international instrument. To this end, it referred to the Beijing Draft.
4. At a high-level colloquium held in Valletta, Malta, on 27 February 2018, the CMI Proposal received support from a cross section of the international maritime industry, including representatives of the Baltic and International Maritime Council (“BIMCO”), the International

Transport Workers Federation (“ITF”) and the Federation of National Associations of Ship Brokers and Agents (“FONASBA”), as well as ship financiers, shipowners, bunker suppliers, ship repairers, harbor authorities and ship registries.

5. For the fifty-first session (New York, 25 June – 13 July 2018) of UNCITRAL, a follow-up proposal from the Government of Switzerland included the outcomes and conclusions of the above colloquium. It noted that there was consensus among delegates and panelists that the Beijing Draft would provide a helpful reference if work were to be taken up on the topic by UNCITRAL.¹ UNCITRAL decided at the same session to add the topic to its work programme. The topic was subsequently allocated to WG VI.²
6. At its thirty-fifth session (New York, 13 – 17 May 2019), WG VI considered the Beijing Draft, and decided that the Beijing Draft provided a useful basis for its deliberations on the topic of the judicial sale of ships.³ Incorporating the discussions and decisions of WG VI at its thirty-fifth session, the UNCITRAL Secretariat has prepared the first revision of the Beijing Draft, which will be presented for consideration by WG VI at its thirty-sixth session (Vienna, 18 – 22 November 2019). Its thirty-seventh session is further scheduled for 20 – 24 April 2020 in New York.
7. Hong Kong SAR representatives participated in the thirty-sixth session of WG VI as part of the Chinese delegation. It is envisaged that the Hong Kong SAR will continue to be represented in the work of WG VI until the conclusion of its work regarding the judicial sale of ships.

First Revision of the Beijing Draft

8. This paper highlights four fundamental issues raised by UNCITRAL in the first revision of the Beijing Draft. Any view from members of the Committee on the Beijing Draft, including the said four fundamental issues, and the thirteen other issues for consideration⁴ identified by UNCITRAL in the Note by Secretariat - Draft Instrument on the Judicial

¹ Paragraphs 1 to 4 of Note by the Secretariat – Judicial Sale of Ships: Proposed Draft Instrument Prepare by the Comité Maritime International (A/CN.9/WG.VI/WP.82).

² Paragraph 1 of the Report of Working Group VI (Judicial Sale of Ships) on the work of its thirty-fifth session (New York, 13-17 May 2019) (A/CN.9/973).

³ Paragraph 1 of Note by the Secretariat – Draft Instrument on the Judicial Sale of Ships: Annotated First Revision of the Beijing Draft (A/CN.9/WG.VI/WP.84).

⁴ Paragraphs 8(a) to (m) of A/CN.9/WG.VI/WP.84.

Sale of Ships: Annotated First Revision of the Beijing Draft (A/CN.9/WG.VI/WP.84) is welcome. The said Note (with the first revision of the Beijing Draft enclosed therewith) is at Annex hereto. It may also be downloaded from the website of WG VI.⁵

(i) Form of the Instrument

9. The Beijing Draft is in the form of a treaty. At its thirty-fifth session, WG VI agreed that it would be premature to consider the form of any eventual instrument (e.g. treaty or model law). In keeping with that decision, the first revision follows the form and structure of the Beijing Draft considered by WG VI at its thirty-fifth session, but includes, in *italicized text*, drafting options for a model law to help WG VI visualize such an alternative.⁶
10. There are views that a treaty is the best way to achieve the various goals of the instrument. The intended legal effects (e.g. clean title to be passed to the purchaser, and limitation of *locus standi* for challenging a judicial sale) affect the fundamental rights and obligations of individuals. The due process stipulated in the instrument also demands uniformity in practice. Proponents hence find it necessary to have a treaty which is legally binding among the Contracting States to ensure compliance with the requirements of the instrument.

(ii) Geographic Scope

11. No decision has been taken as to whether the instrument, if it takes the form of a treaty, will apply to judicial sales conducted in a non-State Party. While geographic scope has not been considered in detail by WG VI, some doubts have already been expressed about applying the recognition regime to judicial sales conducted in a non-State Party, assuming that the instrument were to take the form of a treaty. The first revision is drafted on the basis that, in the form of a treaty, the recognition regime only applies between States Parties.⁷
12. There are contrary views that the instrument should adopt a wider approach so as to maximize its reach. Proponents argue that article 9 of the original Beijing Draft offers sufficient protection. That article

⁵ The annotated first revision of the Beijing Draft can be found on WGVI's website at https://uncitral.un.org/en/working_groups/6/sale_ships.

⁶ Paragraph 3 of A/CN.9/WG.VI/WP.84.

⁷ Paragraph 4 of A/CN.9/WG.VI/WP.84.

provides a reservation mechanism whereby a Contracting State may restrict application of the instrument to recognition of judicial sales conducted in Contracting States.⁸ Such a reservation mechanism, if adopted in the instrument, would give the HKSAR sufficient leeway: should it be considered by the HKSAR that the wide approach is not operationally feasible (because it would be difficult to ascertain whether a non-contracting party has substantially complied with the relevant treaty requirements), it would be open to the HKSAR to adopt its own view on the need for relying on such a reservation mechanism when it is consulted by the Central People's Government on the application of the instrument as a treaty to the HKSAR.

(iii) Substantive scope

13. No decision has been taken on whether the recognition regime under the instrument applies only to judicial sales for which clean title has already been conferred on the purchaser under the national law of the State of judicial sale ("Option A"), or whether it applies more broadly to mandate that all judicial sales confer clean title ("Option B"). As requested by WG VI, the first revision reflects both options (see articles 2(2), 4 and 6).⁹
14. Under Option A, the net effect of the instrument is to add extra procedural safeguards on top of the existing domestic laws of Contracting States, whereby purchasers in judicial sales have already been conferred clean title. Such safeguards include provisions on notice requirement (article 3), certificate of judicial sale (article 5), and limitation of challenge to judicial sale (article 9).

⁸ Article 9 of the original Beijing Draft reads:

"State parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties."

Of relevance is Article 2 of the original Beijing Draft, which provides that:

"This Convention shall apply to the conditions in which a Judicial Sale taking place in one State shall be sufficient for recognition in another State."

The combined effect of Articles 2 and 9 of the original Beijing Draft is that the Convention shall apply to judicial sales conducted in all states, unless a Contracting State makes a reservation (by way of declaration) under Article 9 to restrict application of the Convention to recognition of judicial sales in Contracting States. The original Beijing Draft can be downloaded at the webpage of WG VI : <https://undocs.org/en/A/CN.9/WG.VI/WP.82>

⁹ Paragraph 5 of A/CN.9/WG.VI/WP.84.

15. Option B goes further by requiring all judicial sales to confer clean title. This option would bring significant change to Contracting States which under their national law do not confer clean title upon purchasers in all cases of judicial sales.

(iv) “Qualified” judicial sales

16. No decision has been taken as to whether the instrument should accommodate so-called “qualified” judicial sales (i.e., sales for which clean title is not conferred on the purchaser under the national law of the State of judicial sale). As suggested at the thirty-fifth session of WG VI, the first revision includes drafting options to accommodate such sales (articles 4(2), 5(2)(h), 7(2), and 8(3)).¹⁰

17. Some reservations have been expressed about introducing a qualified title into the instrument, including the impact it might have on the value of the certificate of judicial sale issued under article 5 and the effectiveness of the recognition regime under the instrument. It has been noted that, when considering “qualified” sales, WG VI should not lose sight of the fundamental objective of the instrument to facilitate the deregistration of the ship by way of the certificate of judicial sale.¹¹

Comments sought

18. Members are invited to take note of the work of UNCITRAL WG VI on judicial sale of ships outlined above. Any view from Members on the first revision of the Beijing Draft is welcome.

**International Law Division
Department of Justice &
Multi-lateral Policy Division
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¹⁰ Paragraph 6 of A/CN.9/WG.VI/WP.84.

¹¹ Paragraph 7 of A/CN.9/WG.VI/WP.84.