



АССОЦИАЦИЯ МОРСКОГО ПРАВА

Ассоциация по содействию в развитии международного публичного
и международного частного морского права

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Семинар о проблемах международного признания публичной продажи морского судна на основании судебного решения

1 февраля 2022 г.

Санкт-Петербург, Ассоциация морского права RUMLA,
онлайн-платформа ZOOM,
с 19:00 до 21:00 (МСК)

Цель семинара – обсудить идеи по совершенствованию механизма международного признания публичной продажи морского судна на основании судебного решения.

В настоящее время Комиссия ООН по праву международной торговли (ЮНСИТРАЛ) ведёт работу над проектом Конвенции о продаже судов на основании судебного решения.

Конвенция призвана предложить унифицированные правила публичной продажи морских судов, зарегистрированных в одном государстве, но продаваемых с публичных торгов по требованию кредиторов в другом государстве.

Первый семинар Ассоциации морского права RUMLA, посвящённый обсуждению проекта Конвенции, состоялся 7 декабря 2021 г. Запись первого семинара опубликована на канале Ассоциации RUMLA в YouTube (<https://youtu.be/mrowuK72WJM>).

В рамках второго семинара мы планируем обсудить вопросы, которые на сегодняшний день являются дискуссионными для разработчиков проекта Конвенции.

Вопросы для обсуждения:

1. Должно ли быть возможным оспаривание публичной продажи судна, состоявшейся за рубежом, в суде государства его регистрации? Какими должны быть основания такого оспаривания? (Проблемы ст. 9–10 проекта)
2. Как применять правила о запрете арестов судов в обеспечение других требований, заявленных не в стране публичной продажи судна, и как снимать ранее наложенные аресты, особенно с учетом того, что решение об аресте могло быть принято в другом государстве? (Проблема ст. 8 проекта)

Докладчик – Игорь Ястржембский, руководитель гражданско-правовой практики юридической фирмы «Щекин и партнеры», представитель Центра международных и сравнительно-правовых исследований на заседаниях рабочей группы ЮНСИТРАЛ по вопросам разработки проекта Конвенции.

Модератор – Константин Краснокутский, президент российской Ассоциации морского права RUMLA.

Среди участников семинара:

- Мария Ерохова, к. ю. н., доцент МВШСЭН, консультант NAVICUS.LAW,
- Константин Путря, к. ю. н., преподаватель НИУ ВШЭ – Санкт-Петербург,
- Пётр Фалилеев, к. ю. н., почётный член Учёной Ассоциации Центра Международных Юридических Исследований в Зальцбурге,
- Александр Циммерман, к. ю. н., доцент кафедры международного права СПбГУ.

Мероприятие пройдёт очно-заочно: в офисе Ассоциации морского права RUMLA и на онлайн-платформе ZOOM, с записью и последующим размещением на канале Ассоциации в YouTube.

К участию в семинаре приглашаются все желающие.

Материалы к обсуждению: текст статей 8, 9, 10 пятого варианта текста Конвенции (Пекинского проекта), а также заметки к данным статьям Международного морского комитета (СМІ) приведены ниже.

Также дополнительные материалы по работе над проектом размещены на сайтах ЮНСИТРАЛ (https://uncitral.un.org/en/working_groups/6/sale_ships) и Международного морского комитета (СМІ) (<https://comitemaritime.org/work/judicial-sale-of-ships/>).

Выдержка из пятого варианта Конвенции (Пекинского проекта)

Article 8. No arrest of the ship¹

- 1.If an application is brought before a court in a State Party to arrest a ship or to take any other similar measure against a ship for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, dismiss the application.
- 2.If a ship is arrested or a similar measure is taken against a ship by order of a court in a State Party for a claim arising prior to an earlier judicial sale of the ship, the court shall, upon production of the certificate of judicial sale referred to in article 5, order the release of the ship.
- 3.If the certificate is not issued in an official language of the court, the court may request the person producing the certificate to produce a [certified] translation into such an official language.
- 4.Paragraphs 1 and 2 do not apply if the court determines that dismissing the application or ordering the release of the ship, as the case may be, would be [manifestly] contrary to the public policy of that State.

Article 9. Jurisdiction to avoid and suspend judicial sale²

- 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.]

¹ *No arrest – general*: Article 8 remains unchanged from the fourth revision.

² *Avoidance of judicial sale – general*: Article 9 remains unchanged from the fourth revision.

[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.]³

[5. The effects of avoidance of a judicial sale shall be determined by applicable law].⁴

*Article 10. Circumstances in which judicial sale has no international effect*⁵

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.⁶

³ *Suspension of effects of judicial sale*: The original Beijing Draft and subsequent revisions deal with suspending the effects of a judicial sale. The Working Group has so far not considered the issue and may wish to consider whether it is necessary for the convention to address it. While the secretariat has identified cases in which a judicial sale has been or may be suspended before completion, it has not identified any cases 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).

⁴ *Avoidance of judicial sale – international effect*: Articles 9(3) and 9(4) (including the square brackets) remain unchanged from the second revision. Following initial discussions at the thirty-seventh session (A/CN.9/1047/Rev.1, para. 108), the Working Group engaged in a detailed discussion at its thirty-eighth session of the legal consequences that would flow in the “exceedingly rare” event of a judicial sale being avoided after issuance of the certificate of judicial sale (A/CN.9/1053, paras. 27–31). Different options were put forward for dealing with the issue (ibid., paras. 29 and 30), which the Working Group agreed to consider further (ibid., para. 31). 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 (ibid.). To reflect the outcome of those deliberations, articles 5(6), 9(3) and 9(4) were placed in square brackets in the fourth revision, and article 9(5) was inserted for consideration by the Working Group as an alternative to those provisions. At its thirty-ninth session, the Working Group agreed to delete article 5(6) (and article 5(7)). The Working Group may wish to confirm whether articles 9(3) and 9(4) should also be deleted, and whether article 9(5) should be retained.

⁵ *Ground for refusal – general*: Article 10 remains unchanged from the fourth revision.

⁶ *Grounds for refusal – public policy*: At its thirty-seventh session, the Working Group considered a proposal to delete the word “manifestly” and decided to retain the wording of the public policy ground for the time being (A/CN.9/1047/Rev.1, para. 86). The issue has not since been considered by the Working Group.

Заметки Международного морского комитета СМІ для 40-й сессии Рабочей группы VI ЮНСИТРАЛ (Нью-Йорк 7-11 февраля 2022 года)

8. Article 8 - No Arrest of a Ship

The CMI is of the view that the word “*certified*” in square brackets in article 8 (3) should be maintained, and that the word “*manifestly*” in square brackets in article 8 (4) 4 should also be maintained.

9. Article 9 - Jurisdiction to avoid and suspend judicial sale

i. The Secretariat is asking whether we are agreeable to limiting the exclusive jurisdiction clause of the state of judicial sale to those sales conferring clean title.

In truth having this additional limitation or not, does not make the slightest bit of difference to our case as long as it is the State of judicial sale which has exclusive jurisdiction to hear these cases where the sale of the ship is free and unencumbered.

However the group agreed that again an unscrupulous plaintiff with entirely wrong intentions may try to commence an action in another state and conjure up some fictitious reason for commencing an action in another state. Therefore the preferred route was to leave the wording as is on the grounds that the Working Group has agreed many sessions ago that a fundamental principle of the Convention is that it is only the court of the state of judicial sale that should look into the validity of the sales conducted within its jurisdiction whether these be Convention sales or not.

ii. Article 9 (3) and (4)

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 deleted by the Secretariat in foot note 26 of document A/CN.9/WG.VI/WP.92.

iii. Article 9(5).

For the same reasons expressed above, the CMI is of the view that paragraph 5 currently in square brackets should be retained. However the CMI would like to recommend that for further clarity, the words “*in the state of judicial sale*” be added to the sentence, so that paragraph 5 would read: “*The effects of avoidance of a judicial sale shall be determined by applicable law in the state of judicial sale.*”

iv. Additional paragraph to Article 9.

The CMI would like to repeat a recommendation it made on the 4th revision of the Beijing Draft. It believes that it would be useful to add the following additional paragraph which would be paragraph (4):

“If, after a certificate of judicial sale has been transmitted to the repository pursuant to Article 5 (2), the court of the state of judicial sale avoids the judicial sale or suspends its effects pursuant to Article 9 (1), the court of the state of judicial sale or the competent authority shall promptly transmit to the repository referred to in article 11 the decision of the court of judicial sale to avoid or suspend the judicial sale.”

10. Article 10 - Circumstances in which judicial sale as no international effect

The CMI finds 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.