



Memo

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Date: 14 April 2014

Delivery: Internal

Beijing Convention

- 1 The Final Draft of the Recognition of Foreign Judicial Sales of Ships (Beijing Convention) was circulated in March 2013. The draft instrument covers the judicial sale of ships generally and its purpose is to grant ship purchasers necessary and sufficient protection where they purchase a ship via judicial sale.
- 2 The International Convention applies to all members of the United Nations and there was concern to avoid any possible conflicts with other international conventions, in particular the Maritime Lien & Mortgage (MLM) Conventions of 1926/1967/1993 and the Arrest Conventions of 1952/1999.

Reasons for introduction

- 3 In 2007, the Executive Council of the CMI agreed to conduct a preliminary study on the issues in relation to judicial sale of ships. Provisions concerning the notice and effects of "forced sales" of ships are contained within the MLM 1993 but the subject had not yet been identified as dealt with by a particular international convention, unlike the arrest of ships.
- 4 It was noted that the term "forced sale" may have a broader meaning than "judicial sale", which relates solely to the authority of a judgment or court order.
- 5 It emerged that a number of problems, in particular the recognition of judicial sale of ships by a foreign court, have been encountered.
 - 5.1 The *Acrux* (1961) - the purchaser could not secure permanent registration in his desired country as he was unable to obtain a certificate of deletion from the Italian Register of Ships as the sale was not recognised. The mortgagees could start an executive procedure on the ship under Italian law so an undertaking from the mortgagees was required by the court not to commence proceedings.
 - 5.2 The *Galaxias* (1988) - the ship could not be registered in the Greek Shipping Registry until the previous claims against it were satisfied, despite it supposedly having been sold "free and clear from all encumbrances" in Canada. The Canadian sale was not recognised.
 - 5.3 The *Great Eagle* (1994) - where a claimant seeks to vindicate his ship, under the Admiralty Jurisdiction Regulation 105 of 1983 he was entitled to

arrest and take proceedings against it in rem. In this case, the claimant failed to establish a prima facie case in respect of the causes of action. Issue of registration in a country despite not being deregistered in a previous country. A following action regarding the same ship found that the appropriate forum in which to bring claims is in the court of the country where the challenged sale of ship is effected.

5.4 The *Union* (2005) - no notice of sale by another court so could not take any steps to protect any rights and interests and original registration had not been deleted causing the issue of duplicate registrations of the same ship.

6 The cases highlight issues surrounding registration and deregistration; provision of notice of sale to interested parties; the validity of judicial sales in foreign courts; and which court has jurisdiction over disputes arising from judicial sales of ships.

7 In 2010, a CMI questionnaire was sent to the national maritime associations in order to collect and analyse information and materials from a number of jurisdictions in relation to recognition of the foreign judicial sale of ships. The questionnaire was concerned with: the concept of the judicial sale of ships within the jurisdiction; the key procedural elements; the effects of a judicial sale; the recognition of legal effects; and the necessity and feasibility of an international instrument recognising foreign judicial sales of ships.

8 The Beijing Draft was based upon the answers provided to the questionnaire by a number of jurisdictions.

Article provisions

9 Article 2 - Scope of application

9.1 Limited to application in contracting states with the option of allowing those states to opt for a wider application.

10 Article 3 - Notice of judicial sale

10.1 Notice to be given to interested parties at least 30 days prior to a judicial sale, otherwise there is no obligation on the contracting state to recognise the judicial sale.

10.2 Unresolved issue - the way in which notice in writing is to be provided under Article 3 is unresolved. The qualifying words "which provide confirmation of receipt" are currently in brackets. There is a concern that signatories to the MLM Conventions would be in breach of these Conventions if the words are removed but alternatively if lack of receipt invalidates the sale then the purpose of the Beijing Convention is defeated.

11 Article 4 - Effect of judicial sale

- 11.1 Where a judicial sale has been carried out, all prior rights, title and interests are extinguished and all mortgages, charges and liens or other encumbrances are removed, unless assumed by the purchaser.
- 11.2 Criticised for not having sufficiently clear wording, particularly as to which is the applicable State law conducting the judicial sale.
- 12 Article 5 - Issuance of a certificate of judicial sale
 - 12.1 Where a ship is sold by judicial sale and all conditions complied with, a certificate should be issued reflecting that ownership has passed to or been acquired by the purchaser.
- 13 Article 6 - Deregistration and registration of the ship
 - 13.1 On production of an Article 5 certificate, all previous registered mortgages and charges to be deleted and the ship is deregistered (if previously registered) for the purpose of registration in the name of the purchaser.
 - 13.2 The purchaser is able to register the ship based on the certificate produced under Article 5 - the purchaser is not prejudiced by the previous owner's failure to deregister.
- 14 Article 7 - Recognition of judicial sale
 - 14.1 The court of each contracting state shall recognise a judicial sale and certificate issued under Article 5
 - 14.2 Transfer of ownership extinguished all prior rights, title and interests and the ship is sold free of all registered mortgages, charges and liens or other encumbrances, unless assumed by the purchaser.
 - 14.3 The ship can no longer be subject to an arrest for any claim prior to the sale.
- 15 Article 8 - Circumstances in which recognition may be suspended or refused
 - 15.1 Provides for the most convenient forum for challenging the judicial sale.
 - 15.2 Offering protection to purchasers by remedies challenging the validity of the judicial sale and transfer of ownership.
- 16 Article 9 - Relation with other international instruments
 - 16.1 Convention should not conflict, in particular should not conflict with the MLM and Arrest Conventions.

A Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships
(Known as the "Beijing Draft")

(Done at Beijing on 19 October 2012)

CONSIDERING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing of maritime claims and enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that uncertainty for the prospective Purchaser about the international Recognition of foreign Judicial Sales of Ships and transfer of registry may have an adverse effect upon the level of proceeds generated by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONSIDERING that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by channelling the remedies available to interested parties to challenge the validity of the Judicial Sale and any subsequent transfers of the ownership in the Ship;

CONSIDERING that in principle once a Ship is sold by way of a Judicial Sale, the Ship should no longer be subject to arrest for any claim arising prior to its Judicial Sale; and

CONSIDERING that the most convenient forum for assessing whether or not a Judicial Sale is regular or effective is the Court of the State in which the Judicial Sale took place, therefore only the competent Court in that State should have jurisdiction over actions challenging the Judicial Sale.

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly authorized document, or a certified copy thereof, as provided for in Article 5.
2. "Charge" includes any charge, lien, *privilège*, encumbrance, claim, arrest, attachment, right of retention or notice of interest whatsoever and howsoever arising in relation to the Ship.
3. "Clean Title" means free and clear of all Mortgages or Charges.

4. "Competent Authority" means any Person, Court or authority which is empowered under the laws of the State in which the Judicial Sale takes place to sell or transfer or order to be sold or transferred a Ship free and clear of any and all Mortgages or Charges, all Maritime Liens and other liens, and other encumbrances of whatsoever nature and howsoever arising.
5. "Court" means any judicial body established under the law of the State in which it is located and empowered to determine the matters covered under this Convention.
6. "Day" means any calendar day.
7. "Deficiency Amount" means any amount of a creditor's claim against any Person personally liable on an obligation which is secured by a Mortgage or Charge, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.
8. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a Mortgage or Registered Charge attached to the Ship immediately prior to its Judicial Sale.
9. "Judicial Sale" means any sale of a Ship accomplished by a Competent Authority or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the Judicial Sale takes place by which Clean Title to the Ship is given to the Purchaser and the proceeds of sale are made available to the creditors.
10. "Maritime Lien" means any claim recognized as a maritime lien or *privilege maritime* on a Ship by the law applicable in accordance with the private international law rules of the State in which the Ship is sold by way of Judicial Sale.
11. "Mortgage" means any mortgage or "*hypothèque*" effected on a Ship and recognized as such by the law applicable in accordance with the private international law rules of the State in which the Ship is sold by way of Judicial Sale.
12. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
13. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

14. "Purchaser" means any Person to whom the property in a Ship is transferred or is intended to be transferred pursuant to a Judicial Sale.
15. "Recognition" means that a Judicial Sale of a Ship has the same effect in the State in which Recognition is sought as it does in the State in which that Judicial Sale was accomplished.
16. "Registered Charge" means any Charge entered in the register of the Ship the subject of the Judicial Sale.
17. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
18. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State in which the Judicial Sale takes place.
19. "State" means any member State of the United Nations.
20. "State of Registration" means the State in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.
21. "State of Bareboat Charter Registration" means the State which granted registration and the right to fly temporarily its flag to a ship bareboat chartered-in by a charterer in the said State for the period of that charter.
22. "Subsequent Purchaser" means any Person to whom property in a Ship has been transferred through a Purchaser.

Article 2 Scope of Application

This Convention shall apply to the Recognition in a State Party of a Judicial Sale taking place in the territory of another State Party.

Article 3 Notice of Judicial Sale

1. No State is required by this Convention to recognize a Judicial Sale accomplished in another State unless the party seeking Recognition establishes that the following notices, where applicable, have been provided prior to such Judicial Sale either by the Competent Authority in such State or by one or more parties to the proceedings resulting in such Judicial Sale, in accordance with the laws of such State, to:
 - (a) The authority in charge of the Ship's register in the State of Registration;
 - (b) All holders of registered Mortgages or Registered Charges;
 - (c) All holders of Maritime Liens, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and
 - (d) The Owner of the ship;
2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be provided to the authority in charge of the Ship's register in such State.
3. The notice required by paragraphs 1 and 2 of this Article shall be provided at least 30 days prior to the Judicial Sale and shall contain, as a minimum, the following information:-
 - (a) The name of the Ship, the IMO number (if assigned) and the name of the Owner or the bareboat charterer, as appearing in the registry records (if any) in the State of Registration (if any) or the State of Bareboat Charter Registration (if any).
 - (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 seven days prior to the Judicial Sale; and
 - (c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in paragraph 3 of this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means [which provide confirmation of receipt]¹, to the Persons as specified in paragraphs 1 and 2, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other publications.

Article 4 Effect of Judicial Sale

Subject to:

- (a) the Ship being physically within the jurisdiction of the State in which the Judicial Sale is accomplished, at the time of the Judicial Sale and
- (b) the Judicial Sale having been conducted in accordance with the law of the State in which the Judicial Sale is accomplished and the provisions of this Convention

all rights, title and interests in the Ship existing prior to its Judicial Sale shall be extinguished and all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, shall cease to attach to the Ship and title to the Ship shall be transferred to the Purchaser in accordance with the law applicable.

Notwithstanding the preceding provisions of this article, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 of this Convention shall extinguish any remedies including, without limitation, any claims for Deficiency Amounts, other than those enforceable against the Ship the subject of the Judicial Sale.

Article 5 Issuance of a Certificate of Judicial Sale

¹ Notes: Unresolved issue, 1. Concern that any deviation of MLM could immediately put MLM-countries in breach / a point to be checked. 2. If lack of receipt invalidates the Judicial Sale, the purpose of this Convention is defeated.

When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Judicial Sale is made and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, and (2) all rights, title and interests existing in the Ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall be bound to delete all registered Mortgages or Registered Charges, except those assumed by the Purchaser, and either to register the Ship in the name of the Purchaser or to delete the Ship from the register and to issue a certificate of deregistration for the purpose of new registration, as the case may be.
2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry in such State shall be bound to delete the Ship from the register and to issue a certificate to the effect that the permission for the ship to register in and fly temporarily the flag of the State is withdrawn.
3. If the Certificate as provided for in Article 5 of this Convention is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the Purchaser to submit a duly certified translation of the Certificate into such language.
4. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8 of this Convention, the Court of each State Party on the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale conducted in any other State Party with a Certificate issued as provided for by Article 5 of this Convention, as having the effect:
 - (i) that the ownership of the Ship has been transferred to the Purchaser and all rights, title and interests in the Ship existing prior to its Judicial Sale have been extinguished; and
 - (ii) that the Ship has been sold free of all registered Mortgages and Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances and claims of whatsoever nature and howsoever arising.
2. Where a Ship which was sold by way of Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim arising prior to the Judicial Sale, the Court shall reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Convention, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Convention.
3. Where a Ship is sold by way of Judicial Sale in a State Party, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State Party in which the Judicial Sale took place and no Court other than a competent Court of the State Party in which the Judicial Sale took place shall have jurisdiction to entertain any action challenging the Judicial Sale.
4. No Person other than an Interested Person as defined by this Convention shall be entitled to take any action challenging a Judicial Sale before a competent Court, and no competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person as defined by this Convention. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser of that Ship.
5. No claim challenging a Judicial Sale shall be admitted unless it is presented within three months of the date of the Judicial Sale as recorded in the Certificate. This three-month period shall not be subject to any suspension, interruption or extension whatsoever.

6. In the absence of proof that a circumstance exists under Article 8 of this Convention, a Certificate issued as provided for in Article 5 of this Convention shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4 of this Convention, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

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:

1. Recognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State in which the Competent Authority issuing the Certificate provided for in Article 5 is located.
2. Recognition of a Judicial Sale may be
 - a) suspended by a Court of the State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser and the competent Court has suspended the legal effect of the Judicial Sale; and
 - b) refused by a Court of the State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court after suspension of the legal effect of the Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects.
3. 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 contrary to the public policy of that State Party.

Article 9 Relation with other International Instruments

Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, etc shall be drafted later and separately]