

Comments on 2nd Draft Instrument on Foreign Judicial Sales of Ships
By China Maritime Law Association

1 Comments on the principle

It is noted that the basic principle laid down in the 2nd draft instrument was that this instrument should grant the ship purchasers necessary and sufficient protection. China MLA appreciates such principle and share the views that the provisions in this current draft with respect to effect of judicial sale, deregistration and registration of the ship, ship arrest, the recognition of judicial sale and claims challenging judicial sale, etc. shall take into account sufficient/necessary protection of the rights of ship purchasers.

2 Specific comments on the articles

Article 1

1. It is noted that the definition of “Certificate” in paragraph 1 already includes “the original duly authorized certificate” and “a certified copy thereof”, Hence, Article 6 paragraph1 and 3, Article7 paragraph 2 and 4 may be revised as “Certificate provided for in Article 5 of this Instrument” to avoid duplication. Also, China MLA wonders if “Certificate” (with Capital letter) can be replaced by “certificate” since it it was not intended to be one single/unique document.

4. As regard paragraph 8 and 9, according to the general rules of private international law, the law of the place where the court hearing the case is located shall apply to matters pertaining to maritime liens, which may have potential

conflicts with the regulation in this instrument.

6. According to the definition of “State of registration” in paragraph 15 and Article 3, the notice of judicial sale shall send to the authority in charge of the ship’s register in the state of registration. However, state of registration of a vessel may no longer be certain and unique. For instance, the new shipping policy in Shanghai may allow the owner of a ship to register the ship in two different ports. Therefore, the definition of “State of registration” may need modification and/or clarification to take into account such change.

Article 4

Due to the conditional provision in Article 4, even a very minor defect concerning the proceedings of judicial sales may result in a full refusal of the recognition by the interested party, and thus the purchasers can hardly acquire sufficient protection. Therefore, it might be possible to revise “Subject to.....” to “Unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument”

Article 6

1. As regards Article 6, in practice, the buyer may be unable to register the ship if and when the original registry is reluctant or even refuses to deregister the ship (as the circumstance in “*Galaxias*”). Therefore, the provision in *Maritime*

Procedure Law of People's Republic of China may be considered, that is, the previous owners is obliged to deregister the ship, and the effect of judicial sale shall not be influenced by his violation of this obligation. In other words, where new buyer has produced evidence that the original registry is reluctant or refuses to deregister the ship within a reasonable time, they may register the ship in a contracting state based upon the certificate alone.

2. Particularly, there are various suggestions pertaining paragraph 4 of this article, they are listed as follows:

(1) It is perhaps worthwhile to consider whether the instrument should allow a temporary registration system, that is, after the conduct of judicial sale, the purchasers shall be entitled to register the ships temporarily [against an appropriate security] regardless of the challenging suit, and this may better protect the rights of ship purchasers and ensure operation of ships after purchase. If there is no challenging suit or the challenging claims are withdrawn or objected by the court, the registry shall change the temporary registration into permanent one. If the challenge succeeds, the temporary registration shall be withdrawn at the request of the Interested Person.

(4) In order to prevent the interested party initiating the malicious suit detrimental to the rights and interests of ship purchasers, whether it should adopt the same approach as *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* did in Art 6, i.e. it might be an effective way to ask the interested

party to provide sufficient security when it intends to challenge the judicial sale.

(5)As an administrative department, registry has no right to judge if the interested party is a genuine one or if he possesses the substantive rights, therefore, it is not reasonable and nor practical to allow the registry to suspend registration just on the basis of the proof which is presented by the interested party.

Article 7

1. Paragraph 1 provides the recognition by the court, however, it is ambiguous whether de-registration of a ship and subsequent registration by the purchaser is subject to prior recognition of the court. It appears negative according to Art 6, and if so, what was the purpose for such recognition when the ship purchaser could simply do with the Certificate (as opposed to obtaining a court order granting the recognition of the ship sale)?

Article 8

It appears that Article 8 paragraph 1(b) is not reconciled with Article 7 paragraph 4; Further, Article 8 paragraph 1(b) does not follow the principle of giving full protection to the ship purchasers, therefore, it may be deleted.

Also, the meaning of “the date of the Judicial Sale” in Article 8 paragraph 2 shall be clarified. In Chinese legal practice, after conducting the sale, the court will deliver a “confirmation of sale”; and after the price are paid, the court will deliver another

legal document called “confirmation of transfer of ship”, both of these two documents are the proof of judicial sale and record issued dates on them. According to the current wording of the instrument, it may be difficult to identify “the date of the Judicial Sale”.