

COMMENTS OF THE BMLA ON THE DRAFT INSTRUMENT FOR THE RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

Article 1

Para.2

- we suggest the deletion of the words ‘ applicable in accordance with the private international law rules’ as they are unhelpful;
- ‘Charge’ is defined as ‘any registerable charge in the same nature of a mortgage’ This definition may give rise to two problems. First, in England a mortgage on a ship registered in Part I or Part II (full registration) of the Register under the Merchant Shipping Act 1995 (“the 1995 Act”) may be registered with the Registrar of Shipping & Seaman (“ the Registrar of Ships”). A mortgage on a ship registered in Part II (simple registration) [fishing boats], Part III [small ships], or not registered at all, cannot be registered with the Registrar of Ships. However under the Companies Act 2006 any mortgage granted on a ship by a limited company has to be registered with the Registrar of Companies within 21 days of its creation and if it is not so registered it is void as against creditors of the owner and any liquidator or administrator. Perhaps the wording could be altered to say “registerable with the Registrar of Ships if there is provision for such registration”;
- The paragraph refers to a charge “in the same nature as a mortgage”: in commercial terms mortgage and charge may be synonymous but in English law a mortgage transfers legal title in the property to the mortgagee whereas a charge does not although it gives the mortgagee a power of sale if the mortgagor defaults;
- The validity of the “charge” should be determined by the lex situs i.e. the law of the State in which the ship is registered not the lex fori. Accordingly this definition should be amended to read ‘ “Charge” means any mortgage, charge or hypothec effected on a ship and recognised under the law of the State in which legal ownership of the ship is registered [or if the ship is not so registered under the law of the State of its home port].’
- We also suggest the deletion of the words ‘applicable in accordance with the private international law rules’ in this definition.

Para 3

- The phrase ‘competent judicial body of the State in which the judicial sale takes place’ encompasses everything else. There is significant repetition between Paras.1.3 and 1.7 likely to produce problems. One solution is to simplify Para 1.3 by defining any judicial body in the State that effected the sale and detail in the term Judicial Sale the requirements that only a sale that is free from any pre-existing encumbrances is considered in this instrument.

Para. 4

- is this needed?

Para.5

- Is the deficiency amount to be determined by the court making the judicial sale? Are costs and interest included?

Para 7

- This defines Judicial Sale as any sale by the court: this would include not only the enforcement of an in rem claim against the ship but any judgment requiring the sale of a ship in legal proceedings that have no connection with the ship whatever.
- A Judicial Sale of a ship under the terms of this proposed Instrument should be limited to a sale of a ship to enforce an in rem claim against the ship set out in the Arrest Convention [sec.20(1) The Senior Courts act 1981]
- Also rather than referring to ‘clean title’ perhaps the sale should be said to be a transfer of the absolute legal and beneficial ownership of the ship free of all mortgages, hypothèques, charges, encumbrances, maritime and other liens, claims and debts whatsoever.[cf. the wording in SALEFORM 2012 “free from all charters, encumbrances, mortgages and maritime liens or any other debts whatsoever”];
- Alternatively the term “encumbrances” could be defined so as to avoid repetition of this wording in the Instrument;
- Also “any appropriate ways provided for....” includes public auction and private treaty so these terms are redundant;
- If there are states where a Judicial Sale takes place on condition that the new owner or the ship will remain liable for specific liabilities then this sale will not be recognised. Is this the intention?

Para.8

- Delete “applicable in accordance with private international law rules”;
- The court seized with the jurisdiction to sell the ship will apply the lex fori in deciding whether a claim is a maritime lien;

Para 9

- English law recognises not only registered mortgages and charges but also unregistered mortgages and charges: Recognition should be governed by the lex situs i.e. law of the State of registration or if the ship is not registered the State of its home port;

Para 10

- Instead of “any person registered in the register of ships in the State of Registration as the owner of the ship” substitute “the registered owner of the ship or the owner of the ship as recognised by the law of the State of her home port”;

Para 12

- “Purchaser” means any person to whom the property in the ship is transferred pursuant to a Judicial Sale.

Para 13

- “Ship” means the property subject to the Judicial Sale which is categorised as a ship under the law of the State that makes the Judicial Sale”. Certain jurisdictions treat various marine structures such as oil rigs, drilling platforms etc which are not technically ships as ships;

Para 15

- If the ship is not registered then the relevant State should be the State of the home port of the ship.

Para 16

- Under which law?]

Article 2

We suggest: “This Instrument will apply to the recognition of a judgement, decision or agreement for the Judicial Sale of a ship made or endorsed by a court of a Contracting State”

Article 3

Para 1

- “A Judicial Sale will not be recognised under this Instrument unless prior to the Judicial Sale the court effecting the Judicial Sale has given notice in accordance with this Article to:...
- Para 1(d): should not there also be a public notice for any claimants who have not given notice to the court?

Para 2

- If the ship is to be sold pendente lite because of special factors e.g. rapid deterioration of the ship or the ship is creating a danger to the port installation or other ships then thirty days is too long and provision should be made for this to be abrogated to seven days where the sale is a matter of urgency.

Para 3

- The second sentence should be (d) in the section above

Article 4

- Will a ship sailing through territorial waters be subject to a Judicial Sale? We suggest:
 - (a) the ship is under the control or custody of the court which effects the Judicial Sale;
 - (b) the Judicial Sale has been conducted in accordance.....
 - (c) under the law of the court effecting the Judicial Sale the property in the ship is transferred to the purchaser free from any encumbrances of whatsoever nature.

Then the Judicial Sale of the ship will be recognised by the courts of all contracting states to have effectively transferred the property in the ship to the purchaser free from all encumbrances of whatsoever nature .

- Nothing in this Article affects the liability of the previous shipowner for any Deficiency Amount;
- Proviso(b): this states that the Judicial Sale is conducted in accordance with the law of the State in which the sale takes place. Different states have widely differing methods of sale and perhaps consideration should be given to providing for specified methods of sale e.g. sale by tender, sale by auction etc. Should private (e.g. so called “fast track”) sales be permitted?

Article 5.

- The wording is confusing: if the Judicial Sale is to be defined by the Instrument why is there an additional requirement of compliance? In any case who will judge compliance with the Instrument? Is it not straightforward – a judgment for Judicial Sale is to be recognised UNLESS – and then add a number of conditions.

Article 6.

- If a ship is registered in Panama but Panama is not a Contracting State how can the registrar in Panama be obliged to do this? Is the plan to restrict the instrument to ships registered in Contracting States?
- If the ship sold is not registered or is registered under a system which does not provide for the registration of mortgages (fishing boats registered in Part II with simple registration and small boats registered in Part III) then there can be no deregistration of a mortgage granted on the ship although the effect of the Judicial Sale will be to discharge all mortgages on the ship.

Article 7.

- This is too complicated: what needs to be said is that a Judicial Sale Certificate issued by the court of a Contracting State (1) shall be recognised by the courts of all Contracting States as transferring, under the laws of the recognising state, the property [in the ship] to the purchaser free, at the time of the Judicial Sale, from any encumbrances of whatsoever nature, and (2) shall prohibit.....”

Article 8.

- Para 1 (paragraph below (c)): we cannot see the point of this: the authenticity of the document and the ship are issues for the court effecting the Judicial Sale. Also, is the ‘interested person ‘ to be determined by the law of the state effecting the sale or the law of the state where recognition is sought?

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