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MEMORANDUM ON THE REVISED TEXT OF THE CONVENTION ON THE RECOGNITION OF THE FOREIGN JUDICIAL SALE OF SHIPS

General

One of the problems in the revised text is that it assumes that mortgages must be registered to be valid and enforceable. It is not mandatory to register a mortgage on a ship registered in Part I of the Register under the MSA 1995 but failure to register will affect priority. An unregistered mortgage may be valid as an equitable mortgage and would be enforced as such by the English Admiralty Court. A further problem is that if the owner is a limited company then the mortgage has to be registered under s. 860 of the Companies Act 2006 and if it is not so registered it will be void as against a creditor, liquidator or receiver of the owner notwithstanding that it is registered under the MSA 1995.

Also this Convention should only apply to ships sold pursuant to judgments for maritime claims in respect of which a ship may be arrested under the Arrest Convention. It should not apply to ships sold pursuant to a court order to enforce a judgment which has no connection with the ship but is simply sold as one of the assets of a judgment debtor.

Finally perhaps consideration should be given as to whether any provision in this Convention is at variance with the terms of the European Judgments Convention.

Article 1 Definitions

Para. 2. "Charge" for the avoidance of doubt "including a Maritime Lien" (*a defined term*) should be added after "lien". The term "notice of interest" is imprecise - perhaps "security interest" would be a better definition.

Para 3. "Clean Title" if Charges includes Maritime Liens then this is correct.

Para 4. "Competent Authority" the words after "Mortgages or Charges" are unnecessary in view of the definition of "Charges".

Para 8. "Interested Person" - see comment on para 16. re "Registered Charge".

Para 10. "Maritime Lien" - these should be maritime liens recognised by the *lex fori* i.e. the Competent Authority effecting the Judicial Sale will apply its own rules.

Para 11. "Mortgage" - the law which determines the validity or otherwise of a Mortgage should be the law of the State in which the Ship is registered. If a U.K. registered Ship is to be sold by a foreign court then the validity of the Mortgage should be determined by English law.

Para 16. "Registered Charge" - in the U.K. and many other States the only security interest which may be registered in the Register of Ships is a Mortgage - this definition is unnecessary. If it is deleted subsequent references to the term should be deleted.

Article 3 Notice of Judicial Sale

Para 1 (b) delete "or Registered Charge"

Para 1 (c) delete "Maritime Lien" and substitute "Charges"

Para 2. at the end add "and the Bareboat Charterer".

Para 3. provision should be made for the abrogation of the 30 day notice period if it becomes necessary to sell the ship as a matter of urgency - for example if the ship is causing a danger or is deteriorating rapidly.

Article 4 Effect of Judicial Sale

If the definition of "Charge" is amended then in the paragraph commencing "all rights, title and interests...", the words "...or Registered Charges" to "howsoever arising" can be deleted and replaced by "and all Charges (except those assumed by the Purchaser)"

Article 5 Issuance of a Certificate of Judicial Sale

In England it is the Admiralty Marshal's Bill of Sale which transfers a clean title to the purchaser of the ship. Perhaps the document issued by the "Competent Authority" should be in the form of a bill of sale or instrument of transfer and this document would specifically state that the transfer is free of all encumbrances etc.

Also (as mentioned above) if the definition of "Charge" is amended then the last four lines may be amended to "...said State and the provisions of this Convention free of all Mortgages (except those assumed by the Purchaser) and all Charges 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

Para 1. line 3 delete "Registered"

Article 7 Recognition of Judicial Sale

Para 1 line 3 – perhaps "and the" rather than "with a"?

Para 1(ii) Again if the definition of "Charges" is amended this sub clause should be amended to read "that the Ship has been sold free of all registered Mortgages and Charges"

Para 4. delete "bona fide": if legal ownership is transferred by order of the Court the issue of good faith is not relevant.

Article 8 Circumstances in which Recognition may be Suspended or Refused

This Article gives a Court in another State the right to refuse to recognise the order of the 'competent Court' (i.e. the Court which issued the order for sale) in certain limited circumstances. Para .1 is fundamental since if the Ship was not within its territorial jurisdiction the 'competent Court' was not competent. However as to the matters mentioned in Para 2. perhaps an alternative procedure would be that in the event of a challenge to Judicial Sale, the Court hearing the challenge should itself directly ask (through official or diplomatic channels) the 'competent Court' to confirm (or otherwise) that the order for sale is final and cannot be appealed.

GJB 5th May 2013

UNITED KINGDOM – 29 SEPTEMBER 2013

**MEMORANDUM ON THE REVISED TEXT OF THE CONVENTION ON
THE RECOGNITION OF THE FOREIGN JUDICIAL SALE OF SHIPS
(PART 2)**

I have handed in a short paper with comments made by Graeme Bowtle on the Beijing draft.

He made a couple of general points.

First, his concern was that the text assumes mortgages must be registered in order to be enforceable, whereas that is not so as a matter of English law (although failure to register will likely have an adverse effect on priorities).

From my review of the text, I am not convinced this is an issue. Mortgage is not defined or limited with reference to registration, and in fact I consider registration is only intended to be relevant - so far as mortgages are concerned - for the purposes of giving notice under Article 3.

I wonder, however, if the definition of mortgage is too narrow, by limiting it to mortgages recognised by the rules of the selling state? I would suggest that matters of recognition go more towards priorities than to the effect of Clean Title, and that the definition may have the unintended effect of prejudicing the clean slate principle.

[Post committee note: Frank Smeele said he thought the definition was not so narrow as I perceived, because it referred to mortgages as recognised by the private intentional law of the Selling State. He may be right. My feeling was that there was no need to limit or define the term beyond "Mortgage and/or hypotheque"]

The second general point was that the Convention should only apply to Judicial Sales made where the vessel is arrested under the Arrest Convention. Graeme Bowtle's view is that this Convention should not apply where a vessel is sold to enforce an *in personam* judgment which has no connection with the vessel –which might be the case if the ship is simply one of the assets of a judgment creditor, say the husband of a divorcing wife.

I have grave reservations about this as a principle – one, because there is more than one Arrest Convention; two, because many countries – the UK included – have definitions of "*Maritime Claims*", that are not identical with those of the Arrest Conventions; and three, because I would not wish to link the adoption of this Convention with another convention which was not universally accepted.

In any event, I am not convinced that this is a major concern since the definition of Judicial Sale limits its application to situations where the effect of the sale is to confer Clean Title on a Purchaser. *[Post-committee note: But compare the comments from China]*.

Again, however, I have questions about the definitions.

As it stands, a Judicial Sale for the purposes of this instrument is only a sale which confers Clean Title, and Clean Title means “*free and clear of all Mortgages and Charges*”.

Does this mean that it is not a Judicial Sale where there are “*Mortgages or Registered Charges assumed by the Purchaser*” as contemplated, in for instance, Article 4?

I would propose that Clean Title be re-defined to cover this point to read “*free and clear of all Mortgages and Charges other than those assumed by the Purchaser*”.

And to ensure that this is all-inclusive, I would propose amending the definition of Charges, as well, as follows:-

“includes, without limitation any charge (including any Mortgage and any Registered Charge), lien (including any Maritime Lien), privilege, encumbrance, claim, arrest, right of retention or other interest whatsoever and howsoever arising in relation to the ship”.

[I am unclear what the phrase “*notice of interest*” (as opposed to “*other interest*”) in the current definition is intended to encompass. I disagree with the Bowtle suggestion that this be amended to “*security interest*”, since I think this is wrong and would probably serve to exclude for the definition of “Charge” simple, unsecured claims].

If the above proposals were adopted, this would have a knock-on effect elsewhere. For instance, the definition of Competent Authority would be shortened so that it covers any relevant authority empowered to transfer a ship “*with Clean Title*”.

There is one – perhaps two – other definition issues.

First, “*Deficiency Amount*” refers to an obligation “*secured by*” a Mortgage or charge. I query whether someone who simply has a claim or an interest is “*secured*” at all. Perhaps “*as relates to a Charge*” or “*arising out of a Charge*”?

The half point relates to “*Maritime Lien*”. There are many claims which qualify as maritime liens in, say, the US, but are not recognised as such in England. If such claims are clearly liens (with a small “L”) for the purposes of the definition of Charges, then this is a non-issue.

But if there is a risk that a court might say that a claim it recognises as giving rise to a maritime lien is not within the Convention definition of “*Maritime Lien*” and yet is not a simple “*lien*” (and so falls outside the definition of the Charges), then this *is* an issue, since we might then find a clever advocate arguing that a lien recognised by the US as “*maritime*”, but which is not recognised as such by the selling state, survives so as to enable a subsequent arrest.

On the issues that dominated yesterday’s discussion:-

1. **Confirmation of service of notice.** My initial view was that the words in brackets should simply be deleted. I probably remain of that view, but it seems to me that, either way, recognition in a second State will be a two-stage process – first, production of an Article 5 certificate and, second, proof of

service of Article 3 notices. (I would by way of side-note say that I could sell a ship in England without serving any of the notices listed in Article 3). At all events, the question is whether the test for good service is that of the State Party where the sale takes place or that of the State Party where recognition is sought. The only practical answer appears to me to be the law of the place of sale. [*Post meeting note: Germany was surprised by my interpretation that Article 3 means the question of notice is for the place where recognition is sought, but agreed that is the effect of the introductory words of Article 3. This does mean that the Art 5 certificate is not conclusive on its own, and that the person seeking recognition must prove notice to the satisfaction of the recognising State.*].

2. **Time for challenge under Article 7.5.** I do not propose to go over the ground covered yesterday and will say no more than that I support the simple deletion of Article 7.5. [*Post meeting note: While not debating the notice issue, I did ventilate the idea with others that in practice there would be (1) the arrest, (2) the application for sale, (3) a hearing about the order for sale, (4) an order for sale, (5) – perhaps - an appeal, (6) an auction, (7) the acceptance of an offer and (8) a period during which the successful buyer might or might not complete the transaction. None of this would be secret. Any interested party would have the chance at any stage to intervene. That being so ... Once the sale is completed by the selling Court then surely, there should be no opportunity to challenge?*]

There are two minor comments on Article 7.

First is Article 7.1: I wonder why the words “*Clean Title*” are not used?

Secondly, why are the words in Article 7.3 “*competent court of the State Party in which the Judicial Sale took place*” used instead of “*Competent Authority*”, and why in Article 7.4 is the phrase “*Competent Court*” used rather than “*any other Court*” (in the first instance) and “*Competent Authority*” (in the second instance)?

The words “*Competent Court*” appear again in Article 8.2. I think this means the Competent Court in the place of sale, but I am not sure and wonder if these various usages suggest it was right to propose yesterday that a definition of “*Competent Court*” be included?

[This memorandum adapts the comments made in the UK memo handed in to the IWS on 29 September. In some instances it disagrees with that memo].