

Comments and Proposals on the First Draft Instrument on JSS by China MLA

Draft Instrument on the Recognition of Foreign Judicial Sales of Ships

[Preamble: ...]

Article 1 Definitions

For the purposes of this Instrument:

1. ~~"Certificate" means the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.~~

Note. This definition is not necessary.

2. "Charge" means any registerable charge of the same nature as a mortgage or "hypothèque" effected on a ship and recognized as such by the law of the State ~~in which the ship is sold by way of Judicial Sale~~ where the Judicial Sale takes place.

Note. Is it possible to find a general legal term with a definition to cover mortgage, hypothèques, lien and charge to make expressions in the context simpler and to possibly facilitate translation to the domestic language in some civil law countries including China?

3. "Court" means any competent judicial body defined as a court by the law of the state in which the Judicial Sale takes place which is empowered under the law of that State to sell or order the sale of a ship ~~free and clear of any and all liens, charges and mortgages, and hypothèques and charges.~~

Note.

1. *"laws of the State" should be changed into "law of that State"*

2. “free and clear of any and all liens, charges and mortgages, and hypothèques” may be deleted, as it is to be the effect of Judicial Sale which is provided below. Such an expression here may cause misunderstanding to mean “to sell or order the sale of a ship which is free and clear of”.

4. ~~"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 "hypothèque" 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 of a ship.~~

Note. This term may not be found in the draft and its definition is therefore unnecessary

5. "Flag State" means a State whose flag a ship flies and is entitled to fly.

6. ~~"Good faith Good-faith purchaser of the ship for value" shall mean any Purchaser or Subsequent Purchaser of a ship at a Judicial Sale for payment or in satisfaction of an obligation in a public auction or court sanctioned private sale, where no wrongful conduct is chargeable to such Purchaser in connection with the Judicial Sale.~~ **who has in good faith paid valuable consideration for the ship in a Judicial Sale without wrongful conduct chargeable according to the law of the State where the Judicial Sale takes place.**

7. "Interested Person" means the **owner** of a ship prior to a Judicial Sale or the holder of a mortgage, "hypothèque", charge, or maritime lien and any other encumbrance of whatsoever nature attached to the ship prior to **a its** Judicial Sale.

Note.

1. “shipowner” should be replaced by “owner”.

2. *Question: Is a claimant whose maritime claim against the shipowner or the ship is not secured by mortgage, "hypothèque", charge, maritime lien, or other encumbrance attached to the ship included in this definition or shall such a person be treated as "Interested Person" under this instrument? Obviously, the answer is positive under Chinese law.*

8. "Judicial Sale of a ship" or "Judicial Sale" or "sale" means any sale of a ship accomplished by 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 ~~in which where the sale is to take place for the purposes of (1) execution or satisfaction of a judgment or other enforceable instrument, (2) enforcement of a maritime lien or mortgage or "hypothèque" or charge on the ship, or (3) preservation of maritime claims in respect of the ship or her sister ship.~~

*Note. "in which the sale is to take place for the purposes of (1) execution or satisfaction of a judgment or other enforceable instrument, (2) enforcement of a maritime lien or mortgage or "hypothèque" or charge on the ship, or (3) preservation of maritime claims in respect of the ship or her sister ship." may be replaced by "where the sale is to take place for the purpose of execution or satisfaction of a judgement or other enforceable instruments **rendered in respect of maritime or commercial claims** with an effect to give the Purchaser thereof clean title to the ship and make proceeds of sale available for distribution among the creditors under the law of the State in which the Judicial Sale takes place."*

9. ~~"Maritime lien" means any lien recognized as a maritime lien on a ship by the law of the State in which the ship is sold by way of Judicial Sale.~~ by the law applicable in accordance with the private international law rules of the State in

which the Judicial Sale takes place.

Note. The applicable law for maritime liens may not be the lex fori.

10. "Mortgage" or "hypothèque" means any mortgage or "hypothèque" effected on a ship and recognized as such ~~by the law of the State in which the ship is sold by way of Judicial Sale.~~ by the law applicable in accordance with the private international law rules of the State in which the Judicial Sale takes place.

Note. The definition of "Mortgage" or "hypothèque" has the same problem as the above definition of "Maritime Lien". For example, mortgage attached to ship is subject to the law of flag state under Chinese international private law.

11. "Owner" or "Shipowner" means any person ~~recorded~~ registered in the register of ships of the State of Registration as the owner of the ship.

Note. The full of definition of "Owner" or "Shipowner" in CLC art.1.3 may be followed, i.e.: "Owner" or "Shipowner" means the person or persons registered as the owner of the ship in the register of ships of the State of Registration or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship's operator, "owner" shall mean such company.

12. "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.

13. "Purchaser" means any person who has acquired ~~ownership of title to~~ a ship from a Judicial Sale.

14. "Ship" means ~~any sea-going ship used in commercial trade and~~ any seaborne craft of any type whatsoever excluding a ship for military or public service purpose which is capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.

Note. "any sea-going ship used commercial trade" may be replaced by "any sea-going ship and any seaborne craft of any type whatsoever excluding a ship for military or public service purpose". It seems certain that a ship for military or public service purpose shall not be within the scope of application of this instrument.

15. "State" means any member State of the United Nations.
16. "State of registration" means ~~the State in whose register of ships a ship has been entered~~, the State in whose register of ships a ship is registered at the time of its Judicial Sale, but does not include the case of bareboat charter registration in which a ship is temporarily registered in the charterer's register.

Note. A ship under construction is usually or may be temporarily registered before delivery and subject to Judicial Sale. There may be also other cases other than the case of bareboat charter registration in which a ship is temporarily registered. Such a case should be included in this instrument. Thus, this definition may be replaced by " `State of registration` means the State in whose register of ships a ship is registered at the time of its Judicial Sale, but does not include the case of bareboat charter registration in which a ship is temporarily registered in the charterer's register. "

17. "Subsequent purchaser" means any person who has acquired ownership from a Purchaser or its sub-purchaser of a ship which was sold by way of Judicial Sale.

Article 2 Scope of Application

This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of a State other than the State in which its recognition is sought.

Article 3 Notice of Judicial Sale

1. Prior to a Judicial Sale in a State, the Court in such State shall ensure that notice

in accordance with this Article is provided to :

- (a) the registered owner **or the master** of the ship;
- (b) all holders of registered mortgages, "hypothèques" or charges which have not been issued to bearer;
- (c) all holders of registered mortgages, "hypothèques" or charges issued to bearer and all holders of maritime liens, provided that the Court conducting the Judicial Sale receives notice of their respective claims;
- (d) the authority in charge of the ship's register in the State of Registration, **or the Embassy or Consulate of the ship's Flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State.**
- ~~(e) the Embassy or Consulate of the ship's Flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State.~~

Note.

1. *"or the master" shall be added after "owner".*
2. *The original provision of (e) may be maintained, but the word "and" at the end of (d) will be changed into "or" and the provisions of (e) will become part of (d).*
3. The notice required by paragraph 1 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, the IMQ number, the registered **ship**owner of the ship;
 - (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 Court conducting the proceedings shall determine is sufficient to protect the interests of ~~persons entitled to notice~~ interested persons.

Note. "the interests of persons entitled to notice" may be replaced by "the interests of interested persons".

- 3. The notice specified in paragraph 2 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, to the persons as specified in paragraph 1, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale ~~is conducted~~ takes place and if deemed appropriate by the Court conducting the Judicial Sale, in other publication.

Article 4 Effect of Judicial Sale

Subject to:

- (a) the ship being in the area of the jurisdiction of the State in which the ~~Sale~~ ~~Judicial Sale is accomplished~~ takes place, at the time of the Sale; and
- (b) the Sale having been conducted in accordance with the law of the State in which ~~the Sale is accomplished~~ the Judicial Sale takes place and the provisions of this Instrument.

the purchaser acquires the title to the ship, all proprietary rights and interests

existing in the ship prior to the Judicial Sale shall be extinguished and all mortgages, "hypothèques" or charges, except those assumed by the Purchaser, ~~and maritime and other all kinds of liens (including Maritime liens)~~, and other encumbrances of whatsoever nature, shall cease to attach to the ship.

Note. According to the law of some countries the title to property is transferred to the purchaser through Judicial Sale, but in some countries like China the owner's title to the property under Judicial Sale is extinguished and the purchaser acquires the original title to the property thereafter. This issue should be decided by the law of the state where the Judicial Sale takes place. Therefore adding the sentence "the purchaser acquires the title to the ship" is to avoid defining it by this instrument.

Article 5 Issuance of a Certificate of Judicial Sale

When a ship is sold by way of Judicial Sale **and the conditions required by the law of the State where the Judicial Sale takes place and by this Instrument have been met**, the Court or court officer conducting the Sale 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 Instrument free of all ~~registered~~ mortgages, "hypothèques" or charges, except those assumed by the Purchaser, ~~and~~ of all **maritime and other of liens (including Maritime liens)**, and **of** other encumbrances of whatsoever nature, and (2) ~~that the ownership of the shipowner prior to the Sale is all proprietary rights and interests existing in the ship prior to the Judicial Sale are~~ extinguished.

The content of a Certificate of Judicial Sale shall be released on newspaper or other open publication which is deemed appropriate by the court conducting the

Judicial Sale.

Note. Taking consideration of the provision of Article 8.1B, it seems necessary for the interested persons to learn about the date of the Judicial Sale recorded in the Certificate. Therefore there shall be a procedure requirement for the contents of the Certificate to be released by open press.

Article 6 Deregistration and Registration of the Ship

1. Subject to the provisions of Paragraph 4 of this Article, upon production by the Purchaser of the Certificate provided for in Article 5 of this Instrument duly certified in accordance with the law of the State **in which the Judicial Sale takes place** the registrar of the ~~ship's~~ Registry where the ship was registered prior to the **Judicial Sale** ~~and which is a State Party~~ shall be bound to delete the ~~ownership registered prior to the Judicial Sale and~~ all registered mortgages, "hypothèques" or 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 ~~said~~ Certificate as provided for in Article 5 is not made in an official language of the State in which the registrar **of the Registry** is located, the registrar may request the Purchaser to submit a translation of the Certificate into such language. The translation shall be certified by an official or qualified translator or by a diplomatic or consular agent.
3. The registrar **of the Registry** may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.
4. ~~Before the process of deregistration or subsequent registration provided for in~~

~~Paragraph 1 of this Article in respect of a ship is completed, if the registrar is put on notice with necessary supporting document(s) by an Interested Person that one or more of the circumstances set out in Article 8 below has arisen and therefore a legal action challenging or nullifying a Judicial Sale has been entertained by a Court in the State where the recognition is sought in respect of the ship registered with the registrar.~~ **If before the deletion of all registered mortgages, hypothèques and charges and registration of the ship in the name of the Purchaser or the issuance of a Certificate of Deregistration as the case may be the Registrar of the Registry is put on notice with necessary supporting documents by an Interested Person evidencing an legal action challenging or nullifying the Judicial Sale has been brought according to Article 8 below in the competent court of the State where the Judicial Sale takes place,** the said registrar ~~will~~ shall not entertain any request for or if commenced, suspend the process of deregistration or subsequent registration of the ship and shall act in accordance with the following provisions:

- (a) where the legal action by the Interested Person challenging or nullifying the Judicial Sale is finally rejected by the Court, the registrar **of the Registry** shall again be free to entertain the request for or be bound to resume and complete the suspended process of deregistration or registration of the ship **in the name of the Purchaser**; or
- (b) where the legal action challenging or mollifying the Judicial Sale is finally upheld by the Court, the registrar **of the Registry** shall not entertain any request for deregistration or **registration of the ship in the name of the Purchaser** or cancel the suspended deregistration or registration process, as the case may be.

Note. It is suggested that only the court of the State in which the Judicial Sale takes place should be competent to assess whether the sale has been regular and effective.

5. If after **the deletion of all registered mortgages, hypothèques and charges and registration of the ship in the name of the Purchaser or the issuance of a Certificate of Deregistration as the case may be is completed, a deregistration or subsequent registration as provided for in Paragraph 1 of this Article is completed, but** the Interested Person produces to the registrar **of the Registry** a duly authenticated original court document (or a certified copy) evidencing that his legal action challenging or nullifying the Judicial Sale **brought in the competent court of the State where the Judicial Sale takes place**, as per paragraph 4 above, has been finally upheld by the Court in respect of the ship which has been deregistered or registered **in the name of the Purchaser** by the registrar, the said registrar shall, at the request of the Interested Person, be bound to restore the previous register of the ship as it was prior to the deregistration~~;~~, provided, however, that the requirement of this Section shall not apply once the ship has been reregistered in the name of a good-faith Purchaser of the ship for value following the Judicial Sale~~; and, provide, further, that this Section shall not prohibit any action for damages under the applicable laws of any State brought by an Interested Person against another Person based on such Person's wrongful conduct with regard to the Judicial Sale; and, provided, further, that this Section shall not be deemed to create any new cause of action.~~

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of this Instrument, each State Party shall recognize a

Judicial Sale in any other State **Party** accomplished in accordance with the law of the said State and the provisions of this Instrument, as having the effect:

- (i) ~~that ownership of the ship is transferred to the purchaser and the rights of the previous owner to the vessel are extinguished;~~ **the purchaser acquires the title to the ship and all proprietary rights and interests existing in the ship prior to the Judicial Sale** are extinguished

Note. The previous owner may have the right to claim for partial proceeds of sale and/or to claim against a third party based upon his title to or other interests in the ship before sale. Therefore, the sale of ship shall not prejudice to the rights as such of the previous owner.

- (ii) that (subject to Article 4) the ship has been sold free of all **registered** mortgages, "hypothèques" or charges, except those assumed by the Purchaser, ~~and maritime and other of all kinds of liens,~~ and other encumbrances of whatsoever nature.

Note. "all registered mortgages" need be replaced by "any mortgages", as non-registered mortgages shall also be extinguished.

2. Where a ship which was sold by way of a Judicial Sale is sought to be arrested or is arrested by a Court **for the application of a Interested Person** in a State Party, the Court shall reject the application ~~for arrest~~ or release the ship from arrest upon production by the Purchaser or Subsequent Purchaser of the Certificate as provided for in Article 5 of this Instrument or a duly certified copy thereof, unless the Interested Person ~~furnishes proof evidencing the existence of any of the circumstances provided for in Article 8 of this Instrument.~~ **produces a duly authenticated original court document (or a certified copy) evidencing that**

his legal action challenging or nullifying the Judicial Sale brought in the competent court of the State where the Judicial Sale takes place has been finally upheld by the Court in respect of the ship. But this Section shall not apply once the ship has been reregistered in the name of a good-faith Purchaser of the ship for value following the Judicial Sale.

Note. Once the Judicial Sale is accomplished and the good –faith purchaser acquired the clean title to the ship, the ship should not be arrested for the action challenging the Judicial Sale brought by the Interested Person especially after the ship is reregistered and there is possibility for the title of the ship to be transferred to the subsequent purchaser. Therefore amend this section as above in line with the provisions of Article 6.4 and Article 6.5 .

3. No Court of a State Party other than of the State Party in which ~~recognition of a Judicial Sale is sought~~ **the Judicial Sale takes place** shall entertain any application to challenge or nullify the Judicial Sale.
4. Where a claim to challenge or nullify the Judicial Sale is filed by an Interested Person against the Purchaser or the Subsequent Purchaser or the ship before the Court of a State Party where ~~recognition is sought~~ **the Judicial Sale takes place**, the Court shall refuse to entertain the claim or reject the claim upon production by the Purchaser or Subsequent Purchaser of the Certificate which is provided for in Article 5 of this Instrument or a duly certified copy thereof, unless the Interested Person furnishes proof evidencing the existence of any of the circumstances provided for in Article 8 of this Instrument **and makes the claim within 12 months of the date of the Judicial Sale as recorded in the Certificate.**

Article 8 Circumstances in which Recognition may be Refused

1A. Recognition of a Judicial Sale may be refused by a State Party, at the request of an Interested Person, only if that Interested Person furnishes to the Court where the ~~recognition is sought~~ **Judicial Sale takes place**, proof that:

(a) at the time of the Sale, the ship was not physically in the area of the jurisdiction of the State in which the Court ~~issuing the Certificate provided for in Article 5~~ **conducting the Judicial Sale** is located; or

Note. "issuing the Certificate provided for in Article 5 " may be replaced by "conducting the Judicial Sale", as "issuing the Certificate" is the consequence of the Judicial Sale.

(b) the Judicial Sale was not ~~accomplished~~ **conducted** in accordance with the law of the State in which the Judicial Sale took place or the provisions of this Instrument; or

(c) the Certificate produced by the Purchaser or Subsequent Purchaser is not issued by the Court appearing on the produced Certificate.

~~1B.—Any such request by an Interested Person will only be admitted if it is presented within 12 months of the date of the Judicial Sale as recorded in the Certificate.—~~

Note. removed to the end of Article 7.4

2. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which recognition is sought finds that the recognition of the Judicial Sale would be contrary to the public policy of that State Party.

Article 9 Restricted Recognition

When signing, ratifying or acceding to this Instrument, any State may on the basis of reciprocity declare that it will only apply the Instrument to the recognition of a Judicial Sale **accomplished conducted** in the territory of a State Party ~~and the ship is flying the~~

~~flag of a State Party.~~

Note. It seems not advisable to have this Article, as this instrument shall be applicable to a Judicial Sale in a State Party of a ship flying the flag of a non-State Party. In addition, any declaration as such may cause prejudice to the uniformity in the word which this Instrument is to achieve.

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