

**COMMENTARY ON THE BEIJING DRAFT
A PROPOSED DRAFT INTERNATIONAL CONVENTION ON RECOGNITION
OF FOREIGN JUDICIAL SALES OF SHIPS**

BY CMI IWG on Recognition of Foreign Judicial Sales of Ships

General Comments:

Integrated into this Commentary are individual comments made in the Commentary of the CMI International Working Group (the "IWG") on the Second Working Draft in relation to provisions which have remained materially unchanged in the 3rd Draft of the proposed draft convention, known as the "Beijing Draft". The integrated comments from the Second Working Draft are inverted and placed between brackets ([...]) in order to distinguish them from new comments first introduced in relation to the Beijing Draft.

During the discussions of the International Sub-Committee (the "ISC") and the meeting of the CMI IWG during the CMI Conference in Beijing in October 2012, it was decided to include a preamble in the Beijing Draft in which certain guiding principles and considerations of the drafters are expressed as an aid to the uniform interpretation of the draft or the future Convention by Courts, practitioners and legal scholars. Already in the Commentary on the Second Draft, p. 1-2, a total of eight principles or points were listed which had been borne in mind in the preparation of the Second Draft. In the Beijing Draft five of these have been (slightly) reformulated and elevated to the preamble of the Draft Convention.

Although not expressly mentioned among the considerations stated in the preamble, it may be added that the drafters were also concerned to avoid as much as possible conflicts with other international conventions, in particular the Maritime Lien & Mortgage Conventions (the "MLM") of 1926/1967/1993 and the Arrest Conventions of 1952/1999.

The text of the Beijing Draft, which is attached to this commentary, is based primarily on the deliberations during the Beijing Conference. Additional changes are proposed by the IWG in the interests of clarity and consistency.

Specific Comments:

Article 1 Definitions

1. The earlier proposed definition of "Charge" has been changed in order to make it as encompassing as possible with regard to any private law claims or rights in relation to the ship but with the exception of Mortgages (including *hypothèques*) which are defined elsewhere.

2. It was proposed and supported by the majority view during the discussion at the Beijing Conference that a definition on the term, clean title, should be included. The Beijing Draft made a definition on this term in Article 1, paragraph 3.

[2. It is proposed that a definition on "Day" should be added to the list of definitions of the Draft, and the proposal is adopted and therefore a definition on "Day" is included in the 2nd Draft.]

3. The earlier proposed definition of "Court" has been changed and a new definition of "Competent Authority" has been added in the Beijing Draft to reflect the fact that under the national laws of some countries, ship auctions and sales do not (necessarily) take place under the authority or direction of a Court or judicial body, but (also) under that of other Persons empowered to do so by the laws of the State where the ship auction/sale takes place.

[3. As regards the definition of "Interested Person", for the purposes of reducing the categories and numbers of Interested Persons who are provided for by this Instrument to be entitled to challenge Judicial Sales and providing as much as possible protection to the Purchasers of ships by way of Judicial Sale, the 2nd Draft defines "Interested Person" to cover just a few categories of Persons, i.e. "the Owner of a ship prior to its Judicial Sale or the holder of a Mortgage, "hypothèque", Charge or Maritime Lien attached to the ship prior to its Judicial Sale." It is hoped that this definition may help to reduce the number of challenges on Judicial Sales.]

4. In the Beijing Draft a further reduction of the categories of Interested Persons entitled to challenge Judicial Sales is achieved by replacing "holder of a Charge" with "holder of a ... *Registered Charge*" (with added emphasis). The term "Registered Charge" is defined in Article 1, paragraph 16.

[As to the definition of "Judicial Sale of Ship" contained in the 1st Draft, it is proposed that reference to the three purposes of Judicial Sales should be avoided, since a number of jurisdictions would have problems with such reference. In the 2nd Draft, the three purposes are deleted but words to the effect that Clean Title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors are included in the definition.]

5. The earlier proposed definition of "Judicial Sale of Ship" has been changed to "Judicial Sale" and an effort has been made to only use this term consistently throughout the Beijing Draft. The definition has also been extended in the Beijing Draft in order to include also Judicial Sales effected by a Competent Authority.

6. A definition of the key concept of "Recognition" has been added in order to clarify that it means the extension of the legal effects of a Judicial Sale from the State of origin to the State of Recognition.

[5. Due to the fact that the words "sea-going" and "used in commercial trade" contained in the definition of ship in the 1st Draft may create unnecessary conflicting interpretations, the definition of ship in the 2nd Draft is revised to mean "any ship capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place." In the Beijing Draft the definition of "Ship" has been extended by the inclusion of the words "or vessel".

7. The earlier proposed definition of "State of Registration" has been changed in order to express more clearly that it refers to the State where the ship is entered in the *ownership register*, rather than that of any bareboat charter register in which the ship may also be entered. For this reason, definitions on State of Bareboat Charter Registration and Registrar are also made respectively in the Beijing Draft.

8. The earlier proposed definition of "Subsequent Purchaser" was deemed not to cover all possible situations and therefore it has been changed to: "any Person to whom property in a Ship has been transferred through a Purchaser."

Article 2 Scope of Application

[8. As to the scope of application, it is proposed that the Instrument should have a wide rather than a narrow scope of application, on the other hand, it is also proposed that the Instrument should be applicable only if (1) the sale takes place in a State Party and (2) the ship is flying a flag of a State Party at the time of the sale. For these reasons, the 2nd Draft in Article 2 on Scope of Application provides for that "This Instrument shall apply to the Recognition of a Judicial Sale taking place in the territory of any State." On the other hand, it is also made clear in Article 9 on Restricted Recognition that a State Party may declare that it will only apply the Instrument to the Recognition of a Judicial Sale made in the territory of a State Party and the Ship is flying the flag of a State Part; in addition it may declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity.]

9. The Beijing Draft in Article 2 clarifies that the proposed Convention applies to the Recognition *in States Party* of Judicial Sales that have taken place in another State Party (with added emphasis). Arguably this was already implied in the wording of Article 2 of the Second Working Draft, but it was deemed to cause no harm to make the implied express. An extension of the scope of application of the proposed convention was achieved by the elimination of Article 9 Restricted Recognition in the Second Working Draft which in its first sentence allowed contracting States at the time of signing, ratifying or acceding the option to restrict Recognition of Judicial Sales to ships flying the flag of contracting States.

Article 3 Notice of Judicial Sale

[9. Article 3 of the 1st Draft is a reproduction of Article 11 of the Maritime Lien and Mortgage Convention 1993. This is welcomed, as conflicts between conventions can be avoided.

10. As to the list of addressees to whom a Notice of sale should be sent, in the 1st Draft "the Embassy or Consulate of the Ship's Flag State to the State in which the Judicial Sale takes place" is added to the list of addressees as contained in the Maritime Lien and Mortgage Convention 1993. Whereas, at the ISC meeting in Oslo, the majority view seems that this addition should be deleted, as the aim of this Instrument is to maximise

the chances of the Judicial Sale being recognised, whilst the longer the list of addressees, the more chance of the notice being found to be sent insufficiently.

11. A brief enquiry/investigation shows that in many jurisdictions Mortgages and/or "hypothèques" are not classified or grouped into "being issued to bearer" and "having not been issued to bearer"; and even if in the jurisdictions with the concept of Mortgages and/or "hypothèques" being issued to bearer, such kind of Mortgages and/or "hypothèques" have not been seen in practice for many decades. Therefore, it seems safe to have the wording of item (b) and (c) of paragraph 1 of Article 3 simplified as "(b) All holders of registered Mortgages, "hypothèques" or Charges; (c) All holders of Maritime Liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims; and"].

10. Although the objective to avoid conflict with the MLM 1993 was retained by the IWG, it was deemed necessary to change the addressee of the norm set in paragraph 1 of Article 3 that sufficient notice of the intended Judicial Sale of a Ship shall be given to the Interested Persons there listed. In Article 11 MLM 1993 and Article 3 paragraph 1 Second Working Draft this obligation is imposed upon the Competent Authority, respectively the Court in the State where the Judicial Sale is to take place. However, as the subject matter of the Beijing Draft is the Recognition of foreign Judicial Sales of Ships, it was thought to be more appropriate to clarify that there is an obligation on the part of contracting States to recognize foreign Judicial Sales only if the required notices have been given prior to the Judicial Sale. To this end the wording of Article 3 paragraph 1 Beijing Draft was changed as follows: "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: ...".

11. Furthermore, the order in which the Persons to whom notice must be given are listed in Article 3 paragraph 1 from (a) up to (d) inclusive as earlier proposed, was changed to bring it in conformity with that in paragraph 1 of Article 11 MLM 1993. Besides, as a vessel registered in one State when being bareboat chartered-in by a charterer in another State may be permitted to register in and fly temporarily the flag of the State the vessel is bareboat chartered-in, and it is believed that the notice of Judicial Sale should also be given to the Ship's registry in the State the vessel is bareboat chartered-in and flying its flag. For this purpose, a new paragraph to that effect is inserted into Article 3 of the Beijing Draft

12. An issue left unresolved in the Beijing Draft concerns the way in which notice in writing shall be provided pursuant to Article 3. Whereas paragraph 3 of Article 3 the Second Working Draft is identical with paragraph 3 of Article 11 MLM 1993, in Article 3 of the Beijing Draft the qualifying words "which provide confirmation of receipt" immediately after "by any electronic or other appropriate means" are placed between brackets. On the one hand there was concern that a removal of this qualification might put contracting States to MLM 1993 in breach of their obligations under the convention. On the other hand it was feared that if lack of receipt of the prior notice were to invalidate the (Recognition of) a foreign Judicial Sale, the purpose of the proposed convention might be defeated.

Article 4 Effect of Judicial Sale

[12. It is proposed that the words, "the ownership of the shipowner" in the 1st Draft should be replaced by the words "all rights and interests in the ship". This proposal was supported by a majority view at the ISC meeting in Oslo. Thus, this article is revised to that effect.

13. As regards the effect of Judicial Sales, it was correctly pointed out by some associations that a Judicial Sale should not have the effect of distinguishing any in personam claim for any Deficiency Amount as defined by this Instrument. As a result, a paragraph to that effect is added into Article 4.]

13. The exact meaning of the earlier proposed wording of Article 4 (a) in the Second Working Draft "the ship being *in the area of* the jurisdiction of the State ..." (with added emphasis) was deemed somewhat obscure and therefore was replaced in the Beijing Draft by: "the ship being *physically within the jurisdiction* of the State ..." (with added emphasis). Furthermore it was deemed necessary to make the clarification in Article 4 last sentence more all-embracing by including also the "deletion pursuant to paragraph 1 of Article 6 of this Convention" and by using the words "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

[14. Again, the words "the ownership of the shipowner " in the 1st Draft are replaced by the words "all rights and interests in the ship" in the 2nd Draft.]

14. Apart from a minor terminological adjustment ("Competent Authority" instead of "Court or Court officer") , the provision remained unchanged.

Article 6 Deregistration and Registration of the Ship

15. As mentioned above, a vessel under bareboat charter may be permitted to fly temporarily the flag of the State the vessel is bareboat chartered-in. It is believed that when such a vessel is sold by way of Judicial Sale, the permission for the vessel to register in and to fly temporarily the flag of that State should be withdrawn. For this purpose, a new paragraph to that effect is inserted into Article 6 of the Beijing Draft.

[15. "It is suggested that only the Court of the State in which the Judicial Sale has been conducted should be competent to assess whether the sale has been regular and effective, and once the sale is completed, the purchase price paid and the sale documents enabling the Purchaser to register the ship have been issued, the right of the Purchaser to register the ship in his name cannot be challenged, Purchasers need protection and the failure to grant them such protection would adversely affect the

possibility of conducting Judicial Sale successfully and obtaining in the interests of the creditors a price quasi in line with the market.” This suggestion is supported by a majority view at the ISC meeting in Oslo. In light of this proposal, paragraph 5 of Article 6 of the 1st Draft is deleted and paragraph 4 of this Article is reworded in line with the proposal.]

16. The earlier proposed paragraph 4 of Article 6 in the Second Working Draft was removed in the Beijing Draft in order to ensure that the objective recognized in the third and fifth recital of the preamble of the Beijing Draft is achieved that all remedies to challenge the validity of the Judicial Sale are channeled towards the competent Court in the State where the Judicial Sale took place.

Article 7 Recognition of Judicial Sale

[16. In light of the abovementioned suggestion and a number of other proposals regarding Recognition, now Article 7 consists of 5 paragraphs, each deals with a specific rule which should be followed in Recognition of a foreign Judicial Sale.

17. Paragraph 1 of Article 7 clarifies the specific effect that a Judicial Sale shall bring about, which may be briefed as (1) title to the ship is transferred to the Purchaser and all rights and interests of the previous Owners in the ship shall be extinguished, and (2) all registered Mortgages, “hypothèques” or Charges, maritime and other liens and of all encumbrances of whatsoever nature shall be extinguished.

18. Paragraph 2 of Article 7 affirms that as a general rule once a ship is sold by way of Judicial Sale, the ship shall not be subject to arrest for any claim arising prior to the Judicial Sale;

19. Paragraph 3 of Article 7 iterates the rule that only a Court of a State in which a Judicial Sale took place shall be accepted as a competent Court as having jurisdiction to entertain an action challenging the Judicial Sale.

20. Paragraph 4 of Article 7 restates the rule that any action challenging a Judicial Sale shall be dismissed upon production by a Purchaser or Subsequent Purchaser of a Certificate provided for in Article 5 of this Instrument or a duly certified copy thereof, unless existence of one of the circumstances provided for in Article 8 of this Instrument is proved.

21. Paragraph 5 of Article 7 emphasizes the rule that only an Interested Person as defined by this Instrument shall be entitled to take an action challenging a Judicial Sale before a competent Court and that 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 Instrument.]

17. Apart from some minor linguistic improvements and terminological adjustments the essence and tenor of paragraphs 1, 2 and 3 of Article 7 have remained unchanged in the Beijing Draft. In line with the clear provision in paragraph 3 of Article 7 in which all remedies against a Judicial Sale are channeled towards the competent Courts in the State where the Judicial Sale took place, not only paragraph 4 of Article 6, but also paragraph 4 of Article 7 in the Second Working Draft can be removed in the Beijing Draft.

18. After removal of paragraph 4 of Article 7 in the Second Draft, paragraph 5 of the Second Draft becomes paragraph 4 in the Beijing Draft. In addition, for the purpose of ensuring that necessary and sufficient protection are provided to *bona fide* Purchasers a sentence is added at the end of this paragraph with the following contents, i.e. “No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser of that Ship.”

19. Based on the belief that claims if any challenging a Judicial Sale should be made as early as possible so as to avoid the purchaser's right and interest being jeopardized at a late stage, and that there is no need to put a time limit on the making of a request for suspension and refusal of Recognition, as such request would have to follow after an application for Recognition, so the provisions as regards the three-month time limit in paragraph 1 of Article 8 in the Second Draft with some necessary modification is moved into Article 7 of the Beijing Draft as paragraph 5.

20. Inserted a new paragraph 6 of Article 7, the Beijing Draft provides that a Certificate pursuant to Article 5 will have conclusive force of evidence that the Judicial Sale has taken place and has the legal effect provided in Article 4.

Article 8 Circumstances in which Recognition may be Refused or Suspended

[22. It is correctly proposed that sub-paragraph (b) of paragraph 1 of Article 8 of the 1st Draft should be deleted, as it allows refusal of Recognition in case it is found the Judicial Sale was not accomplished in accordance with the law of the State in which the Judicial Sale took place or the provisions of this Instrument, which may be literally interpreted to mean even a very minor defect concerning the proceedings in relation to Judicial Sale may result in a full refusal of the Recognition. Bearing in mind the widely supported view that a Court of the State in which the Judicial Sale took place should be provided for by this Instrument to be the competent Court as having jurisdiction over any action challenging a Judicial Sale, now this sub-paragraph (b) is revised to be "(b) an action challenging the Judicial Sale is pending before a competent Court as provided for by paragraph 3 of Article 7.

23. It is also proposed that it would be appropriate to prescribe a time limit in this Instrument for actions challenging Judicial Sales. For this reason, a subparagraph to that effect is inserted into paragraph 1 of Article 8, which provides for a one-year time limit not subject to any suspension, interruption or extension whatsoever.]

21. In the Beijing Draft significant changes in the title and contents of Article 8 were effected as compared with the Second Working Draft. Where previously Article 8 only knew of grounds for refusal, the new Article 8 creates the possibility of suspension of Recognition by a Court in a contracting State in the case where legal proceedings have been commenced to challenge a Judicial Sale before the competent Court in the State where the Judicial Sale occurred and that latter Court has suspended the legal effect of the Judicial Sale. Only after the competent Court in the State where the Judicial Sale took place has both initially suspended the effect of the Judicial Sale and subsequently nullified the Judicial Sale and its effects in a judgment or similar judicial document no longer subject to appeal, Recognition in other Contracting States may be refused.

22. As correctly pointed out during the Beijing Conference that a non-authentic certificate means no certificate, the refusal ground (in Article 8 paragraph 1 (c) of Second Working Draft) based upon the non-authenticity of the Certificate produced by the (Subsequent) Purchaser is removed in Beijing Draft.

23. The other refusal grounds listed in Article 8 in the Second Working Draft, i.e. that at the time of the Judicial Sale the Ship was not physically within the jurisdiction of that State (Article 8 paragraph 1 (a)) and that Recognition of the Judicial Sale would be contrary to the public policy of that State Party (Article 8 paragraph 2) have remained but are now to be found in Article 8 paragraph 1, and paragraph 3 respectively.

Article 9 Relation with other International Instruments

24. As stated above already in the commentary in relation to Article 2, in an effort to somewhat extend the scope of application of the proposed convention, Article 9 on Restricted Recognition in the Second Working Draft was deleted. A new Article 9 Relation with other International Instruments was included in order to clarify that: "Nothing in the proposed convention shall derogate from any other basis for the Recognition of Judicial Sales under any bilateral or multilateral Convention, Instrument or agreement or principle of comity."