**CMI IWG ON INTERNATIONAL RECOGNITION OF FOREIGN JUDICIAL SALES**

**C****ONCISE SUMMARY OF VARIOUS COMMENTARIES RECEIVED**

**RELATING TO THE 2nd Draft INSTRUMENT**

**1 Introduction**

1. We refer to the collation of the comments on the 2nd Draft Instrument that was distributed earlier this month.
2. What follows is an attempt at summarising, as concisely as possible, the comments made.
3. Comments on the 2nd Draft Instrument were received from various Maritime Law Associations including those of the Dominican Republic, China, Croatia, France, Great Britain Ireland, Malta, Japan and U.S.A. and further comments were received from Jose Maria Alcantara, in his capacity as a Titulary Member, Spain and Camilla Braefelt of Nordisk Legal Services (Norway).
4. The comments range from suggesting simple grammatical changes, to the inclusions of an entirely new Article. We have sought to identify significant trends or suggestions and members are encouraged to refer, in each case, to the full submissions made.
5. **General:**
	1. It is clear from the comments made that those making the submissions understood, and generally supported, the purpose of the Draft Instrument: namely, to grant ship purchasers necessary and sufficient protection where they purchase a ship via a judicial sale.
	2. Croatia points out that the Draft Instrument also extends the scope of application to all judicial sales, regardless of where the judicial sale occurs. It suggests that the Draft Instrument should distinguish between judicial sales performed in Contracting and Non-contracting States. The Draft Instrument should provide a dual regime whereby judicial sales performed in Contracting State would be automatically recognised whilst judicial sales performed in Non­-contracting States would be recognised only if more detailed conditions were satisfied.
	3. Croatia's further comments set out herein are made on the assumption that the Draft Instrument will apply to judicial sales in both Contracting and Non-contracting States.
	4. Mr Alcantara raises concerns that the draft Instrument seeks to lead to an International Convention when initially the intention was understood to be the drawing up of a set of "common procedural rules" only.
6. **Article 1: Definitions**

In general, the comments on the definition clauses raise more grammatical than substantive

3.1

concerns.

1. A common theme is that the use of capital letters throughoutt the Draft Instrument is inconsistent. **Norway** suggests that all terms defined in Article 1 should start with a capital letter throughout the Instrument.
2. Mr Alcantara is of the opinion that the entire definition section (in other words, Article 1 in its entirety) is unnecessary as the definitions should be determined by applicable law or international conventions.
3. The most contentious definitions appear to be the following:
4. “Charge” in paragraph 2:

The Dominican Republic proposes that a mortgage or hypotheque be referred to as “performed” as opposed to "effected".

**Great Britain** points out that this definition may give rise to two distinct problems. Firstly, under English law, a mortgage on a ship registered in full in Part I or Part II of the Register under the 1995 Merchant Shipping Act may be registered with the Registrar of Shipping & Seaman. A mortgage on a ship registered under Part II or Part III (which pertains to simple registration and small ships respectively) cannot be registered with that Registrar. However, under the 2006 Companies Act, 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.

**Great Britain** therefore suggests that the wording could be altered to say *"registerable with the Registrar of Ships if there is provision for such registration”; and proposes the deletion of the words 'applicable in accordance with the private international llaw rules' as they consider these words unhelpful.*

Also Great Britain is concerned that this definition refers to charge in the "same nature as a mortgage" and in commercial terms mortgage and charge may be synonymous. However, under English law a mortgage transfers legal titles in the property to the mortgagee whereas a charge does not, although it gives the mortgagee a power of sale if the mortgagor defaults.

Great Britain puts forward that the validity of the “charge” should be determined by the lex situs as opposed to lex fori and accordingly they propose that the definition should read as follows:

*'“ Charge" means any mortgage, charge or hypotheque 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.]'*

1. "Deficiency Amount" as defined in paragraph 5:

Great Britain seeks clarity on whether this amount will be determined by the court conducting the judicial sale and whether costs and interest will be included.

Japan proposes the deletion of this entire definition.

1. "Judicial Sale of a ship" in paragraph 7:

Great Britain points out that this definition would include not only the enforcement of an in rem claim against the ship, but also any judgement requiring the sale of a ship in legal proceedings that have no connection whatsoever to the vessel. It is therefore suggested that this definition be limited to a sale of a ship to enforce an in rem claim as set out in the Arrest Convention.

Great Britain also proposes that the judicial sale should refer to a transfer of absolute legal and beneficial ownership of the ship free of all mortgages, hypotheques, charges, encumbrances, maritime and other liens, claims and debts whatsoever; as opposed to merely referring to “clean title”.

France sets out that under French law, there is no legal definition of "Judicial Sale of a Ship”. But such a sale is provided for by French Law by special and detailed provisions (Law n067-5,January 3rd, 1967, article 70 and Decree ท067-967, October 27th, 1967, articles 31 to 58). This sale is similar with regard to the conditions and legal consequences of that of a judicial sale applied to real estate.

Nordisk suggests that the use of alternatives for "Judicial sale of a ship" such as "judicial sale" and "sale" should be avoided. The wording of the instrument would be clearer only one term is used throughout the document. The most correct term would be "Judicial Sale'.

1. "Maritime Lien" in paragraph 8:

China raised the concern that this definition and that of “Mortgage” may give rise to potential conflicts due to the fact that according to the general rules of private international law, the lex fori shall apply to matters pertaining to maritime liens. **Great** Britain was of a similar opinion.

Dominican Republic proposes that the definition of Maritime lien be extended to include a claim recognized as a privileged credit on a ship.

1. "Mortgage" in paragraph 9:

Great Britain points out that under English Law both registered and unregistered

mortgages and charges are recognised. **Great** Britain suggests that recognition of mortgages should be determined by the lex situs, namely the law of the State of registration or the State of home port.

1. " State of Registration" in paragraph 15:

The common concern in this definition is the use of the word “permanent” before the words “registered at the time of its judicial sale".

China raises the concern that the State of Registration of a vessel may no longer be certain or unique. China puts forward Shanghai as an example in which a new shipping policy allows an owner of a ship to register the ship in two different ports.

Great Britain pointed out that in the event that a ship is not registered, this definition should refer to the home port of the ship.

Malta noted that in many registries, registration is first attained on a provisional basis, and permanent registration is only achieved at a later stage upon the satisfaction of certain requirements. By the insertion of the word "permanently", ships which only happen to be provisionally registered would fall outside the scope of the Instrument. **Malta** therefore suggested that a clause similar to that found in the 1993 Convention on Maritime Liens and Mortgages (MLM93) be inserted to take into account the possibility that a ship may be bareboat registered under another flag at the time of the Judicial Sale.

Nordisk noted that the basis that the registration of a vessel will rarely be permanent - it can be changed several times during the vessel's life. The purpose of introducing the word “permanent” is to exclude bareboat registration. This can be achieved by either explicitly exclude bareboat registration or replacing the word "ship" with "the Ship's ownership"

**4 Article 2: Scope of Application**

4.1 There is a common concern that this Article allows for a very wide application of the instrument. Accordingly, the common proposal is to limit the Instrument's application to the Contracting States only with the option of allowing those States to opt for a wider application.

4.2 The commentary provided by the CMI IWG, explains that the scope of application is limited by Article 9 which allows a State party to declare that it will only apply the Instrument to the recognition of a Judicial Sale made within the territory of a Sate party and further it may declare that the Instrument may be applicable in terms of a Judicial Sale made in the territory of a non- Party state on the basis of reciprocity.

4.3 Nordisk suggests that the Instrument should apply only to contracting parties, with the option

to State parties to opt for a wider application as opposed to the limiting clause in Article 9.

4.4 Mr. Alcantara suggests that, in the event that the CMI approves the draft, the scope should

be in line with that of the Mortgages and Maritime Liens Convention (MLM93).

**5 Article 3 Notice of Judicial Sale**

5.1 Article 3 is a reproduction of Article 11 of the MLM93. This was done purposely to avoid any

conflicts.

5.2 Sub-paragraph 1:

1. In the First Draft Instrument, an addition was made to the list on whom notice must be served being “the Embassy or Consulate of the Ship’s Flag State to the State in which the Judicial Sale takes place." At an ISC meeting in Oslo, the majority view was that this clause needed to be deleted to avoid notice being held to be insufficient.
2. Croatia notes that notice to a diplomatic or consular body of the Ship’s Flag state is very important for communicating news of a Judicial Sale and that the reason given for its deletion is not valid. However, such notice may be sent to the Consulate or Embassy in terms of subsection (d), being the authority in charge of the ship’s register in the State of Registration.
3. Under French Law, a creditor who had a claim against a shipowner and wishes to sell the ship by Judicial Sale has to prove an enforceable title against the vessel. What this “enforceable title” entails is a topic of debate under French Law: whether it means a judgment or an award on the merits of the claim as opposed to provisional order or summary decision awarded in urgent matters.
4. The USA suggests that notice to the public should be considered.
5. Ireland proposes that the paragraph be amended to indicate that the Court must have received notice of all claims prior to issuing notice of the Judicial Sale.
6. Malta also suggests that reference should be made to the owner of the Ship as opposed to the registered owner.
7. Norway raises the issue that, according to the Instrument, the owner of the vessel need not disclose unregistered interests in the vessel. Norway accordingly suggests that the owner should be obliged to inform all lien holders, both registered and unregistered, so as to avoid Judicial Sales being conducted without notice to all lien holders. However, USA suggests that reliance should be placed on either filed liens of record or appearances resulting from actual notice in the media.

 The Draft Instrument does not require that the notice in terms of Article 3 contain

(8)

information regarding the applicant or his claim. This is contrary to the Norwegian Enforcement Act, which requires such information to be disclosed on notice.

(9) The USA points out that under this Article, the Court has the obligation to ensure certain notices are given. In terms of the US Constiution this will not be accepted due to the 3 different branches of the constitutional system. Only the Congress may empower the Judiciary to act, not an international agreement entered into by the executive. To avoid this problem, the USA puts forward the following suggestion as a substitute for the first two lines of paragraph 1:

*"No State is required by this instrument to recognize a Judicial Sale in another State unless the party seeking recognition establishes that the following notices have been provided prior to such Judicial Sale either by the Court in such State or by one or more parties to the proceeding resulting in such Judicial Sale, in accordance with the laws of such State."*

1. Sub-paragraph 2:
2. France points out that the first part of a Judicial Sale, relating to service of summons to pay the claim amount and the notice that the claimant is willing to sell the ship before a competent court, is conducted purely by the creditor. Thereafter the claimant has to apply to a competent court for an order effecting such sale. Accordingly, a judge regulates the situation only after such notice is given.
3. Notice must be given at least 30 days prior to the Judicial Sale. Great Britain suggests that provision needs to be made for a shortened notice period in cases where the sale is a matter of urgency. Malta raises concern as to the consequences flowing from non-compliance with the 30 day time notice. In particular, where such notice is given by registered mail: confirmation of unsuccessful delivery may only be received a few days prior to the Judicial Sale thereby forcing the claimant to reschedule the Judicial Sale accompanied with a new set of notices. Such process could impede the expeditious nature of a Judicial Sale which would be prejudicial to creditors.

(3) The USA points out that many ships may not have IMO numbers and this must be taken into account the clause requiring certain information to be contained in the notice.

1. Sub-paragraph 3:

Malta suggests that notice by courier should also be included as a method of issuing notice.

The USA raises concerns as to what "press announcement” would entail as it is ambiguous in the current electronic age.

1. **Article 4 Effect of Judicial Sale**
	1. A common concern raised is that the wording of this article it is not sufficiently clear.
	2. China points out that this article could have the effect of going against the intention of protecting purchasers due to the conditional provision contained in this Article. China therefore suggests the amendment of the conditional “Subject to” in the Article to "Unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument"
	3. Great Britain queries whether a vessel sailing through the territorial waters of a State will fall within the ambit of "the ship being in the area of the jurisdiction of the Sate” and thereby subject to Judicial Sale. Great Britain therefore suggests the following be included in the provision:
2. *the ship is under the control or custody of the court which effects the Judicial Sale;*
3. *the Judicial Sale has been conducted in accordance*
4. *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.*
	1. The words "ownership of the shipowner" as contained in the First Draft was replaced with “all rights and interests in the ship" as supported by a majority view at the ISC meeting in Oslo. Mr. Alcantara is of the view that these words are misleading because under national laws a “maritime lien” is a right vesting on the ship (Article 10.2 of the Spanish Civil Code, impliedly). The rights of ownership may be extinguished, while lien, encumbrances, charges or, indeed, contracts may always be assumable by the Purchaser.
	2. *A common concern relates to provision (b): "in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument”.*
	3. Croatia proposes the deletion of this proviso as it creates a question as to what law is applicable and implies that the Judicial Sale will have the result of transferring title to the Purchaser only if the applicable law permits it.
	4. Great Britain notes that different States have widely differing methods of sale; therefore this proviso should contain specific methods of acceptable sales.
	5. Norway points out that the Instrument does not explicitly require that the purchase price be sufficient to cover all mortgages and liens. However, the Judicial Sale must be concluded "in accordance with the law of the State in which the Sale is accomplished and the provisions of

this Instrument” and these laws presumably have requirements regarding purchase price and

the position of mortgages and liens with better priority than the applicant.

1. **Article 5 Issuance of a Certificate of Judicial Sale**
	1. A common consideration is that the certificate must reflect that ownership has passed to the purchaser, or that the purchaser has acquired such ownership.
	2. Croatia, Ireland and Nordisk maintain that the certificate should contain some clause evidencing that ownership has passed to the Purchaser. France suggests that evidence of payment should be provided before such certificate will be issued, as such indicating a change of ownership.
	3. Both Mr. Alcantara and the USA consider this Article redundant. Mr Alcantara is of the opinion that in many States a true/certified copy of the Sale Judgement is sufficient and is available to the Purchaser. The purpose of the certificate would be fairly low due to the fact that it wouldn't contain any charges, liens etc. The USA points out that, currently, a Bill of Sale is used to evidence the change of ownership and that in terms of a Judicial Sale it would be no different. The USA submits that the Bill of Sale carries all the weight that this certificate would.
	4. Croatia further suggests that Article 5 requires an additional clause setting out that the Judicial Sale is not subject to regular appeal in the State in which the Judicial Sale is accomplished, as such certificate cannot be issued while a participant to a Judicial Sale is able to appeal the sale. This is due to the fact that the certificate will be internationally recognised. Additionally, Croatia proposes that a form of such Certificate be annexed to the Instrument for the purposes of uniformity.
2. **Article 6 Deregistration and Registration of the Ship**
	1. Comments received were particularly focused on sub-paragraph 4 of this article.
	2. China notes that in practice, the buyer may be unable to register the ship if the original registry is reluctant or refuses to deregister the ship. China suggests that the obligation to deregister the ship should fall on the previous owner and that the buyer should not be prejudiced by the failure to fulfil this obligation. Therefore, where a Purchaser in a Judicial Sale evidences reluctance on behalf of an erstwhile owner to deregister the ship within a reasonable time, the Purchaser may register the ship based on the Certificate in terms of Article 5 alone.
	3. China suggests that a temporary registration system should be considered to allow for the better protection of the rights of ship purchasers.
	4. China further suggests that in order to avoid malicious claims by “Interested Parties” thereby delaying the process, Interested Parties should be required to provide sufficient security when challenging a Judicial Sale.
	5. China also proposes that the registry is an administrative department and, as such, should not have the right to determine whether the Interested Party is genuine or if they possess the substantive rights in order to suspend the registration.
	6. Great Britain raises the concern that where a ship sold is not registered or alternatively where it is registered under a system which does not provide for the registration of mortgages then there can be no deregistration of a mortgage even though this would be the effect of a Judicial Sale.
	7. Both **Ireland** and Malta suggest rewording paragraph (4) in order clarify the position.
	8. Mr Alcantara points out that a Purchaser will only be protected where the Sale Judgement has become final in that all prior challenges of ownership have been previously resolved in a full, final and non-appealabe manner and where the sale is not subject to a revision plea.
	9. The USA submits that this article may give rise to problems due to the fact that certain US law provisions prohibit the transfer, by sale or otherwise, of ships currently or most recently documented under the US flag to non-citizens without prior approval from US Maritime Administration.
3. **Article 7 Recognition of Judicial Sale**
	1. There is a common concern that this Article is ambiguous and unnecessarily complicated and, in the view of Great Britain, needs to be revised.
	2. Nordisk suggests that “State Party”, as used in this Article, needs to be defined under Article

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* 1. China points out that the Article does not make it clear whether de-registration of a ship and its subsequent re-registration by the Purchaser is subject to the prior recognition of the Court. China questions the purpose of such recognition when the ship Purchaser could simply provide the Certificate as opposed to obtaining a court order.
	2. The USA recommends a revised wording of Article 7(4) in order to bring the Article in line with the goal of drafting a treaty which resolves both title and registry and thereby avoid difficulties in reregistering ships flowing from a Judicial Sale, while ensuring that the purpose is not to deprive claimants of rights to claim damages collateral to the judicial foreclosure.
	3. In terms of Article 7(4), Mr Alcantara points out that a “Competent Court” is always defined by domestic law and, as such, that Court should hear all actions in relation to a public sale. However, the competent Court might be the place of residence of the party against whom enforcement of a judicial sale order dictated in another EU State is sought. such party may challenge the enforcement decision before the Court of that EU State having dictated the enforcement. The ground for such challenge by way of appeal would be that the enforcement would be manifestly contrary to public policy. It means that a challenge based upon public policy could be made before a Court other than the Court of the place in which the Judicial Sale took place.
1. **Article 8 Circumstances in which Recognition may be Refused**
	1. A common concern raised is that this Article is not reconciled with provisions contained in Articles 6 and 7 or may be in conflict with national laws of State Parties.
	2. In particular, China points out that sub paragraph (1) (b) is not reconciled with Article 7(4) and further notes that Article 8(1) (b) is not in line with the general purpose of the Instrument, being the protection of ship purchasers. Accordingly, China proposes the deletion Article 8(1) (b).
	3. Ireland points out that the one year period contained in this Article conflicts with the provisions of Article 6(4) as this would entail the ship registry having to wait for a full year to expire before deleting mortgages and/or deleting the previous registry. Ireland seeks a clearer separation between the two articles.

10.4 Mr Alcantara also indicates that the time limits for Judicial Sales may be regarded as a "minor defect" under the procedural rules of a determined applicable law system or may conflict with special time limits in national legislation.

1. In attempting to reconcile this Article with the preceding Articles, Malta proposes inserting a provision allowing for temporary refusal or suspension by a Court on presentation of proof by an Interested Party that an action challenging the Judicial Sale is pending as provided for in Article 7(3) until such time that a final judicial decision is made or withdrawn.
2. Mr Alcantara raises the potential conflict of this Article with that of domestic/national legislation of State Parties, in particular due to the fact that in the definition section contained in Article 1 it encompasses “private international rules of the Sate in which the ship is sold by way Judicial Sale". The conflict of law rules may well direct the parties to the law of the flag or to the law of the contract (ship mortgage) or to the law of the place of the contract. The conflict of law rules may well not refer to an international instrument. Moreover, any law that is not substantive or material but procedural is never subject to conflict of law rules because it is reserved to the law of the Court in charge of the public sale. Mr. Alcantara suggests that the issue should be revised in order to avoid conflict with domestic laws, in particular whether or not the MLM 1993 is incorporated into national law.
3. Both China and Japan raise concerns relating to sub paragraph 2.
4. China seeks clarification on the meaning of “Judicial Sale” because under Chinese legal practice, after conducting the sale, the court will deliver a “confirmation of sale”;

and after the price is 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 records issued dates on them. According to the current wording of the Instrument, it may be difficult to identify “the date of the Judicial Sale”.

1. Japan suggests a redrafting of the wording of this paragraph in order that the judgment, in the form of a foreign judicial sale, can be tested by the state in which it is being enforced. A judicial sale of a ship should not be recognized even when such a sale is based on a foreign judgment which cannot be recognized and enforced. Japan advised that it is hesitant to accept a scheme where a foreign judicial sale is automatically recognized without review of the procedure and the nature of the claim, noting that whilst the Second Draft followed the New York Convention, arbitration is based on the relevant parties' agreement to be bound, while the judicial sale does not have such basis.
2. Similarly, Mr. Alcantara notes that the draft of Article 8 does not set out whether the Court receiving the request for non-recognition would be a Court located in a country in which the sale is sought to be effected. Also, the international recognition and enforcement of Court Judgments (unlike an Arbitration Award) remains an issue.

**11** **Article 9 Restricted Recognition**

11.1 The most noticeable comment raised under this Article, is that of Malta, which suggests the addition of a new Article 9 allowing for a temporary change of Flag, and pushing the current Article 9 becoming Article 10. This proposition is similar to that proposed by China under Article 6 in which they suggested amending the Draft Instrument to allow for a temporary registration system. Malta provides a draft wording for such additional Article.

* 1. Croatia proposes an amendment to the first sentence of Article 9 whereby the State signing, ratifying or acceding to the Instrument declare whether the Instrument will only apply to sales made in the territory of a State Party, or where the ship is flying the flag of the State Party.
	2. Along with concerns raised in Article 2, being that the application of the Instrument is too wide, Nordisk suggests that this Article needs to be amended in light of the proposed amendments made to Article 2 in order for application to be limited to State Parties who may opt in this Article to widen its application.
1. Mr. Alcantara seeks clarification on the concept of “restricted recognition." Where a ship is sold lawfully by a foreign Court through final and non-appealable Court decision (a principle internationally admitted), then such decision may be only effective in a different country in accordance with the latter country’s rules on recognition and enforcement of foreign judgments or otherwise pursuant to an International Convention, to which both States are party, which provides a specific system of recognition for certain foreign judgments. The recognitionprovisions contained in any particular International Convention do not easily override the domestic general rules and both live together.