From: CROATIAN MARITIME LAW ASSOCIATION

To: COMITÉ MARITIME INTERNATIONAL

Date: 19 September 2011

Re: Comments on the draft Instrument on the Recognition of Foreign Judicial sales of Ships

Basic Principles - Scope of Application

1 As it appears from Article 2 of the Draft, the intention is to regulate the recognition in Contracting States of foreign judicial sales, regardless of whether the states in which the judicial sale took place are Contracting States to the Instrument or not (see the definition of "Judicial Sale" in Article 1, sub-paragraph 8, and the definition of "State" in Article 1, sub-paragraph 15). If that is the case, the Croatian Maritime Law Association ("CMLA") believes that the Instrument should distinguish between:

(a) judicial sales performed in *Contracting States*; and

(b) judicial sales performed in *non-contracting states*,

and provide a dual regime whereas the judicial sales performed in Contracting States would be recognised almost automatically (more on which in 2 below), while judicial sales performed in *non-contracting states* would be recognised upon a more detailed set of conditions.

The ground for such distinction should be found in the principle that the Contracting States should "trust" each other when it comes to the observation of the basic procedural mechanisms (notification - personal and public) required in order to produce the requested effects of judicial sale. Each Contracting State should be confident that a judicial state performed in another Contracting State did observe those procedural mechanisms, simply because those mechanisms are provided in the Instrument itself. On the other hand, when it comes to recognition of a judicial state performed in a non-contracting state, the court in the country of recognition should have more freedom to analyse whether the sale was performed in the manner compatible with the notification requirements set out in the instrument.

The observations contained in captions 2 through to 4 are given under assumption that the purpose of the Instrument is to cover recognition of judicial sales performed in both the Contracting States and non-contracting states. The CMLA has not provided amendments to the Draft Instrument that are being discussed in captions 2 through to 4 but will be happy to do so.

On the other hand, if the intention of the drafters was only to regulate recognition of judicial sales performed in other Contracting States, this should be clearly stated in Article 2 or in the definition of "State" (Article 1, sub-paragraph 15).

2 With regard to recognition of judicial sales performed in contracting state, the automatism mentioned in 1 above would be obtained by allowing that such judicial sales be recognised solely on the basis of a *Certificate of Judicial Sale* mentioned in Article 5 of the Draft, without a need for exequatur procedure. The Certificate would serve as proof that the judicial sale performed in another Contracting State was performed in accordance with the notification requirements set out in the Instrument.

3 Also, in relation to recognition of judicial sales performed in a Contracting State, it should not be relevant whether the judicial sale was performed *"in accordance with the law of the state in which the Judicial sale took place"* (which expression is used in Article 4, sub-paragraph (b); Article 5; Article 7, paragraph 1; Article 8, paragraph 1A, sub-paragraph (b); and by reference in Article 6, paragraphs 1 and 4; Article 7, paragraph 4), because the court in the recognising state should not embark into analysis of whether the court in another Contracting State acted in accordance with the laws of that state. This should be avoided. All the conditions required for the effects of judicial sale to come about should be regulated in the Instrument, so that it should only be important whether the judicial sale has been performed in accordance with the Instrument. The Certificate of Judicial Sale would create an assumption that it has.

4 On the other hand, when it comes to recognition of judicial sales performed in non-contracting states, the considerations are somewhat different. First, the notification requirements provided by the laws in the state of judicial sale may not be compatible with the requirements provided in the Instrument, and therefore no effects of foreign judicial sale should be recognised without the court in the recognising state first having performed the exequatur procedure. But the criteria for such exequatur procedure should be provided in the Instrument, so as to introduce as much uniformity as possible. Secondly, the documents issued by the courts performing the judicial sale vary from country to country, so they may be different from a certificate envisaged in Article 5 (for example, there may be a court resolution ordering deregistration of the previous ownership and mortgages, and registration of the ownership in the name of the purchaser), and indeed a document such as a certificate may not be possible to obtain in the state where the judicial sale was performed. Consequently, it should not be possible for registrars of ships in the Contracting States to perform the deregistration / registration envisaged in Article 6 without the relevant court decision first having being recognised by the court in the registrar's state.

Comments and Amendments on Individual Provisions

Attached are CMLA's comments and amendments on individual provisions of the Draft. As explained in 1 above, they do not touch upon the issues that in our opinion need to be changed if the intention of the Draft is to cover recognition of judicial sales performed in both contracting and non-contracting states.

Draft Instrument on Recognition of Foreign Judicial Sales of Ships

Croatian MLA's comments on individual provisions

Draft Article	Proposed amendment / Comment	Reasons (if applicable)
1, sub-para. 4	There is no definition of *"charge"* appearing after '"hypotheque"'. If it is meant as "Charge" in the sense of sub-para. 2, then the words *"mortgage, or 'hypotheque' or"* should be deleted from sub-para. 4, because the definition of "Charge" in sub-para. 2 already includes mortgages and 'hypotheques'.	
1, sub-para. 8	It is difficult to understand how a judicial sale of a ship can be done for the purpose of *"preservation of maritime claims in respect of the ship or her sister ship".* The purpose of preserving a claim is served by arresting a ship, but not selling her.	
1, sub-para. 9	This definition introduces an international-private-law concept of determining maritime liens according to the lex fori (the law of the country where the sale is taking place). This is potentially dangerous and can lead to doubtful and inequitable results such as those ensuing from the *Halcyon Isle* case ([1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, 1980 AMC 1221 (P.C.)). Whether a claim is protected by a maritime lien should not depend on a contingency (like where the ship happens to be at the time of her judicial sale) but on a more stable criterion (such as the law of the ship's flag). In any event, this is a complex question, and should not be regulated in an instrument dealing with recognition of effects of judicial sales (as this might interfere with the unification instruments dealing with maritime liens and mortgages), and definitely not in a provision containing definitions.	
1, sub-para. 14	Replace with *'"Ship' means any sea-going ship except ships owned or operated by a State and used only on Government non-*	The capability of a ship to be the object of a judicial sale should not be something to be determined by the laws of the selling state. The

	commercial service".	laws of the selling state may theoretically allow the judicial sale of a ship that cannot be the subject to judicial sale in her state of registration. In such a case, a conflict may arise with regard to deregistration after the judicial sale. Therefore, the CMLA thinks that the Instrument should define which ships can be the object of judicial sale, and that this should best be obtained by introducing a wide definition that would exclude public ships (the definition was taken from Article 13, para. 2 of the 1993 Maritime Liens and Mortgages Convention.
3, para. 1, sub-para. (e)	Replace *"unless no such Embassy or Consulate is established in such State"* with *"or, in case no such Embassy or Consulate is established in such State, to the nearest Embassy or Consulate of the ship's Flag State".*	Notification to a diplomatic or consular body of the ship's Flag State is very important for communicating the news of judicial sale into the Flag State. The unavailability of such body in the country of the judicial sale should therefore not be an obstacle to making such notification.
3, para. 2, sub-para. (c)	The CMLA believes that those particulars should not be left to the court of the selling country, but should be regulated in the Instrument. They should inter alia include: name of the applicant(s) (the creditor(s) upon whose application the vessel is about to be sold; amount of its/their claims; value of the ship as determined by a court-appointed evaluator; minimum acceptable price at the first auction; information on what happens if the minimum acceptable price is not reached at the first auction.	
3, para. 3.	Delete the words *"if known"*. After the words *"by press announcement"*, insert the words *"in the official gazette and other publications regularly used for announcing public sales of vessels"*. Delete the words *"and if deemed appropriate by the Court conducting the Judicial Sale, in other publications2*, and replace them with *"as well as at least one of the world's leading publications dealing with shipping matters."*	The words *"if known"* most logically refer to the persons specified in paragraph 1. Those persons should be known to the court, and therefore there should be no "if" clauses. In order to safeguard the interests of claimants enjoying maritime liens on the ship, the judicial sale should be made public in as efficient manner as possible, having in mind the international nature of shipping and the variety of countries where maritime liens could have arisen. A public notice plays the role of an assumed notice to all maritime lienors and does not guarantee that all the interested lienors will learn of the judicial sale on time, but one should try and make sure that the notice has reached as wide quantity of professional audience as possible.

4, sub-para. (b)	Delete the words *"law of the State in which the Sale is accomplished and the*".	If this remains a condition, there will be situations (such as the ones envisaged in Article 6, para. 1 or in Article 8, para. 1A, sub-para. (b)) in which the recognising body would have to enter into analysis as to the validity of the judicial sale from the standpoint of the laws of the state in which the judicial sale was performed, and that the recognising body knows nothing about. This should be avoided.
5	Perhaps it would be useful to provide a form of such Certificate (attached as a Schedule to the Instrument), in order to introduce uniformity and avoid doubts.	
5, caption (2)	At the end, insert *"and that the ownership has been acquired by the Purchaser."*	It is only stating the obvious, but it does not hurt.
5	At the end of the paragraph, add: *"and (3) that the Sale is not subject to regular appeal in the State in which the Sale is accomplished"*.	
6, para. 2	Perhaps it would be useful to provide that the Certificate should be certified by apostille in the issuing country.	
6, para. 4	After *"or if commenced,"* enter *"will"*.	
6, para. 4, sub-para. (b)	Replace *"shall not entertain"* with *"shall reject"* or *"shall decline".*	In the context of earlier text in paragraph 4, the term *"shall not entertain"* should be taken to mean "shall not consider" or "shall not deal with". Now, where the legal action to challenge or nullify the judicial sale is finally upheld, the only logical reaction by the registrar is to reject or decline any request for deregistration or subsequent registration.
7, para. 1	Delete the words *"law of the said State and the*".	See the reasons with regard to the amendment on Article 4, sub-para. (b) above.
7, para. 2	After *"by a Court in a State Party"* insert *"upon a motion by an Interested Person".*	In order to make clear that this provision covers only arrests by Interested Persons, and not arrests that have nothing to do with

	After *"for arrest or"* insert *"shall".* At the end of the sentence, add: *and provided that, not later than 15 days from such arrest, the Interested Person files a legal action to challenge or nullify the Judicial Sale in accordance with Article 8."*	the pre-judicial sale rights (such as regular arrests to secure claims against new owners). If the Interested Person has obtained the arrest upon production of proof evidencing the existence of the circumstances provided in Article 8, the Interested Person should promptly commence a legal action to challenge or nullify the Judicial Sale, because the existence of such circumstances has to be decided on the merits. Given that actions to challenge or nullify the Judicial Sale are within the exclusive jurisdiction of the State in which recognition of a Judicial Sale is sought (Article 7, para. 3), and that the ship may be arrested in another State, the court in the State where the ship has been arrested will not have jurisdiction to hear such action.
8, para 1A, sub-para (b)	Delete the words *"law of the State in which the Sale took place or the*".	See the reasons with regard to the amendment on Article 4, sub-para. (b) above.
8, para. 2	If the Instrument covers recognition of Judicial Sales performed in Contracting States only, then the public policy reason for refusal of recognition should not exist. If a Judicial Sale satisfies the conditions set out in the Instrument, it cannot be against the public policy of any other State Party (otherwise that state would not be a Party to the Instrument). Consequently this provision should be deleted.	