

## DRAFT INSTRUMENT ON THE RECOGNITION OF FOREIGN JUDICIAL SALE OF SHIPS

### COMMENTS BY THE ITALIAN MARITIME LAW ASSOCIATION

The Italian Maritime Law Association welcomes the initiative of preparing a draft instrument in an area in which there is no certainty, a fact that may be against the success of judicial sales, and with the view to hopefully contributing to the success of such initiative wishes to submit the following comments and suggestions on the draft instrument.

#### **Title of the Draft Instrument**

We assume that the term “judicial sale” in lieu of that “forced sale” used in the 1993 MLM Convention is due to the intention to extend the scope of the draft instrument to sales that strictly speaking would not be described as “forced sale”. We shall revert to that when considering the definition in article 1(8).

#### **Article 1. Definitions**

5. *Flag State.* Since in many jurisdictions there are rules on temporary registration (also called “bareboat charter registration”) and such rules have also been included in the 1993 MLM Convention, it is suggested that reference to the flag the ship is flying may be misleading. In case of temporary registration in fact the ship is flying the flag of the State in which it is temporarily registered, but for the purposes of the “judicial” or rather “forced” sale, reference should be made to the Register of permanent registration or, in case of temporary change of flag, it should be used the same wording as in article 16 of the MLM Convention.

8. *Judicial sale of a ship.* This definition covers three different types of sale:

- under (1) the sale conducted in “execution or satisfaction of a judgment or other enforceable instrument”,
- under (2) the sale for the enforcement of a maritime lien or mortgage or “hypothèque” or charge on the ship and
- under (3) the sale for the preservation of maritime claims in respect of the ship or its sister ship.

We are aware that in common law jurisdictions an action *in rem* may lead to the sale of the ship, but such an action is unknown in Italy and very likely in other civil law jurisdictions, in which a sale by a Court requires the existence of an enforceable judgment or of a notarial deed, such as a deed by which the debtor acknowledges his indebtedness. A mortgage or a hypothèque may be considered a deed such that,

provided it contains a promise of the mortgagor or of the person executing the hypothèque to pay a specified sum of money. But this is not the case for a maritime lien, which arises by operation of law, unless the claim secured by the maritime lien has been the subject of a judgment or of an acknowledgment by the debtor. We therefore may accept definition (2) only in respect of a mortgage, hypothèque or similar charge if the sale of the ship would be permissible under the law of the State where the ship is registered, but are unable to accept any reference to maritime liens. Maritime liens and maritime claims generally may entitle the claimant under the 1952 Arrest Convention, as well as under the 1999 Arrest Convention, to arrest the ship in respect of which the claim has arisen, but not to sell the ship, the sale being permissible only when a judgment on the merits has been obtained. Nor can we accept the general reference under definition (3) to the preservation of a maritime claims: preservation of maritime claims may justify the arrest, but definitely not the sale.

14. *Ship.* We would like to know the reasons for which it has been deemed necessary to add in this definition to the words “sea-going ship”, used in most conventions, the words “used in commercial trade”. The term “trade” may have different meanings and may considerably restrict the scope of the draft instrument. Would, for example, be considered a “trade” the pipe laying activity, or the drilling activity or a ship whilst laid up? There is instead an element that seems to be required for the application of the draft instrument, and that may be included in the definition or in article 2: the need for the ship to be registered in a public register.

### **Article 2. Scope of Application**

We suggest that it would be appropriate to require that

- a) the sale takes place in a State Party and
- b) that also the State in which the recognition is sought be a State Party.

### **Article 3. Notice of “Judicial” Sale**

*Para. 1.* The reproduction in (a) through (d) of the provisions of article 11 (1) of the 1999 Maritime Liens and Mortgages Convention is very important, as it avoids a conflict of conventions. The addition of the reference to the diplomatic authority of the Flag State is appropriate, but we are not certain that the wording is clear: why the alternative between Embassy and Consulate? Generally the practice is to give notice to the competent Consulate (there may be various Consulates of the flag State in the State in which the judicial sale takes place) and notice to the Embassy is conceivable only where there are no Consulates.

*Para. 2.* This paragraph is based on article 11(2) of the 1999 MLM Convention and the additions do not seem to create any conflict.

*Para 3.* This paragraph is worded exactly as paragraph 3 of article 11 of the 1999 MLM Convention.

#### **Article 4. Effect of Judicial Sale**

The provisions contained in this article are based on those of article 12(1) and (5) of the 1993 MLM Convention save for the statement that “the ownership of the shipowner prior to the sale shall be extinguished”. It is thought that the effect of any sale, whether judicial or not, is that title to the ship passes from the previous owner to the buyer and it seems rather odd to talk about “extinction” of ownership. The only situation where this terminology may make sense is that of the loss of the ship. It is appreciated that article 8 provides that in certain situations the recognition of the judicial sale may be refused, but, subject to our comments on that article, words such as “subject to article 8” may be included in article 4.

#### **Article 5. Issuance of a Certificate of “Judicial” Sale**

Here again reference is made to the “extinction” of the ownership and we refer to our previous comments on that rather unusual terminology.

#### **Article 6. Deregistration and Registration of the Ship**

##### *Para.1*

The initial words “subject to the provisions of paragraph 4 of this article” should be deleted because we recommend that paragraph 4 be deleted for the reasons stated below. We suggest this alternative wording of this paragraph:

Upon production by the Purchaser of the Certificate provided for in article 5 of this instrument or a duly certified copy thereof, the registrar of the ship’s registry where the ship was registered prior to the “judicial” (or rather “forced”) sale and which is a State Party shall be bound to delete all registered mortgages, hypothèques or charges except those assumed by the Purchaser and either register the ship in the name of the Purchaser or to issue a certificate of deregistration for the purpose of new registration, as the case may be.

##### *Para. 2*

No comment.

##### *Para.3.*

We think that this provision is redundant, since the Registrar will have already a copy of the certificate as provided in the previous paragraph.

##### *Paras.4 and 5.*

The provisions in paragraphs 4 and 5 of article 6 give rise to great concern.

- (i) Para 4 gives the Registrar of the Register in which the ship was registered prior to the judicial sale a discretionary power “not to entertain” (see below our comments on that expression) a request of deregistration or to suspend the process of deregistration if he “is put on notice with the necessary supporting documents... that one or more of the circumstances set out in article 8 has arisen and therefore a legal action...has been entertained”. We consider that that means that the Registrar may not “entertain” a request of deregistration if an action has been “entertained” by a Court in the State where recognition of the sale is sought (i.e. of the State of its previous registration). The meaning of the phrase “a legal action ...has been entertained by a Court” is unclear. In Italy, and we think not only in Italy, where an action is brought in a Court by which the claimant alleges that one of the circumstances enumerated in article 8 (1A) is alleged, that Court will have to investigate the allegations and decide with a judgment whether they are true or not. There is no procedure whereby a preliminary investigation is made on the respects of success of an action, followed by either a rejection outright or a decision to the effect that proceedings may be continued and the allegation be investigated in depth. Something similar to the *fumus boni iuris* requested in respect of security measures such as arrest does not seem to be conceivable.
- (ii) If a judgment is therefore required, it would suffice for the previous owner to bring such action in order to prevent or suspend the request of deregistration and that would stay deregistration until such action “is finally rejected” by the Court of the State where the ship was previously registered. Since a “final rejection” may take many years (it may be “final” only if there has been a judgment not subject to further appeal), the innocent purchaser (because all that may happen notwithstanding the absolute good faith of the purchaser, the goods faith becoming relevant, pursuant to para. 5, only if the ship has already been registered in his name: registered in which Register?) may be prevented to obtain the registration of the ship in the Register he has chosen and, since the ship will continue to be registered in the name of the previous owner, he might be prevented to operate the ship he has purchased and paid. Out of the three situations enumerated in article 8 only the last one seems to be outright, while those enumerated under (a) and (b) may be the subject of difficult and lengthy investigations.
- (iii) The only practical solution would be for the purchase price to be paid by the successful bidder and kept by the Court, until the sale will have been endorsed in the Register in which the ship was registered and either the ship will have been registered in the name of the purchaser or a certificate of deregistration will have

been issued. In this connection article 6(5) comes into play. Its meaning, however, is not altogether clear. Since the situation envisaged is that of deregistration or subsequent registration having been completed, the restoration of the original registration may occur only if the purchaser was not in good faith (and good faith is always presumed). It is also unclear what registration in the name of a good faith purchaser” means: since the purchaser has the option either to request the registrar to register the ship in his name or to request its deregistration for subsequent registration in another State Registry, in such second case will it be a condition for paragraph 5 not to apply that the ship has already been registered in such other State Registry?

(iv) In this connection we also wonder whether the interpretation of article 6 may be affected by article 8(1B), pursuant to which the request of an “interested person” to restore the original registration will only be admitted if presented within twelve months of the date of the judicial sale. That would mean that it may not be admitted only if a good faith purchaser has been unable to register the ship in his name (or to obtain a certificate of deregistration?) within one year from the date of the judicial sale: an event that reasonably may occur only if the original registrar will refuse to deregister the ship.

We would therefore recommend that paragraphs (4) and (5) be excluded from the draft and that attention should be paid to the need for the avoidance of any conflict with the corresponding provisions in the 1993 MLM Convention.

## **Article 7. Recognition of Judicial Sale**

### *Para.1*

Since the subject matter of the judicial sale is the transfer of title to the ship to the purchaser, we consider the second part of (i) to be redundant and perhaps creating confusion: which are the rights that are extinguished?

### *Para 2.*

We believe that this provision is not necessary to the extent that the arrest is made or applied for by the previous owner or by a person having a claim against the previous owner and is incorrect to the extent that the claimant has a claim against the buyer.

### *Paras.3 and 4.*

The deletion of paragraphs 4 and 5 of article 6 entails the deletion also of paragraphs 3 and 4 of article 7.

## **Article 8.Circumstances in which Recognition may be refused**

We recommend that this article be deleted for the reasons stated in respect of article 6 (4) and (r4).