

## **Commentary on the 2nd Draft of the Instrument on International Recognition of Foreign Judicial Sales of Ships**

By CMI IWG ON RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

### **General Comments:-**

It is worthy noting that in preparation of the 2nd Draft, the following principles or points were borne in mind:

1. For the purpose of facilitating efficient recognition by a State Party of a foreign judicial sale of ship, certain necessary minimal requirements for conducting Judicial Sales should be laid down in this Instrument;
2. Some basic effects of Judicial Sales of Ships to be recognized by the State Party should be provided for in this Instrument;
3. Necessary and sufficient protection should be provided to Purchasers of ships by way of Judicial Sale so as to ensure that Judicial Sales of Ships may be maintained as an effective way of enforcement of maritime claims and enforcement of judgments or arbitral awards or other enforceable instruments against the owners of ships;
4. Effects of Judicial Sales of Ships as provided for by this Instrument should be recognized by all State Parties unless existence of one of the circumstances provided for by this Instrument in which recognition may be refused is proved by an Interested Person furnishing valid evidence;
5. 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 its Judicial Sale;
6. Actions, if any, challenging a Judicial Sale should be allowed to be made by an Interested Person as defined by this Instrument only and before a competent court as provided for by this Instrument only;
7. Since the most convenient forum for assessing whether or not a Judicial Sale is regular or effective should be the court of the State in which the Sale took place, therefore it should be accepted that the competent court under this Instrument as having jurisdiction over actions challenging Judicial Sales should be a court of the State in which the Judicial Sale took place,

including the court having conducted the Sale or its court of appeal which will be decided by the law of the State in which the Judicial Sale took place;

8. Conflicts with other international conventions, in particular the Maritime Lien & Mortgage Conventions of 1926/1967/193 and the Arrest Conventions of 1952/1999, should be avoided.

## Specific Comments:-

### Article 1 Definitions

1. Based upon the understanding that it is not the objective or intention of this Instrument to create any new rules of substantive or conflicts laws on maritime liens, mortgages, “hypothèques” or registrable charges on ships, words are inserted into the definitions on maritime lien, mortgage, “hypothèque” or registrable charge on ships to the effect that all maritime liens, or mortgages, “hypothèques” or registrable charges on ships referred to in this Instrument shall mean those recognized by **the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale**. It is hoped that this insertion may help to avoid that the “the law of the State in which the ship is sold by way of Judicial Sale” would be misinterpreted to mean the substantive law of the State in which the ship is sold by way of Judicial Sale only.
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. As regards the definition of “Interested Person”, for the purposes of reducing the categories and numbers of Interested Persons who are provided 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. 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. 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.”
6. The definition of “State of Registration” in the 1st Draft was taken from the UN Convention on Conditions for Registration of Ships 1986, whereas it is correctly suggested that this definition ignored the registration for a temporary entry by a bareboat charterer. Thus, in the 2nd Draft, “State of Registration” is defined to mean “the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale.”
7. Two definitions, i.e. “Flag State” and “Good faith purchaser” are deleted, for reasons that these words are not used in the 2nd Draft.

## **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 Party; 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.

## **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”

#### **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.

#### **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.

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

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.

### **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 emphasises 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.

#### **Article 8 Circumstances in which Recognition may be Refused**

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 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 sub-paragraph 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.

#### **Article 9 Restricted Recognition**

24. As mentioned in the preceding paragraph 8 regarding scope of application, divergent views are expressed during the discussion. Since Article 2 of the 2nd Draft has adopted the so-called

wide scope of application approach, it is appropriate to have an article to allow those who would like to take the so-called narrow scope of application approach to do so. This Article 9 is inserted into the 2nd Draft to that effect.