



A Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships

- Comments by Korea Maritime Law Association

Article 1, paragraph 3

Article 1 is the "Definitions" clause of the Draft Convention, and paragraph 3 defines the term "Clean Title." Under the Draft Convention, "Clean Title" is defined as "a title free and clear of all Mortgages or Charges (unless such Mortgages and Charges have been assumed by any Purchaser or Subsequent Purchaser), all Maritime Liens and other liens, and any other encumbrances of whatsoever nature and howsoever arising." At the same time, "Charge" is defined in Article 1, paragraph 2, to include "any charge, maritime lien, privilege maritime, encumbrance, claim, arrest, attachment, right of retention or notice of interest whatsoever and howsoever arising in relation to the ship." (Emphasis added.)

We think there is inconsistency between these two definitions in that a "Charge" by definition should already include "all Maritime Liens and other liens, and any other encumbrances of whatsoever nature and howsoever arising." In this respect, we think that the phrase "including, without limitation" should be inserted before the phrase "all Maritime Liens" in the definition of "Clean Title." Additionally, wording that is identical or similar to the language in the definition of "Clean Title" (i.e., "all Maritime Liens and other liens . . .") appears in Article 4(1)(b), Article 5(1)(a), and Article 7(1)(b). We think that the phrase "including, without limitation" should be inserted before the phrase "all Maritime Liens" in each of these locations, for the same reason.

Article 1, paragraph 7

Article 1, paragraph 7 defines the term "Interested Person." The Draft Convention defines an "Interested Person" as "the Owner of a Ship immediately prior to its Judicial Sale or the holder of a Mortgage or Registered Charge attached to the Ship immediately prior to its Judicial Sale."

Our understanding of the term "Charge" as it applies in the Draft Convention, is that it refers to any kind of security right that exists in relation to the Ship other than mortgage. To be an "Interested Person" according to the Draft Convention, however, it is insufficient to simply be the holder of a "Charge." Rather, one must be a holder of a "Registered

Charge." In contrast, the Draft Convention does not draw a distinction between the term "Mortgage" and "Registered Mortgage." Our understanding is that in the UK, it is possible for an "Unregistered Mortgage" to exist under the law. In our opinion, this creates an imbalance in the Draft Convention.

Article 3: Notice of Judicial Sale

In our view, Article 3 is the most important provision in our Draft Convention. The reason is that, in practice, it is expected that interpretation of Article 3 will give rise to the highest number of disputes. For example, a holder of a maritime lien may not know that a judicial sale is taking place in a foreign jurisdiction. Such a person may not be able to participate timely in the foreign judicial sale, or may not be able to participate at all, because of insufficient time or opportunity. The effect of the foreign judicial sale would be to extinguish the maritime lien held by such a person, which would likely create a dispute. This is why we think that Article 3 is the most important provision.

In our view, there are two major issues associated with Article 3 as currently drafted.

First, which party is the party that must prove whether or not the proper notice required by Article 3 was in fact given? Three views may exist on this question.

According to the first view, the party seeking recognition of the judicial sale need only submit the Certificate to the Registrar in the State of Registration, and all of the requirements are met. In such case, either an "Interested Person" as defined by the Convention, or the Registrar itself, may be able to make an objection as to actual satisfaction of the Article 3 notice requirements in the Courts of the State of Registration. Under this first view, the party seeking recognition would then need to prove that the notice requirements were satisfied in accordance with the Convention.

Under the second view, the party seeking recognition of the judicial sale must prove that the notice requirements were satisfied in accordance with the Convention from the very beginning.

According to a third possible view, the state of judicial sale is required to verify, before issuing the Certificate, whether or not the Article 3 notice requirements have been fulfilled. Under this view, it is enough for the party seeking recognition of judicial sale to simply submit the Certificate to the Registrar in the State of Registration. In such case, if an Interested Person wishes to raise an argument about failure to comply with the Article 3 notice requirements, then the issue should be determined by the State of Judicial Sale, and not the State of Registration.

Which view is correct? It is well known that our Draft Convention takes its general

structure and framework from the 1958 New York Arbitration Convention. Under the 1958 New York Convention, Article V(b), it is the "Respondent," or the party against whom an award is invoked, that bears the burden of proving that proper notice of the proceedings under that Convention was not given. In view of Article 6.1 of the Draft Convention, deletion by the Registrar in the State of Registration is a very simple matter, requiring only presentation of a Certificate.

We think that the first view is what is intended by our Draft Convention. One of the main purposes of the Draft Convention is to smoothly and expeditiously obtain final and complete recognition of foreign judicial sales of ships. Nonetheless, even when Article 3 is interpreted as per the first view, the Registrar or the Court in the State of Registration will still be called upon to make some determination as to compliance with the notice requirements of Article 3. This is inconsistent with the Convention's purpose that all disputes, if possible, should be referred to the State of Judicial Sale.

In short, our view is that the Article 3 provision should be revised to make it clearer that the first view is intended in the Draft Convention. Like the 1958 New York Convention, we think that the power to judge whether or not proper notice has been lawfully made should be granted to the State of Registration. Revision of the Draft Convention to reflect our views should cause no major difficulties.

The second major issue associated with Article 3 is when the required notice should be given.

Article 3, paragraph 1 states that proper notice must be given "prior to such Judicial Sale." The problem is how this phrase is to be interpreted, in particular, the term "Judicial Sale" itself. As far as this matter is concerned, both the 1967 and 1993 MLM Conventions also employ the same wording. However, neither of these conventions have come into force, and there is insufficient commentary and very few precedents as to how this phrase should be interpreted.

In view of English law concerning judicial sales and the entire context of the Draft Convention, the "sale" appears to mean the date on which bidding occurs and the ship is sold to the highest bidder. If so, the 30-day notice requirement of Article 3, paragraph 3 states that the notice must be sent out at least 30 days before that date. However, the Korea and other civil law countries such as Japan, the "date of sale," if understood to be the date on which bidding takes place, does not serve as a significant reference date for the purpose of giving notice, and Korean law does not appear to be in conformity with the Draft Convention notice requirement in this regard. In Korean practice, a party files an application for judicial sale, which the Court then reviews together with the evidence. Subsequently, the Court will either reject or accept the application. "Accepting" the application means that the Korean court issues a decision that commences judicial sale

proceedings. After this decision is made, Korean law then requires the Court to send a notice to the debtor, owner, and other "Interested Persons." The main purposes of this notice are to provide opportunity for objection, and to provide opportunity to participate or inform creditors of their various rights. The 1st opportunity is provided until the sales money is paid into the Court. The 2nd opportunity is provided until a date specified by the Court, which always precedes the "date of sale," and the "date of sale" is not significant for these purposes. Also, in Korea, subsequent to the date of bidding, the Court must formally approve the sale within one week. In Korea, the better reference date for the Draft Convention's notice provisions would be the date that the Court "accepts" an application for judicial sale.

In our view, there may be considerable differences between common law and civil law countries in respect of this aspect of Article 3. We think that the provision should be revised to reflect a more sophisticated understanding of how judicial sales take place in civil law and common law jurisdictions.

Article 3, paragraph 2

Our comment on this paragraph is related to types of registration that are similar the Bareboat Charter Registration, such as "offshore registration." As a matter of fairness, it is our view that the Draft Convention should require that notice also be given to such registration and the parties that are related to them.

Article 3, paragraph 3(b)

Article 3, paragraph 3(b) concerns the requirement of notice of the time and place of the Judicial Sale, providing for an approximate time and place if the actual time and place is not yet known, and so on.

Our comment on this section is as follows. It is possible for a Judicial Sale to fail on its first attempt. Then, at least in Korean practice, the Court should have another date for a second attempt at the Judicial Sale. This Draft Convention contemplates Judicial Sales with international participants. It is naturally a time-consuming process to put such a Judicial Sale in place. In the case where a first Judicial Sale fails, for whatever reason, how should the parties be notified of the date of the second attempted Judicial Sale? It would be inconvenient and burdensome to require the same notice procedure to be repeated for a second attempt. In Korean practice, when the first notice is given, the first notice also contains dates for second and third attempts at Judicial Sale, should the first and/or second Judicial Sale fail. In our view, this is a good system that should be introduced to the Draft Convention.

Article 3, paragraph 4

Because the concept of notice is so important under the Draft Convention, Article 3, paragraph 4 provides requirements for the means of notice to include both direct communications to the persons specified in Article 3, paragraphs 1 and 2, and also broader communications via a press announcement. The Revised Beijing Draft version of this paragraph differs from the original Beijing Draft in Article 3, paragraph 4(a) in that the Revised Beijing Draft deletes the phrase "which provide confirmation of receipt" after the term "appropriate means." This deletion promises to serve well the Draft Convention's purpose to create a speedy and smooth procedure. But this is in confrontation with how well the rights of "Interested Persons" are protected. It is noteworthy that both the 1967 and 1973 MLM Conventions include the language which was deleted from the original Beijing Draft. There may have been concern about causing inconsistency with the MLM Conventions, but we can rest assured because Article 3, paragraph 5 effectively removes the possibility of such a problem arising.

Our comment on this paragraph is the following. With the regard to the parties required to receive notice in Article 3, paragraph 1, our proposal is that the Draft Convention should only require confirmation of receipt from subsection (a), the Registrar of the Ship's register in the State of Registration. Confirmation of receipt should not be required of the parties identified in subsections (b) through (d). In practice, we do not think that this will pose any substantial burden.

Article 6, paragraph 1

Article 6 of the Draft Convention deals with deregistration and registration of a Ship, subsequent to a Judicial Sale and issuance of a Certificate. Unlike Article 7, however, which deals with recognition of Judicial Sales by the Courts of state parties, Article 6 of the Draft Convention does not state explicitly that it is "[s]ubject to the provisions of Article 8." Article 8 itself deals with circumstances in which Recognition of a Judicial Sale may be suspended or refused.

We think that the Draft Convention should explicitly state that deregistration and registration of a Ship by a Registrar subsequent to Judicial Sale and issuance of a Certificate, is "[s]ubject to the provisions of Article 8." Therefore, we propose that the phrase "Subject to the provisions of Article 8" should be inserted at the very beginning of Article 6, paragraph 1."

Article 7, paragraph 1

Article 7, paragraph 1 deals with the recognition of Judicial Sales by state parties. It requires state parties to recognize a Judicial Sale conducted in any other state party in which a Certificate has been issued in accordance with Article 5, and then states the effect

of such recognition.

We think that the effects of recognition listed in subsections (a) and (b) of Article 7, paragraph 1, duplicate the content of Article 5, paragraph 1. Therefore we think that the language in Article 7, paragraph 1 which follows the phrase "in accordance with" should be deleted in its entirety and replaced with the phrase "Article 5, paragraph 1."

Article 7, paragraph 5 in the original Beijing Draft

In the Revised Beijing Draft version, this paragraph is deleted. The deleted language read as follows:

"No claim challenging a Judicial Sale shall be admitted unless it is presented within three months of the date of the Judicial Sale as recorded in the Certificate. This three-month period shall not be subject to any suspension, interruption, or extension whatsoever."

As noted in the Revised Beijing Draft Commentary at page 13, for some, this time bar was much too long, and for others this time bar was much too short,. There was also concern that a uniform time bar would intrude too much upon the procedural order in the State of Judicial Sale and unduly complicate ship sale and finance transactions, particularly in the context of giving legal opinions as to clean title. It was observed that in some jurisdictions challenges to judicial sales typically arise during the sale process and are frequently made in the course of applications opposing court approval of Judicial Sales. The Revised Beijing Draft Commentary suggests that the language in Article 7, paragraph 4, which forbids the exercise of remedies against the Ship and bona fide Purchasers, protects against concerns related to the Ship's title, the rights of bona fide Purchasers, and the giving of legal opinions as to clean title, even in the absence of any provision in the Draft Convention for a time bar.

Practically speaking, we think that the time bar language deleted from paragraph 4 of Article 8 is important because the Draft Convention heavily relies on the law of the State of Judicial Sale, and likewise, the decision-making power of the courts in such states in regard to claims challenging Judicial Sales. We cannot preclude that some states have time-bar periods that are quite a bit longer than three months, i.e., 6 months to a year or longer, which would cause very serious damage to a main purpose of the Draft Convention. Therefore, in our view, the time-bar provision should be reinstated.