



Malta Maritime Law Association
Malta Transport Centre, Wine Makers' Wharf,
Marsa MRS 1917, t. (+356) 27 250 320,
e. mlac1@onvol.net www.mmla.org.mt

29th July 2013

Stuart Hetherington
President
Comite Maritime International

Dear Mr. Hetherington,

Further to your communication dated 25th March, 2013, please find herewith attached the Beijing Draft Final Version with the tracked changes / some comments of the Malta Maritime Law Association.

In particular, please note as follows:

I. ARTICLE 1 – DEFINITIONS

The need was felt to insert a definition of "State Party"

II. ARTICLE 3 – NOTICE OF JUDICIAL SALE

Our Association has considered the unresolved issue in the insertion of the phrase "which provides confirmation of receipt" and the fact that this Article is a reflection of the position under the International Convention on Maritime Liens and Mortgages 1993.

We appreciate that :

- a) On one hand, States party to the 1993 Convention argue that if the phrase "which provides confirmation of receipt" is removed then they will be in breach of their obligations under the provisions on forced sales under the same 1993 Convention;
- b) At the same time, other States fear that the requirement of confirmation of receipt would slow the judicial sale process down dramatically and consequently make their jurisdiction less attractive for creditors to enforce in. Moreover, if the lack of such confirmation could invalidate a judicial sale, then the consequences of the inclusion of this phrase would be substantial.

The Malta Maritime Law Association wishes to put forward a possible two-step recommendation:

- 1) First Step - the removal of the phrase "which provide confirmation of receipt" and the inclusion of the duty for expediency (in red below)

The notice specified in this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means ~~[which provide confirmation of receipt]~~, to the Persons as specified in paragraphs 1 and 2, if known.
The notice shall be send as expediently as possible and should not frustrate or



significantly delay the proceedings concerning the Judicial Sale.^[1] In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other publications.

2) Second Step - the Addition of a proviso along the lines of the below:

“Provided that nothing in this Article shall prevent a State Party^[2] from adopting any national laws, rules or regulations governing the procedure in which service of such notice is to be effected.”

By virtue of this proviso, it is contented that those States which are parties to the 1993 Convention might accordingly be able to make provisions in their domestic legislation to provide that this notice should be served by means which provide a confirmation of receipt. These States would thus ensure that they do not derogate from their obligations under the 1993 Convention.

Moreover, the failure to duly serve the notice is not even listed as one of the grounds under Article 8 whereby the recognition of a foreign judicial sale may be suspended or refused. Accordingly, it can therefore be argued that the method of service of this notice remains a matter regulated by domestic law.

The only necessary requirements are that the Judicial Sale and the relative notice are affected in accordance to the law of the country where the sale takes place (in accordance with Articles 4(b) and 5).

III. ARTICLE 6 - DEREGISTRATION AND REGISTRATION OF THE SHIP

We felt it necessary to insert reference to the “Subsequent Purchaser” to cover situations where a bidder who successfully purchases a vessel immediately draws up a back-to-back bill of sale to another legal entity with the result that the transfer of the vessel after the judicial sale is carried out before the actual deregistration of the vessel and therefore, the Subsequent Purchaser should be entitled to liaise directly with the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale.

IV. ARTICLE 7 – RECOGNITION OF JUDICIAL SALE

Whilst we feel that it is necessary to protect the Buyer of a vessel through a Judicial Sale from being molested in his title until any proceedings attacking the merits of the Judicial Sale are concluded, we believe that once the proceedings attacking the Judicial Sale are finally concluded and subject to the attack being successful, the Buyer can no longer be protected under the Convention because this would then defeat the proceedings brought by the party who would have successfully attacked the judicial sale. Hence, our suggestion to insert wording limiting the protection to the time when the attack of the judicial sale proceedings are still underway.

Yours sincerely,

Suzanne Shaw

Chairperson - MMLA Sub-Committee on Judicial Sales

^[1] We understand that there is a provision to the effect that the notice does not frustrate the sale in Section 171 of the German ZVG (Enforcement Act).

^[2] Assuming that our suggestion to define “State Party” is accepted.

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

(Known as the "Beijing Draft")

(Done at Beijing on 19 October 2012)

CONSIDERING that the needs of the maritime industry and ship finance require that the Judicial Sale of Ships is maintained as an effective way of securing and enforcing of maritime claims and enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that uncertainty for the prospective Purchaser about the international Recognition of foreign Judicial Sales of Ships and transfer of registry may have an adverse effect upon the level of proceeds generated by a Ship sold at a Judicial Sale to the detriment of interested parties;

CONSIDERING that necessary and sufficient protection should be provided to Purchasers of Ships at Judicial Sales by channelling the remedies available to interested parties to challenge the validity of the Judicial Sale and any subsequent transfers of the ownership in the Ship;

CONSIDERING that in principle once a Ship is sold by way of a Judicial Sale, the Ship should no longer be subject to arrest for any claim arising prior to its Judicial Sale; and

CONSIDERING that the most convenient forum for assessing whether or not a Judicial Sale is regular or effective is the Court of the State in which the Judicial Sale took place, therefore only the competent Court in that State should have jurisdiction over actions challenging the Judicial Sale.

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly authorized document, or a certified copy thereof, as provided for in Article 5.
2. "Charge" includes any charge, lien, privilege, encumbrance, claim, arrest, attachment, right of retention or notice of interest whatsoever and howsoever arising in relation to the Ship.
3. "Clean Title" means free and clear of all Mortgages or Charges.

4. "Competent Authority" means any Person, Court or authority which is empowered under the laws of the State in which the Judicial Sale takes place to sell or transfer or order to be sold or transferred a Ship free and clear of any and all Mortgages or Charges, all Maritime Liens and other liens, and other encumbrances of whatsoever nature and howsoever arising.
5. "Court" means any judicial body established under the law of the State in which it is located and empowered to determine the matters covered under this Convention.
6. "Day" means any calendar day
7. "Deficiency Amount" means any amount of a creditor's claim against any Person personally liable on an obligation which is secured by a Mortgage or Charge, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.
8. "Interested Person" means 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.
9. "Judicial Sale" means any sale of a Ship accomplished by a Competent Authority or under the control of a Court in a State by way of public auction or private treaty or any other appropriate ways provided for by the law of the State where the Judicial Sale takes place by which Clean Title to the Ship is given to the Purchaser and the proceeds of sale are made available to the creditors.
10. "Maritime Lien" means any claim recognized as a maritime lien or privilege maritime on a Ship 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.
11. "Mortgage" means any mortgage or "hypothèque" effected on a Ship and recognized as such 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.
12. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
13. "Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.
14. "Purchaser" means any Person to whom the property in a Ship is transferred or is intended to be

transferred pursuant to a Judicial Sale.

15. "Recognition" means that a Judicial Sale of a Ship has the same effect in the State in which Recognition is sought as it does in the State in which that Judicial Sale was accomplished.

16. "Registered Charge" means any Charge entered in the register of the Ship the subject of the Judicial Sale.

17. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.

18. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State in which the Judicial Sale takes place.

19. "State" means any member State of the United Nations.

20. "State of Registration" means the State in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.

21. "State of Bareboat Charter Registration" means the State which granted registration and the right to fly temporarily its flag to a ship bareboat chartered-in by a charterer in the said State for the period of that charter.

22. "Subsequent Purchaser" means any Person to whom property in a Ship has been transferred through a Purchaser.

23. 'State Party' means any State Party to this Convention.

批注 [L1]: If the purpose of this definition was to restrict a Registered Charges to a charge registered in the underlying register this is fine but if the intention is to include also a charge entered in the bareboat register, then this definition needs to be clarified.

Article 2 Scope of Application

This Convention shall apply to the Recognition in a State Party of a Judicial Sale taking place in the territory of another State Party.

Article 3 Notice of Judicial Sale

1. No State is required by this Convention to recognize a Judicial Sale accomplished in another State unless the party seeking Recognition establishes that the following notices, where applicable, have been provided prior to such Judicial Sale either by the Competent Authority in

such State or by one or more parties to the proceedings resulting in such Judicial Sale, in accordance with the laws of such State, to:

- (a) The authority in charge of the Ship's register in the State of Registration;
- (b) All holders of registered Mortgages or Registered Charges;
- (c) All holders of Maritime Liens, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and
- (d) The Owner of the ship;

2. If the Ship subject to Judicial Sale is flying the flag of a State of Bareboat Charter Registration, the notice required by paragraph 1 of this Article shall also be provided to the authority in charge of the Ship's register in such State.

3. The notice required by paragraphs 1 and 2 of this Article shall be provided at least 30 days prior to the Judicial Sale and shall contain, as a minimum, the following information:-

(a) The name of the Ship, the IMO number (if assigned) and the name of the Owner and the bareboat charterer, as appearing in the registry records (if any) in the State of Registration, and the State of Bareboat Charter Registration (if any).

删除的内容: or

删除的内容: (if . any) or

(b) The time and place of the Judicial Sale; or if the time and place of the Judicial Sale cannot be determined with certainty, the approximate time and anticipated place of the Judicial Sale which shall be followed by additional notice of the actual time and place of the Judicial Sale when known but, in any event, not less than seven days prior to the Judicial Sale; and

(c) Such particulars concerning the Judicial Sale or the proceedings leading to the Judicial Sale as the Competent Authority conducting the proceedings shall determine are sufficient to protect the interests of Persons entitled to notice.

4. The notice specified in this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2, if known. The notice shall be sent as expeditiously as possible and should not frustrate or significantly delay the proceedings concerning the Judicial Sale. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other

删除的内容: paragraph 3 of

批注 [L2]: We note omission of notice being given by courier which was provided for in the second draft. Is this because notice by courier is **deemed to be included** in service by registered mail or by some form of means which provides confirmation of receipt ?

删除的内容: [which provide confirmation of . receipt]';

publications.

Provided that nothing in this Article shall prevent a State Party from adopting any national laws, rules or regulations governing the procedure in which service of such notice is to be effected.

带格式的: 缩进: 左侧: 0 厘米

Article 4 Effect of Judicial Sale

Subject to:

(a) the Ship being physically within the jurisdiction of the State in which the Judicial Sale is accomplished, at the time of the Judicial Sale and

(b) the Judicial Sale having been conducted in accordance with the law of the State in which the Judicial Sale is accomplished and the provisions of this Convention

all rights, title and interests in the Ship existing prior to its Judicial Sale shall be extinguished and all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, shall cease to attach to the Ship and title to the Ship shall be transferred to the Purchaser in accordance with the law applicable.

Notwithstanding the preceding provisions of this article, no Judicial Sale or deletion pursuant to paragraph 1 of Article 6 of this Convention shall extinguish any remedies including, without limitation, any claims for Deficiency Amounts, other than those enforceable against the Ship the subject of the Judicial Sale.

Article 5 Issuance of a Certificate of Judicial Sale

When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State where the Judicial Sale is made and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser containing the date of the Judicial Sale and recording that (1) the Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all

encumbrances of whatsoever nature and howsoever arising, and (2) all rights, title and interests existing in the Ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall be

刪除的内容: .

bound to delete all registered Mortgages or Registered Charges, except those assumed by the

Purchaser or Subsequent Purchaser, and either to register the Ship in the name of the Purchaser or Subsequent Purchaser or to delete the Ship from

the register and to issue a certificate of deregistration for the purpose of new registration, as the case may be.

2. In addition, if the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial

刪除的内容: If

Sale, upon production by a Purchaser or Subsequent Purchaser of a Certificate provided for in Article 5 of this Convention,

the Registrar of the Ship's registry in such State shall be bound to delete the Ship from the register and to issue a certificate to the effect that the permission for the ship to register in and fly temporarily the flag of the State is withdrawn.

3. If the Certificate as provided for in Article 5 of this Convention is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the

Purchaser or Subsequent Purchaser to submit a duly certified translation of the Certificate into such language.

4. The Registrar may also request the Purchaser or Subsequent Purchaser to submit a duly certified copy of the said

Certificate for its files.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8 of this Convention, the Court of each State Party on the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale conducted in

any other State Party with a Certificate issued as provided for by Article 5 of this Convention, as having the effect:

(i) that the ownership of the Ship has been transferred to the Purchaser and all rights, title and interests in the Ship existing prior to its Judicial Sale have been extinguished; and

(ii) that the Ship has been sold free of all registered Mortgages and Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances and claims of whatsoever nature and howsoever arising.

2. Where a Ship which was sold by way of Judicial Sale is sought to be arrested or is arrested by order of a Court in a State Party for a claim arising prior to the Judicial Sale, the Court shall reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate as provided for in Article 5 of this Convention, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Convention.

3. Where a Ship is sold by way of Judicial Sale in a State Party, any legal proceeding challenging the Judicial Sale shall be brought only before a competent Court of the State Party in which the Judicial Sale took place and no Court other than a competent Court of the State Party in which the Judicial Sale took place shall have jurisdiction to entertain any action challenging the Judicial Sale.

4. No Person other than an Interested Person as defined by this Convention shall be entitled to take any action challenging a Judicial Sale before a competent Court, and 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 Convention.

5. Pending a final decision in legal proceedings commenced in the competent Court with the aim of nullifying the Judicial Sale and its effects, no remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any bona fide Purchaser of that Ship.

刪除的内容: N

6. 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

刪除的内容: 5

subject to any suspension, interruption or extension whatsoever.

7. In the absence of proof that a circumstance exists under Article 8 of this Convention, a Certificate issued as provided for in Article 5 of this Convention shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4 of this Convention, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

删除的内容: 6

Article 8 Circumstances in which Recognition may be Suspended or Refused

Recognition of a Judicial Sale may be suspended or refused only in the circumstances provided for in the following paragraphs:

1. Recognition of a Judicial Sale may be refused by a Court of a State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State in which the Competent Authority issuing the Certificate provided for in Article 5 is located.

删除的内容: the

2. Recognition of a Judicial Sale may be :

a) suspended by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that a legal proceeding pursuant to paragraph 3 of Article 7 has been commenced on notice to the Purchaser and the competent Court has suspended the legal effect of the Judicial Sale; and

删除的内容: the

b) refused by a Court of the State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court after suspension of the legal effect of the Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects.

3. Recognition of a Judicial Sale may also be refused if the Court in a State Party in which Recognition is sought finds that Recognition of the Judicial Sale would be contrary to the public policy of that State Party.

Article 9 Relation with other International Instruments

Nothing in this Convention shall derogate from any other basis for the Recognition of Judicial Sales under any other bilateral or multilateral Convention, Instrument or agreement or principle of comity.

[Final clauses in respect of signature, ratification, acceptance, approval, accession, denunciation, coming into force, language, etc shall be drafted later and separately]