

Comments of the Malta MLA to the
Instrument on Recognition of Foreign Judicial Sales of Ships

(Second Working Draft)

[Preamble: - - -]

Article 1 Definitions

For the purposes of this Instrument:

1. "Certificate" means the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.
2. "Charge" means any registerable charge of the same nature as a 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.
3. "Court" means any competent judicial body defined as a court by the law of the State in which the Judicial Sale takes place which is empowered under the laws of the State to sell or order the sale of a ship free and clear of any and all mortgages, "hypothèques" or charges, and all maritime and other liens and other encumbrances of whatsoever nature, and to deal with all issues in relation to recognition of Judicial Sales of Ships accomplished in any other State.
4. "Day" means any calendar day.
5. "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 "hypothèque" or charge, or maritime lien, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.

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6. “Interested person” means 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.
7. “Judicial sale of a ship” or “judicial sale” or “sale” means any sale of a ship accomplished by 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 sale by which clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors takes place.
8. “Maritime lien” means any claim recognized as a maritime lien 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.
9. “Mortgage” or “hypothèque” 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.
10. “Owner” or “Shipowner” means any person registered in the register of ships of the State of Registration as the owner of the ship.
11. “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.
12. “Purchaser” means any person who has acquired title to a ship pursuant to a Judicial Sale.
13. “Ship” means any ship or vessel capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.
14. “State” means any member state of the United Nations.
15. “State of registration” means the State in whose register of ships a ship is ~~permanently~~ registered at the time of its Judicial ~~Sale~~.
16. “Subsequent purchaser” means any person who has acquired from a Purchaser or its sub-purchaser title to a ship which was sold by way of Judicial Sale.

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批注 [L1]: In many registries, registration is first attained on a provisional basis, and permanent registration is only achieved at a later stage upon the satisfaction of certain requirements. By insertion of the word "permanently", ships which only happen to be provisionally registered would fall outside the scope of the Instrument which is not ideal. We suggest inserting a clause similar to that found in the 1993 Convention on Maritime Liens and Mortgages to take into account the possibility that a ship may be bareboat registered under another flag at the time of the Judicial Sale - please refer to new Article 9.

Article 2 Scope of Application

This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of any State.

Article 3 Notice of Judicial Sale

1. Prior to a Judicial Sale in a State, the Court in such State shall ensure that notice in accordance with this Article is provided to :

- (a) The ~~registered owner~~ Owner of the ship;
- (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
- (d) The authority in charge of the ship's register in the State of Registration.

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2. The notice required by paragraph 1 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, the IMO number, the Owner of the ship;
- (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 Court conducting the proceedings shall determine is sufficient to protect the interests of persons entitled to notice.

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3. The notice specified in paragraph 2 of this Article shall be in writing, and either given by registered mail, or courier or given by any electronic or other appropriate means which provide confirmation

of receipt, to the persons as specified in paragraph 1, ~~if known~~. 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 Court conducting the Judicial Sale, in other ~~publication~~.

批注 [L2]: Once the wording referring to holders of registered mortgages, hypothèques or chargers issued "to bearer" has been removed in the second draft, notice is to be given to the known persons identified in paragraph 1 of Article 3.

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批注 [L3]: We have our concerns as to what would happen in case one of the parties is not notified at least 30 days prior to the Judicial Sale, bearing in mind that when for example giving notice by registered mail, one would only receive the confirmation of receipt or the confirmation of unsuccessful delivery a few days prior to the Judicial Sale. The party at whose request the Judicial Sale would be taking place would therefore have to reschedule the Judicial Auction to a later date and notify afresh the parties, with no guarantee that the notification of the new date of the Judicial Auction would be successfully made the second time round. This could prejudice the expeditious nature of a Judicial Sale which is essential to all creditors since the longer it takes for a ship to be sold, the expenses to preserve the ship increase, thus decreasing the proceeds from which the creditors will be paid, and the chances of deterioration of the ship are higher.

4. Article 4 Effect of Judicial Sale

Subject to:

- (a) the ship being in the area of the jurisdiction of the State in which the Sale is accomplished, at the time of the Sale and
- (b) the Sale having been conducted in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument

all rights and interests in the ship existing prior to its Judicial Sale shall be extinguished and all mortgagees, "hypothèques" or charges, except those assumed by the Purchaser, all maritime and other liens, and all encumbrances of whatsoever nature, 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 shall extinguish any in personam claim for any Deficiency Amount.

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 Sale is made and by this Instrument have been met, the Court or court officer conducting the Sale 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 Instrument free of all mortgages, "hypothèques" or charges, except those assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature, and (2) all rights and interests existing in the ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Subject to the provisions of Paragraph 4 of this Article, upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument or a copy thereof duly certified in accordance

with the law of the State in which the Sale has taken place, the Registrar of the Registry where the ship was registered prior to its Judicial Sale shall be bound to delete all registered mortgages, “hypothèques” or charges except those assumed by the Purchaser, and either to register the Ship in the name of the 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. If the Certificate as provided for in Article 5 is not made in an official language of the State in which the abovementioned Registrar is located, the Registrar may request the Purchaser to submit a duly certified translation of the Certificate into such language.
3. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.
4. If, before the deletion of any registered mortgages, “hypothèques” and charges and the registration of the ship in the name of the Purchaser or the issuance of a certificate of deregistration as the case may be, the Registrar receives an objection raised by an Interested Person to the deletion or the registration or the issuance and supported by evidence proving that an action challenging the sale has been brought before a Court of the State in which the Judicial Sale took place, the deletion of any registered mortgages, “hypothèques” and charges and the registration of the ship in the name of the Purchaser or the issuance of a certificate of deregistration, as the case may be, will be suspended until a final judicial decision is rendered over the challenge, or the objection is withdrawn.

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Article 7 Recognition of Judicial Sale

1. Subject to the provisions of this Instrument, the court of each State Party at the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale taken place in any other State with a Certificate as provided for by Article of 5 of this Instrument issued, as having the effect:
 - (i) that title to the ship is transferred to the Purchaser and the rights and interests of the previous owner in the ship are extinguished;
 - (ii) that the Ship has been sold free of all registered mortgages, “hypothèques” or charges, except those assumed by the Purchaser, of all maritime and other liens and of all encumbrances of whatsoever nature.

2. Where a ship which was sold by way of a 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 Instrument or a duly certified copy thereof, unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument.
3. Where a ship is sold by way of Judicial Sale in a State Party, any action challenging the Judicial Sale shall be brought only before a competent court of a State Party in which the Judicial Sale took place and no court other than a court of the State Party in which the Judicial Sale took place shall be a competent court as having jurisdiction to entertain any action challenging the Judicial Sale.
4. Where an action challenging a Judicial Sale is taken by an Interested Person against a Purchaser or a Subsequent Purchaser or a Ship before a competent court, the court shall dismiss the action or reject the relevant claim upon production by the Purchaser or Subsequent Purchaser of a Certificate which is provided for in Article 5 of this Instrument or a duly certified copy thereof, unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument.
5. No person other than an Interested Person as defined by this Instrument 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 Instrument.

Article 8 Circumstances in which Recognition may be Refused

1. Recognition of a Judicial Sale may be refused by a Court of the State Party, at the request of an Interested Person, only if that Interested Person furnishes to the Court proof that:-

(a) at the time of the Sale, the Ship was not physically in the area of the jurisdiction of the State in which the Court issuing the Certificate provided for in Article 5 is located; or

~~(b) the Certificate produced by the Purchaser or Subsequent Purchaser is not authentic.~~

- ~~2. Recognition of a Judicial Sale may be temporarily refused [or suspended] by a Court of the State Party, at the request of an Interested Person if that Interested Person furnishes to the~~

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(c)

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Court proof that an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7 until a final judicial decision is rendered or the action is withdrawn.

Notwithstanding the preceding provisions of this paragraph, no such request by an Interested Person will be admitted unless it is presented within one year of the date of the Judicial Sale as recorded in the Certificate. This one year period shall not be subject to any suspension, interruption or extension whatsoever.

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

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Article 9 Temporary Change of Flag

If a Ship registered in one State is permitted to fly temporarily the flag of another State, the following shall apply:

(a) For the purposes of this article, references in this Instrument to the "Registry where the ship was registered prior to its Judicial Sale" or to the "State of registration" shall be deemed to be references to the State in which the ship was registered immediately prior to the change of flag, and references to "the authority in charge of the ship's register in the State of Registration" shall be deemed to be references to the authority in charge of the register in that State.

(b) The law of the State of registration shall be determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges.

(c) The State of registration shall require a cross-reference entry in its register specifying the State whose flag the ship is permitted to fly temporarily; likewise, the State whose flag the ship is permitted to fly temporarily shall require that the authority in charge of the ship's record specifies by a cross-reference in the record the State of registration.

(d) No State Party shall permit a ship registered in that State to fly temporarily the flag of another State unless all registered mortgages, "hypothèques" or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, "hypothèques" or charges has been obtained.

(e) The notice referred to in article 3 shall be given also to the competent authority in charge of the ship's record in the State whose flag the vessel is permitted to fly temporarily.

(f) Upon production of a Certificate provided for in Article 5 of this Instrument or a copy thereof duly certified in accordance with the law of the State in which the Sale has taken

~~place, the competent authority in charge of the ship's record in the State whose flag the ship is permitted to fly temporarily shall, at the request of the purchaser, issue a certificate to the effect that the right to fly the flag of that State is revoked.~~

~~(g) Nothing in this Instrument is to be understood to impose any obligation on States Parties to permit foreign ships to fly temporarily their flag or national ships to fly temporarily a foreign flag.~~

Article ~~9~~ 10 Restricted Recognition

When signing, ratifying or acceding to this Instrument, any State 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. It may also declare that it will apply this Instrument to Judicial Sale made in the territory of a non-Party State on the basis of reciprocity.

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

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