

Comité Maritime International Conference: Beijing October 2012

**CMI INTERNATIONAL WORKING GROUP ON INTERNATIONAL RECOGNITION OF FOREIGN
JUDICIAL SALES OF SHIPS**

***A SUMMARY OF VARIOUS COMMENTARIES RECEIVED ON THE 2ND
DRAFT INSTRUMENT ON THE RECOGNITION OF FOREIGN
JUDICIAL SALES OF SHIPS***

Andrew Robinson¹

1 Introduction

- 1.1 This paper considers and provides limited comment on the submissions received by the CMI International Working Group² on the 2nd Draft Instrument on the Recognition of Foreign Judicial Sales of Ships³.
- 1.2 A copy of an unannotated 2nd Draft Instrument is attached to this paper as Appendix I for ease of reference.
- 1.3 Comments on the 2nd Draft Instrument were received from 10 Maritime Law Associations including those of the Dominican Republic, China, Croatia, France, Great Britain, Ireland, Malta, Italy, Japan and The United States of America⁴ and two further comments were received from José Maria Alcántara, in his capacity as a Titulary Member, Spain and Camilla Braefelt of Nordisk Legal Services⁵.
- 1.4 The Working Group wishes to record its extreme gratitude to all National Law Associations and individuals who took time to consider, record and forward their comments to the Working Group.
- 1.5 The comments ranged from suggesting simple grammatical changes, to the suggested inclusion of an entirely new Article. I have sought only to identify significant trends or

¹ Director and Regional Head of Transport, Norton Rose in South Africa. The author is indebted to Stephne Kleinloog of Norton Rose for her preparatory work in collating the commentaries and in preparing a draft of this paper and Appendix II.

² Hereinafter referred to as "the Working Group".

³ Hereinafter referred to as the "2nd Draft Instrument".

⁴ Hereinafter "the USA".

⁵ Hereinafter "Nordisk".

suggestions and members are encouraged to refer, in each case, to the full submissions made for a proper consideration of those submissions.

- 1.6 Where specific amendments have been proposed and drafts provided, these have, by and large, been set out in Appendix II attached to this Paper. This Appendix sets out the selected suggested amendments against the Articles and paragraphs to which they relate.

2 General

- 2.1 It is clear from the comments made that those making the submissions understood, and generally supported, the overall purpose of the Draft Instrument: namely, to grant ship purchasers necessary and sufficient protection when they purchase a ship via a judicial sale.
- 2.2 **Croatia** notes that the 2nd Draft Instrument extends the scope of the Instrument's application to all judicial sales, regardless of where the judicial sale occurs. It suggests that the 2nd Draft Instrument should accordingly distinguish between judicial sales performed in Contracting and Non-contracting States. The 2nd Draft Instrument should, they suggest, provide a dual regime whereby judicial sales performed in Contracting States would be automatically recognised whilst judicial sales performed in Non-contracting States would be recognised only in the event that more detailed conditions were satisfied.
- 2.3 **Croatia's** further comments on the 2nd Draft Instrument were made on the assumption that the 2nd Draft Instrument will apply to judicial sales in both Contracting and Non-contracting States.
- 2.4 **Italy** notes its concern that the Draft Instrument enables "Interested Parties" to challenge a judicial sale after it has been concluded. This will create uncertainty and will prejudice a successful bidder, who has obtained a certificate of judicial sale after payment of the purchase price, and who wishes to obtain the endorsement in the ships registry of his title to the ship.
- 2.5 **Italy** further notes that the question would arise as to whether the successful would be entitled to obtain the possession of the ship or would be willing to obtain it and to operate the ship if he does not know whether or not he will be the owner.
- 2.6 In addition, it would be questionable whether he would be entitled to keep the net earnings. It is believed that in Italy the Courts would apply the same rules governing the operation of the ship after its seizure and pending its sale: and that will require the operator to seek the authority of the court for the operation, to submit to the court all accounts of the operation and probably to pay to the court the net earnings.
- 2.7 **Italy** makes reference to *The "Acrux"* where the Court stated⁶:

⁶ [1952] 1 Lloyd's Rep.405 Hewson J. @p.409.

"Where such a clean title as given by this Court be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer ...

It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, assented to the sale to an innocent purchaser, should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This Court recognises proper sales by competent Courts of Admiralty, or Prize, abroad – it as part of the comity of nations as well as a contribution to the general well-being of international maritime trade."

2.8 Italy's proposed amendments under the specific Articles to follow are for the reasons set out above.

2.9 **Mr Alcantara** raises concerns that the 2nd Draft Instrument seeks to lead to an International Convention when initially the intention was understood to be the drawing up of a set of "common procedural rules" only.

2.10 No doubt there will be some debate during this Conference over precisely what form the Instrument should take and how it is to be progressed so that its "International" status is achieved.

3 **Article 1: Definitions**

3.1 In general, the comments on the Definition paragraphs raise more grammatical than substantive concerns.

3.2 A common theme is that the use of capital letters throughout the 2nd Draft Instrument is inconsistent. **Nordisk** suggests that all terms defined in Article 1 should start with a capital letter and that this practice is followed throughout the Instrument.

3.3 **Mr Alcantara** holds the view that the entire definition section (in other words, Article 1 in its entirety) is unnecessary as the definitions of words or phrases mentioned therein should be determined by either the applicable law or international conventions.

3.4 The most contentious definitions appear to be the following:

(1) "Charge" in paragraph 2:

The **Dominican Republic** proposes that a mortgage or hypothèque be referred to as having been "performed" as opposed to "effected".

Great Britain points out that this definition may give rise to two distinct problems. Firstly, under English law, a mortgage on a ship registered in full in Part I or Part II of the Register under the 1995 Merchant Shipping Act may be registered with the Registrar of Shipping & Seaman. A mortgage on a ship registered under Part II or

Part III (which pertains to simple registration and small ships respectively) cannot be registered with that Registrar. However, under the 2006 Companies Act, any mortgage granted on a ship by a limited company has to be registered with the Registrar of Companies within 21 days of its creation and if it is not so registered it is void as against creditors of the owner and any liquidator or administrator.

Great Britain therefore suggests that the wording could be altered to say “*registerable with the Registrar of Ships if there is provision for such registration*”; and proposes the deletion of the words ‘*applicable in accordance with the private international law rules*’ as they consider these words unhelpful.

Also **Great Britain** is concerned that this definition refers to charge in the “same nature as a mortgage” and in commercial terms mortgage and charge may be synonymous. However, under English law a mortgage transfers legal titles in the property to the mortgagee whereas a charge does not, although it gives the mortgagee a power of sale if the mortgagor defaults.

Great Britain puts forward that the validity of the “charge” should be determined by the lex situs as opposed to lex fori and accordingly they propose that the definition should read as follows:

“Charge” means any mortgage, charge or hypothec effected on a ship and recognised under the law of the State in which legal ownership of the ship is registered [or if the ship is not so registered under the law of the State of its home port.]

- (2) “Deficiency Amount” as defined in paragraph 5:

Great Britain seeks clarity on whether this amount will be determined by the court conducting the judicial sale and whether costs and interest will be included.

Japan proposes the deletion of this entire definition.

- (3) “Judicial Sale of a ship” in paragraph 7:

Great Britain points out that this definition would, as it stands, include not only the enforcement of an in rem claim against the ship, but also any judgement requiring the sale of a ship in legal proceedings that have no connection whatsoever to the vessel. It is therefore suggested that this definition be limited to a sale of a ship to enforce an in rem claim as set out in the Arrest Convention.

Great Britain also proposes that the judicial sale should refer to a transfer of absolute legal and beneficial ownership of the ship free of all mortgages, hypothecues,

charges, encumbrances, maritime and other liens, claims and debts whatsoever; as opposed to merely referring to "clean title".

France sets out that under French law, there is no legal definition of "Judicial Sale of a Ship". But such a sale is provided for by French Law by special and detailed provisions⁷. This sale is similar, with regard to the conditions and legal consequences, to that of a judicial sale applied to real estate.

Nordisk suggests that the use of alternatives for "Judicial sale of a ship" such as "judicial sale" and "sale" should be avoided. The wording of the instrument would be clearer only one term is used throughout the document. The most correct term would, it suggests, be "Judicial Sale".

(4) "Maritime Lien" in paragraph 8:

China raised the concern that this definition and that of "Mortgage" may give rise to potential conflicts due to the fact that according to the general rules of private international law, the lex fori shall apply to matters pertaining to maritime liens. **Great Britain** was of a similar opinion.

Dominican Republic proposes that the definition of Maritime lien be extended to include a claim recognized as "*a privileged credit on a ship*".

(5) "Mortgage" in paragraph 9:

Great Britain points out that under English Law both registered and unregistered mortgages and charges are recognised. **Great Britain** suggests that recognition of mortgages should be determined by the lex situs, namely the law of the State of registration or the law of the State of the ship's home port.

(6) "Purchaser" in paragraph 12

Great Britain proposes that this definition be amended to read: "'Purchaser' means any person to whom the property in the ship is transferred pursuant to a Judicial Sale".

(7) "Ship" in paragraph 13

Great Britain proposes that this definition be amended to read: "'Ship' means the property subject to the Judicial Sale which is categorised as a ship under the laws of the State that makes the Judicial Sale".

(8) "State of Registration" in paragraph 15:

⁷ (Law n°67-5, January 3rd, 1967, article 70 and Decree n°67-967, October 27th, 1967, articles 31 to 58).

The common concern in this definition is the use of the word "permanent" before the words "registered at the time of its judicial sale".

China raises the concern that the State of Registration of a vessel may no longer be certain or unique. **China** puts forward Shanghai as an example in which a new shipping policy allows an owner of a ship to register the ship in two different ports.

Great Britain pointed out that in the event that a ship is not registered, this definition should refer to the home port of the ship.

Malta noted that 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 the insertion of the word "*permanently*", ships which only happen to be provisionally registered would fall outside the scope of the Instrument. **Malta** therefore suggested that a clause similar to that found in the 1993 Convention on Maritime Liens and Mortgages (MLM93) be inserted to take into account the possibility that a ship may be bareboat registered under another flag at the time of the Judicial Sale.

Nordisk noted that the basis that the registration of a vessel will rarely be permanent - it can be changed several times during the vessel's life. The purpose of introducing the word "permanent" is to exclude bareboat registration. This can be achieved by either explicitly exclude bareboat registration or replacing the word "ship" with "the Ship's ownership".

4 **Article 2: Scope of Application**

- 4.1 There is a common concern that this Article allows for a very wide application of the instrument. Accordingly, the common proposal is to limit the Instrument's application to the Contracting States only with the option of allowing those States to opt for a wider application.
- 4.2 The commentary previously provided by the Working Group, explains that the scope of application is limited by Article 9 which allows a State party to declare that it will only apply the Instrument to the recognition of a Judicial Sale made within the territory of a State party and further it may declare that the Instrument may be applicable in terms of a Judicial Sale made in the territory of a non-Party state on the basis of reciprocity.
- 4.3 **Italy** is concerned that this Article allows for the provisions of the Instrument to also apply where the sale is made in a State that is not party to the Instrument. **Italy** proposes a revised wording of this Article.
- 4.4 **Nordisk** suggests that the Instrument should apply only to contracting parties, with the option to State parties to opt for a wider application as opposed to the limiting clause in Article 9.

4.5 **Mr. Alcantara** suggests that, in the event that the CMI approves the Draft Instrument, the scope of application should be in line with that of the Mortgages and Maritime Liens Convention (MLM93).

5 **Article 3: Notice of Judicial Sale**

5.1 Article 3 is essentially a reproduction of Article 11 of the MLM93. This was done purposely to avoid any conflicts with that instrument.

5.2 Paragraph 1:

- (1) In the First Draft Instrument, an addition was made to the list on whom notice must be served, being “the Embassy or Consulate of the Ship’s Flag State to the State in which the Judicial Sale takes place.” At an ISC meeting in Oslo⁸, the majority view was that this clause needed to be deleted to avoid notice being held to be insufficient.
- (2) **Croatia** however notes that notice to a diplomatic or consular body of the Ship’s Flag state is very important for communicating news of a pending Judicial Sale and that the reason given for its deletion is not valid. However, such notice should be sent to the Consulate or Embassy in terms of subsection (d), being the authority in charge of the ship’s register in the State of Registration.
- (3) **France** notes that under French Law, a creditor who had a claim against a shipowner and wishes to sell the ship by Judicial Sale has to prove an enforceable title against the vessel. What this “enforceable title” entails is a topic of debate under French Law: it may refer to a judgment or an award on the merits of the claim, or it may refer to a provisional order or summary decision awarded in urgent matters.
- (4) **Great Britain** proposed that paragraph 1 be rephrased to reflect that a Judicial Sale will not be recognised unless notice has been given as stipulated in the Article, which stipulations should include some form of public notice.
- (5) The **USA** also suggests that notice to the public should be considered.
- (6) **Ireland** proposes that the paragraph be amended to indicate that the Court *must* have received notice of all claims *prior to issuing notice of the sale*.
- (7) **Malta** also suggests that reference should be made in the paragraph to the owner of the Ship as opposed to the registered owner.
- (8) **Nordisk** raises the issue that, according to the Instrument, the owner of the vessel need not disclose unregistered interests in the vessel. **Nordisk** accordingly suggests

⁸ First International Sub-Committee meeting was held in Oslo on 27 September 2011, where the First Draft was discussed and was attended by delegates appointed by member associations from Australia, Belgium, Brazil, Canada, China, Croatia, Germany, Japan, Malta, Netherlands, Norway, Singapore, the United Kingdom and the United States of America.

that the owner should be obliged to inform all lien holders, both registered and unregistered, so as to avoid Judicial Sales being conducted without notice to all lien holders. However, **USA** suggests that reliance should be placed on either filed liens of record or appearances resulting from actual notice in the media.

- (9) **Nordisk** notes, further that the 2nd Draft Instrument does not require that the notice in terms of Article 3 contain information regarding the applicant or his claim. This is contrary to the Norwegian Enforcement Act, which requires such information to be disclosed on notice.
- (10) The **USA** points out that under this Article, the Court has the obligation to ensure certain notices are given. In terms of the US Constitution this will not be accepted due to the 3 different branches of the constitutional system. Only the Congress may empower the Judiciary to act, not an international agreement entered into by the executive. To avoid this problem, the **USA** puts forward the following suggestion as a substitute for the first two lines of paragraph 1:

"No State is required by this instrument to recognize a Judicial Sale in another State unless the party seeking recognition establishes that the following notices have been provided prior to such Judicial Sale either by the Court in such State or by one or more parties to the proceeding resulting in such Judicial Sale, in accordance with the laws of such State."

5.3 Paragraph 2:

- (1) **France noted** that the first part of a Judicial Sale, relating to service of summons to pay the claim amount and the notice that the claimant is willing to sell the ship before a competent court, is conducted purely by the creditor. Thereafter the claimant has to apply to a competent court for an order effecting such sale. Accordingly, a judge regulates the situation only after such notice is given.
- (2) Notice must be given at least 30 days prior to the Judicial Sale. **Great Britain** suggests that provision needs to be made for a shortened notice period in cases where the sale is a matter of urgency. **Malta** raises concern as to the consequences flowing from non-compliance with the 30 day time notice. In particular, where such notice is given by registered mail: confirmation of unsuccessful delivery may only be received a few days prior to the Judicial Sale thereby forcing the claimant to reschedule the Judicial Sale accompanied with a new set of notices. Such process could impede the expeditious nature of a Judicial Sale which would be prejudicial to creditors.

- (3) The **USA** points out that many ships may not have IMO numbers and this must be taken into account the clause requiring certain information to be contained in the notice.

5.4 Paragraph 3:

- (1) **Malta** suggests that notice by courier should also be included as a method of issuing notice.
- (2) The **USA** raises concerns as to what "press announcement" would entail as it is ambiguous in the current electronic age.

6 **Article 4: Effect of Judicial Sale**

- 6.1 A common concern raised is that the wording of this article it is not sufficiently clear.

- 6.2 **China** points out that this article could have the effect of going against the intention of protecting purchasers due to the conditional provision contained in this Article. **China** therefore suggests the amendment of the conditional "Subject to" in the Article to "*Unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument*"

- 6.3 **Great Britain** queries whether a vessel sailing through the territorial waters of a State will fall within the ambit of "*the ship being in the area of the jurisdiction of the State*" and thereby subject to Judicial Sale. **Great Britain** therefore suggests that the Judicial Sale only be recognised where:

"(a) the ship is under the control or custody of the court which effects the Judicial Sale;

(b) the Judicial Sale has been conducted in accordance.....

(c) under the law of the court effecting the Judicial Sale the property in the ship is transferred to the purchaser free from any encumbrances of whatsoever nature".

- 6.4 The words "*ownership of the shipowner*" as contained in the First Draft was replaced with "*all rights and interests in the ship*" as supported by a majority view at the ISC meeting in Oslo. **Mr. Alcantara** is of the view that these words are perhaps misleading because under Spanish national laws⁹ a "maritime lien" is a right vesting on the ship. The rights of ownership may be extinguished, whilst liens, encumbrances, charges or, indeed, contracts may always be assumable by the Purchaser.

- 6.5 A common concern relates to provision (b): "*in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument*".

⁹ Article 10.2 of the Spanish Civil Code.

- 6.6 **Croatia** proposes the deletion of this proviso as it creates a question as to what law is applicable and implies that the Judicial Sale will have the result of transferring title to the Purchaser only if the applicable law permits it.
- 6.7 **Great Britain** notes that different States have widely differing methods of sale; therefore this proviso (b) should contain specific methods of acceptable sales (for example: sale by tender; sale by auction, etc)
- 6.8 **Nordisk** points out that the Instrument does not explicitly require that the purchase price be sufficient to cover all mortgages and liens. However, the Judicial Sale must be concluded "*in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument*" and these laws presumably have requirements regarding purchase price and the position of mortgages and liens with better priority than the applicant.

7 **Article 5: Issuance of a Certificate of Judicial Sale**

- 7.1 A common consideration is that the certificate must reflect that ownership has passed to the purchaser, or that the purchaser has acquired such ownership.
- 7.2 **Croatia, Ireland** and **Nordisk** maintain that the Certificate to be issued in terms of Article 5 should contain some clause evidencing that ownership has passed to the Purchaser. **France** suggests that evidence of payment should be provided before such certificate will be issued, as such indicating a change of ownership.
- 7.3 Both **Mr. Alcantara** and the **USA** consider this Article redundant. **Mr Alcantara** is of the opinion that in many States a true/certified copy of the Sale Judgement is sufficient and is available to the Purchaser. The usefulness of the certificate would be fairly low due to the fact that it wouldn't contain any reference to charges, liens etc. The **USA** points out that, currently, a Bill of Sale is used to evidence the change of ownership and that in terms of a Judicial Sale it would be no different. The **USA** submits that the Bill of Sale carries all the weight that this certificate would.
- 7.4 **Croatia** further suggests that Article 5 requires an additional clause setting out that the Judicial Sale is not subject to regular appeal in the State in which the Judicial Sale is accomplished, as such certificate cannot be issued while a participant to a Judicial Sale is able to appeal the sale. This is due to the fact that the certificate will be internationally recognised. Additionally, **Croatia** proposes that a form of such Certificate be annexed to the Instrument for the purposes of uniformity.

8 **Article 6: Deregistration and Registration of the Ship**

- 8.1 Comments received were particularly focused on sub-paragraph 4 of this article.
- 8.2 **China** notes that in practice, the buyer may be unable to register the ship if the original registry is reluctant or refuses to deregister the ship. **China** suggests that the obligation to

deregister the ship should fall on the previous owner and that the buyer should not be prejudiced by the failure to fulfil this obligation. Therefore, where a Purchaser in a Judicial Sale evidences reluctance on behalf of an erstwhile owner to deregister the ship within a reasonable time, the Purchaser may register the ship based on the Certificate in terms of Article 5 alone.

- 8.3 **China** suggests that a temporary registration system should be considered to allow for the better protection of the rights of ship purchasers.
- 8.4 **China** further suggests that in order to avoid malicious claims by “Interested Parties” thereby delaying the process, Interested Parties should be required to provide sufficient security when challenging a Judicial Sale.
- 8.5 **China** also proposes that the registry is an administrative department and, as such, should not have the right to determine whether the Interested Party is genuine or if they possess the substantive rights in order to suspend the registration.
- 8.6 **Great Britain** raises the concern that where a ship sold is not registered or alternatively where it is registered under a system which does not provide for the registration of mortgages then there can be no deregistration of a mortgage even though this would be the effect of a Judicial Sale.
- 8.7 Both **Ireland** and **Malta** suggest rewording paragraph (4) in order clarify the position while **Italy** suggests the deletion thereof.
- 8.8 **Mr Alcantara** points out that a Purchaser will only be protected where the Sale Judgement has become final in that all prior challenges of ownership have been previously resolved in a full, final and non-appealable manner and where the sale is not subject to a revision plea.
- 8.9 The **USA** submits that this article may give rise to problems due to the fact that certain US law provisions prohibit the transfer, by sale or otherwise, of ships currently or most recently documented under the US flag to non-citizens without prior approval from US the Maritime Administration.

9 **Article 7: Recognition of Judicial Sale**

- 9.1 There is a common concern that this Article is ambiguous and unnecessarily complicated and, particularly in the view of **Great Britain**, needs to be revised.
- 9.2 **Nordisk** suggests that “State Party”, as used in this Article, needs to be defined under Article 1.
- 9.3 **China** points out that the Article does not make it clear whether de-registration of a ship and its subsequent re-registration by the Purchaser is subject to the prior recognition of the Court.

China questions the purpose of such recognition when the ship Purchaser could simply provide the Certificate as opposed to obtaining a court order.

- 9.4 **Italy** proposes that the last sentence of paragraph 2 be amended to read “*unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument*” and what the whole of paragraphs 3, 4 and 5 of this article should be deleted.
- 9.5 The **USA** recommends a revised wording of Article 7(4) in order to bring the Article in line with the goal of drafting a treaty which resolves both title and registry and thereby avoid difficulties in reregistering ships flowing from a Judicial Sale, while ensuring that the purpose is not to deprive claimants of rights to claim damages collateral to the judicial foreclosure.
- 9.6 In terms of Article 7(4), **Mr Alcantara** points out that a “Competent Court” is always defined by domestic law and, as such, that Court should hear all actions in relation to a public sale. However, the competent Court might be the place of residence of the party against whom enforcement of a judicial sale order dictated in another EU State is sought. Such party may challenge the enforcement decision before the Court of that EU State having dictated the enforcement. The ground for such challenge by way of appeal would be that the enforcement would be manifestly contrary to public policy. It means that a challenge based upon public policy could be made before a Court other than the Court of the place in which the Judicial Sale took place.
- 10 **Article 8: Circumstances in which Recognition may be refused**
- 10.1 A common concern raised is that this Article is not reconciled with provisions contained in Articles 6 and 7 or may be in conflict with national laws of State Parties.
- 10.2 In particular, **China** points out that paragraph (1) (b) is not reconciled with Article 7(4) and further notes that Article 8(1) (b) is not in line with the general purpose of the Instrument, being the protection of ship purchasers. Accordingly, **China** proposes the deletion Article 8(1) (b).
- 10.3 **Ireland** points out that the one year period contained in this Article conflicts with the provisions of Article 6(4) as this would entail the ship registry having to wait for a full year to expire before deleting mortgages and/or deleting the previous registry. **Ireland** seeks a clearer separation between the two articles.
- 10.4 **Mr Alcantara** also indicates that the time limits for Judicial Sales may be regarded as a “minor defect” under the procedural rules of a determined applicable law system or may conflict with special time limits in national legislation.
- 10.5 In support of its concerns raised under: General Comments” **Italy** proposes the deletion of the first part of the Article, with paragraphs 2 being the only provision in this Article.

- 10.6 In attempting to reconcile this Article with the preceding Articles, **Malta** proposes inserting a provision allowing for temporary refusal or suspension by a Court on presentation of proof by an Interested Party that an action challenging the Judicial Sale is pending as provided for in Article 7(3) until such time that a final judicial decision is made or withdrawn.
- 10.7 **Mr Alcantara** raises the potential conflict of this Article with that of domestic/national legislation of State Parties, in particular due to the fact that in the definition section contained in Article 1 it encompasses "*private international rules of the State in which the ship is sold by way of Judicial Sale*". The conflict of law rules may well direct the parties to the law of the flag or to the law of the contract (ship mortgage) or to the law of the place of the contract. The conflict of law rules may well not refer to an international instrument. Moreover, **Mr. Alcantara** notes that any law that is not substantive or material but procedural is never subject to conflict of law rules because it is reserved to the law of the Court in charge of the public sale. **Mr. Alcantara** suggests that the issue should be revised in order to avoid conflict with domestic laws, in particular whether or not the MLM 1993 is incorporated into national law.
- 10.8 Both **China** and **Japan** raise concerns relating to sub paragraph 2.
- (1) **China** seeks clarification on the meaning of "Judicial Sale" because under Chinese legal practice, after conducting the sale, the court will deliver a "confirmation of sale"; and after the price is paid, the court will deliver another legal document called "confirmation of transfer of ship". Both of these two documents are the proof of judicial sale and records issued dates on them. According to the current wording of the Instrument, it may be difficult to identify "the date of the Judicial Sale".
 - (2) **Japan** suggests a redrafting of the wording of this paragraph in order that the judgment, in the form of a foreign judicial sale, can be tested by the state in which it is being enforced. A judicial sale of a ship should not be recognized even when such a sale is based on a foreign judgment which cannot be recognized and enforced. **Japan** advised that it is hesitant to accept a scheme where a foreign judicial sale is automatically recognized without review of the procedure and the nature of the claim, noting that whilst the Second Draft followed the New York Convention, arbitration is based on the relevant parties' agreement to be bound, while the judicial sale does not have such basis.
 - (3) Similarly, **Mr. Alcantara** notes that the draft of Article 8 does not set out whether the Court receiving the request for non-recognition would be a Court located in a country in which the sale is sought to be effected. Also, the international recognition and enforcement of Court Judgments (unlike an Arbitration Award) remains an issue.

11 **Article 9: Restricted Recognition**

- 11.1 The most noticeable comment raised under this Article, is that of **Malta**, which suggests the addition of a new Article 9 allowing for a temporary change of Flag, and moving the current

Article 9 to become a new Article 10. This proposition is similar to that proposed by **China** under Article 6 in which they suggested amending the 2nd Draft Instrument to allow for a temporary registration system. **Malta** provides a draft wording for the additional Article¹⁰.

- 11.2 **Croatia** proposes an amendment to the first sentence of Article 9 whereby the State signing, ratifying or acceding to the Instrument declare whether the Instrument will only apply to sales made in the territory of a State Party, or where the ship is flying the flag of the State Party.
- 11.3 Along with concerns raised in Article 2, namely that the application of the Instrument is too wide, **Nordisk** suggests that this Article 9 needs to be amended in light of the proposed amendments made to Article 2 in order for application to be limited to State Parties who may opt in this Article 9 to widen its application.
- 11.4 Italy proposes the deletion of this Article, in line with its preceding proposed amendments.
- 11.5 **Mr. Alcantara** seeks clarification on the concept of "restricted recognition." Where a ship is sold lawfully by a foreign Court through a final and non-appealable Court decision (a principle internationally admitted), then such decision may be only effective in a different country in accordance with the latter country's rules on recognition and enforcement of foreign judgments or otherwise pursuant to an International Convention, to which both States are party, which provides a specific system of recognition for certain foreign judgments. **Mr Alcantara** notes that the recognition provisions contained in any particular International Convention do not easily override the domestic general rules and both live together.

12 **Conclusion**

The IWG has been most fortunate to receive so many excellent suggestions as to how the 2nd Draft Instrument can be amended.

We look forward to discussing these alternative suggestions with the delegates over the next few days in the sincere and optimistic belief that the 2012 CMI Conference in Beijing will produce a final version of the Instrument.

Andrew Robinson

¹⁰ See Schedule II.

Comité Maritime International Conference: Beijing October 2012

Appendix I to Paper: *“A Summary of Various Commentaries Received on the 2nd Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships” by Andrew Robinson*

2ND DRAFT INSTRUMENT

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, which remains unpaid after application of such creditor’s share of proceeds actually received following and as a result of a Judicial Sale.*
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 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.*

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 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.*
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 registered 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.*
3. *The notice specified in paragraph 2 of 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 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.*

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 registration of the ship in the name of the Purchaser will be suspended until a final judicial decision is rendered over the challenge, or the objection is withdrawn.*

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) *an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7; or*
 - (c) *the Certificate produced by the Purchaser or Subsequent Purchaser is not authentic.*

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.

2. *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.*

Article 9 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.

Comité Maritime International Conference: Beijing October 2012

Appendix II to Paper: "A Summary of Various Commentaries Received on the 2nd Draft Instrument on the Recognition of Foreign Judicial Sales of Ships" by Andrew Robinson

	2ND DRAFT INSTRUMENT	PROPOSED AMENDMENTS
1	<u>ARTICLE 1: DEFINITIONS</u>	
1.1	"Certificate" means the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.	China wonders if "Certificate" (with Capital letter) can be replaced by "certificate" since it was not intended to be one single/unique document.
1.2	"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.	<p>Dominican Republic: "Charge" means any registerable charge of the same nature as a mortgage or "hypothèque" performed 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. "</p> <p>Great Britain: Proposes the deletion of the words ' applicable in accordance with the private</p>

		<p><i>international law rules' as they are unhelpful;</i></p> <p>Proposes the definition to read as follows:</p> <p><i>‘“Charge” means any mortgage, charge or hypothèque effected on a ship and recognised under the law of the State in which legal ownership of the ship is registered <u>[or if the ship is not so registered under the law of the State of its home port.]’</u></i></p>
1.3	<p><i>“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.</i></p>	<p>Great Britain:</p> <p>Proposes simplifying this paragraph by defining any judicial body in the State that effected the sale and detailing in the term “Judicial Sale” the requirement that only a sale that is free from any pre-existing encumbrances is considered in this instrument.</p>
1.4	<p><i>“Day” means any calendar day.</i></p>	<p>Great Britain:</p> <p>Proposes possible deletion.</p>
1.5	<p><i>“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, which remains unpaid after application of such creditor’s share of</i></p>	<p>Japan:</p> <p>Proposes the deletion of this definition.</p>

	proceeds actually received following and as a result of a Judicial Sale.	
1.6	"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.	<p>Italy:</p> <p>Proposes the deletion of this Article on the basis that its recommendation that Articles 6.1, 7.3, 7.4, 7.5 and 8 be deleted is upheld</p>
1.7	"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.	<p>Great Britain:</p> <p>Proposes replacing "clean title" with "free from all charters, encumbrances, mortgages and maritime liens or any other debts whatsoever"</p> <p>Alternatively, Great Britain proposes that the term "encumbrances" could be defined so as to avoid repetition of this wording in the Instrument;</p> <p>Also "any appropriate ways provided for..." includes "public auction" and "private treaty" so these terms are redundant and could be deleted.</p> <p>Further, Great Britain proposes that sales arising from the enforcement of an <i>in rem</i> claim only should be recognised.</p>
1.8	"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.	<p>Dominican Republic:</p> <p>"Maritime lien" means any claim recognized as a maritime lien <u>or as a privileged credit</u> 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.</p> <p>Great Britain:</p> <p>Proposes the deletion of "applicable in accordance with private international law rules".</p> <p>China:</p> <p>Supports the <i>lex fori</i> approach.</p>

1.9	<p>"Mortgage" or "hypothèque" means any mortgage or hypothèque performed 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.</p>	<p>Dominican Republic:</p> <p>"Mortgage" or "hypothèque" means any mortgage or hypothèque performed 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.</p>
1.10	<p>"Owner" or "Shipowner" means any person registered in the register of ships of the State of Registration as the owner of the ship.</p>	<p>Great Britain:</p> <p>Proposes replacing "any person registered in the register of ships in the State of Registration as the owner of the ship" with "<u>the registered owner of the ship or the owner of the ship as recognised by the law of the State of her home port</u>"</p>
1.11	<p>"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.</p>	<p>No particular proposed amendment.</p>
1.12	<p>"Purchaser" means any person who has acquired title to a ship pursuant to a Judicial Sale.</p>	<p>Great Britain:</p> <p>Proposes that this paragraph read: "<u>Purchaser</u>" means any person <u>to whom the property in the ship is transferred</u> pursuant to a Judicial Sale."</p>
1.13	<p>"Ship" means any ship capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.</p>	<p>Great Britain:</p> <p>Proposes this to read: "<u>Ship</u>" means <u>the property subject to the Judicial Sale which is categorised as a ship under the law of the State that makes the Judicial Sale</u>". Certain jurisdictions treat various marine structures such as oil rigs, drilling platforms etc which</p>

		are not technically ships as ships;	
	1.14	<i>"State" means any member state of the United Nations.</i>	No particular proposed amendment.
	1.15	<i>"State of registration" means the State in whose register of ships a ship is permanently registered at the time of its Judicial Sale.</i>	<p>Great Britain: Proposes that this definition should include that where the ship is not registered then the relevant State should be the State of the home port of the ship.</p> <p>Malta: Proposes that the word "permanently" should be deleted from this definition.</p> <p>Nordisk: Proposes removal of the word "permanently" and including a clause explicitly excluding bareboat registration or replacing the word "Ship" with "the Ship's Ownership"</p>
	1.16	<i>"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.</i>	No particular proposed amendment.
2	ARTICLE 2 SCOPE OF APPLICATION		
		<i>This Instrument shall apply to the recognition of a Judicial Sale taking place in the territory of any State.</i>	<p>Great Britain: Suggests the following : <i>"This Instrument will apply to the recognition of a <u>judgement, decision or agreement for the Judicial Sale of a ship made or endorsed by a court of a</u></i></p>

	<p><u>Contracting State</u></p> <p>Italy: Proposes the Article to be amended as follows: <i>"This Instrument shall apply to the recognition of a Judicial Sale for a ship flying the flag of a State Party that takes place in the territory of a State Party."</i></p> <p>Nordisk: Suggests the Article should be amended in line with the following: The Instrument shall only apply to the recognition of judicial sales that has taken place in states that are parties to the Instrument, with a right for the states to opt for a wider application of the Instrument.</p> <p>Mr. Alcantara: Suggests bringing the Scope of Application in line with that of the MLM93 which states : <i>"1. Unless otherwise provided in this Convention, its provisions shall apply to all seagoing vessels registered in a State Party or in a State which is not a State Party, provided that the latter's vessels are subject to the jurisdiction of the State Party.</i> <i>2. Nothing in this Convention shall create any rights in, or enable any rights to be enforced against, any vessel owned or operated by a State and used only on Government non-commercial service."</i></p>
3	<p align="center">ARTICLE 3 NOTICE OF JUDICIAL SALE</p>

<p>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 :</p> <p>(a) The registered owner of the ship;</p> <p>(b) All holders of registered mortgages, "hypothèques" or charges;</p> <p>(c) All holders of maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims; and</p> <p>(d) The authority in charge of the ship's register in the State of Registration.</p>	<p>Croatia: Proposes adding back the following subparagraph to paragraph 1 with an additional last sentence: " (e) <u>"the Embassy or Consulate of the ship's State of Registration to the State in which the Judicial Sale takes place or, in case no such Embassy or Consulate is established in such State, to the nearest Embassy or Consulate of the ship's State of Registration"</u> .</p> <p>Great Britain: Proposes that paragraph 1 be rephrased as follows: "<u>A Judicial Sale will not be recognised under this Instrument unless prior to the Judicial Sale the court effecting the Judicial Sale has given notice in accordance with this Article to:</u>" Proposes further that public notice should also be incorporated in paragraph 1.</p> <p>Ireland: Proposes amending sub-paragraph 1(c) as follows : "<u>All holders of maritime liens, provided that the Court conducting the Judicial Sale must have received notice of their respective claims prior to issuing the notice of the sale</u>" .</p> <p>Malta: Proposes the sub paragraph 1(a) should read as follows: "<u>The owner of the ship</u>"</p> <p>Norway: Proposes all defined terms to be give a capital letter.</p>

<p>USA:</p> <p>Proposes the following as a substitute for the first two lines of Article 3.1:</p> <p><u>"No State is required by this instrument to recognize a Judicial Sale in another State unless the party seeking recognition establishes that the following notices have been provided prior to such Judicial Sale either by the Court in such State or by one or more parties to the proceeding resulting in such Judicial Sale, in accordance with the laws of such State."</u></p> <p>Further, proposes the deletion of the proviso in Article 3.1(c)</p> <p>Great Britain:</p> <p>Suggests that under paragraph 2, a clause be added making provision for shortened notice periods where the sale is a matter of urgency.</p> <p>Malta:</p> <p>Proposes the sub paragraph 2(a) should read as follows: <i>"The name, the IMO number, the owner of the ship"</i></p> <p>USA:</p> <p>Proposes that article 3.2 (a) be amended to read as follows:</p> <p><u>"The name of the ship, the IMO number (if one exists) and the name of the Owner, as it appears in the registry records in the State of Registration."</u></p>	<p>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:-</p> <p>(a) The name, the IMO number, the registered owner of the ship;</p> <p>(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</p>
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	<p>(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.</p>	
	<p>3. The notice specified in paragraph 2 of 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 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.</p>	<p>Malta:</p> <p>Proposes that "<u>or courier</u>" be included after the words "by registered mail"</p>
4	<p>ARTICLE 4 EFFECT OF JUDICIAL SALE</p>	
	<p>Subject to:</p> <p>(a) the ship being in the area of the jurisdiction of the State in</p>	<p>China:</p> <p>Proposes amending the first line from "Subject to:" to "<u>Unless the Interested</u>"</p>

<p>which the Sale is accomplished, at the time of the Sale and</p> <p>(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</p>	<p><u>Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument."</u></p> <p>Great Britain: Proposes incorporating the following: <u>"Where</u></p> <p>(a) <u>the ship is under the control or custody of the court which effects the Judicial Sale;</u></p> <p>(b) <u>the Judicial Sale has been conducted in accordance with the law of the State in which the Sale is accomplished and the provisions of this Instrument;</u></p> <p>(c) <u>under the law of the court effecting the Judicial Sale the property in the ship is transferred to the purchaser free from any encumbrances of whatsoever nature.</u></p> <p><u>Then the Judicial Sale of the ship will be recognised by the courts of all contracting sates to have effectively transferred the property in the ship to the purchaser free from all encumbrances of whatsoever nature."</u></p> <p>Nordisk: Proposes replacing the word "Sale" with the term "Judicial Sale."</p> <p>USA: Proposes that Article 4(a) be amended to read as follows:</p> <p>"(a) the ship <u>within the jurisdiction of the State in which the Sale is accomplished, at the time of the Sale and</u>"</p>
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	<p>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.</p> <p>Notwithstanding the preceding provisions of this article, no Judicial Sale shall extinguish any in personam claim for any Deficiency Amount.</p>	<p>Croatia: Proposes that "shall be transferred to the Purchaser" should be replaced with "<u>shall be acquired by the Purchaser</u>". Proposes the deletion of the words "in accordance with the law applicable".</p> <p>Japan: Proposes deleting the last sentence of Article 4.</p>
5	<p align="center"><u>ARTICLE 5 ISSUANCE OF A CERTIFICATE OF JUDICIAL SALE</u></p>	
	<p>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</p>	<p>Croatia: Suggests caption (2) to read as follows: (2) <u>all rights and interests existing in the ship prior to its Judicial Sale are extinguished and that the ownership has been acquired by the Purchaser.</u></p> <p>Further proposes the following addition to the clause: "<u>and (3) that the Sale is not subject to regular appeal in the State in which the Sale is accomplished</u>".</p>

	<p><i>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.</i></p>	<p>Further suggests that an example of such Certificate be annexed to the Instrument.</p> <p>Ireland: Suggests incorporating an express provision that the vessel was sold by Judicial Sale to the name Purchaser.</p> <p>Similarly, Nordisk: Suggests adding the words "<i>to the Purchaser</i>" after the word "<i>sold</i>" in the 5th line.</p> <p>Mr Alcantara and USA: note that this Article is not necessary.</p>
6	<p style="text-align: center;"><u>ARTICLE 6 DEREGISTRATION AND REGISTRATION OF THE SHIP</u></p>	
	<p>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.</p> <p>2. If the Certificate as provided for in Article 5 is not made in an</p>	<p>China: Proposes including a provision in this Article allowing for temporary registration system, to allow Purchaser to register the ships temporarily. Further proposes to possibly include a provision asking Interested Parties to provide sufficient security when challenging a Judicial Sale.</p>

	<p>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.</p> <p>3. The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.</p> <p>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 registration of the ship in the name of the Purchaser will be suspended until a final judicial decision is rendered over the challenge, or the objection is withdrawn.</p>	<p>Ireland:</p> <p>Proposes that the first sentence of Article 6(4) should read as follows:</p> <p><u>"If, before the deletion of any registered mortgages, hypothèques and charges and the deletion of the ship from the registry or the registration of the ship..."</u></p> <p>Italy:</p> <p>Proposes the deletion of Article 6(4).</p> <p>Malta:</p> <p>Proposes Article 6(4) should read as follows:</p> <p><u>"If, ..., the Registrar receives an objection ... to the deletion ..., 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 ..."</u></p>
7	<p align="center"><u>ARTICLE 7 RECOGNITION OF JUDICIAL SALE</u></p>	
	<p>1. Subject to the provisions of this Instrument, the court of each</p>	<p>Great Britain:</p> <p>Proposes that what needs to be contained in this Article is that : <u>"a Judicial Sale Certificate issued by the court of a Contracting State:</u></p>

<p><u>(1) shall be recognised by the courts of all Contracting States as transferring, under the laws of the recognising state, the property [in the ship] to the purchaser free, at the time of the Judicial Sale, from any encumbrances of whatsoever nature, and</u></p> <p><u>(2) shall prohibit....."</u></p> <p>Nordisk: Proposes adding a definition of "State Party" Further proposes that paragraph 1 should read as follows: "Subject to the provisions of this Instrument, the court of each State Party ... shall recognize a Judicial Sale taken place in any other State Party with a Certificate"</p> <p>Proposes that subparagraph 2 should read as follows: "Where a ship which was sold by way of a Judicial Sale in a State Party is sought to be arrested or is arrested by order of a court..."</p> <p>Italy: Proposes the last sentence of paragraph 2 to read "unless the Interested Person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Instrument" and the deletion of the whole of paragraphs 3, 4 and 5 of this Article.</p>	<p>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 5 of this Instrument issued, as having the effect:</p> <p>(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;</p> <p>(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.</p> <p>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.</p>
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	<p>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.</p> <p>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.</p> <p>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</p>
	<p>USA:</p> <p>Suggests that Article 7.4 be restated as follows:</p> <p><u>"Absent proof that a ground exists under Article 8 to refuse recognition of a judicial sale, an authenticated bill of sale or certificate issued pursuant to Article 5 of this Instrument shall constitute conclusive evidence that the judicial sale has the effect provided in Article 4 hereof and that the purchaser at judicial sale acquired all right, title and interest in the Vessel, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect."</u></p>

	defined by this Instrument.	
8	<p style="text-align: center;"><u>ARTICLE 8 CIRCUMSTANCES IN WHICH RECOGNITION MAY BE REFUSED</u></p> <p>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:-</p> <p>(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</p> <p>(b) an action challenging the Judicial Sale is pending before a competent court as provided for by paragraph 3 of Article 7; or</p> <p>(c) the Certificate produced by the Purchaser or Subsequent</p>	<p>Malta:</p> <p>Proposes that Article 8 should be amended by the removal of paragraph 1(b) ; and the inclusion of the following paragraph 2:</p> <p>" 2. <u>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 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.</u></p> <p>Notwithstanding ...</p> <p>3. Recognition of a Judicial Sale"</p>

	<p><i>Purchaser is not authentic.</i></p> <p><i>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.</i></p> <p>2. 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.</p>	<p>China:</p> <p>Proposes the deletion of Article 8(1)(b).</p> <p>Italy:</p> <p>Proposes the deletion of the first part of the Article, with paragraphs 2 being the only provision in this Article.</p> <p>Japan:</p> <p>Proposes the paragraph 2 to be revised as follows:</p> <p>" "8.2 Recognition of a Judicial Sale may also be refused if the Court in a State Party in which recognition is sought finds that:</p> <p>(i) <u>the recognition of the Judicial Sale and/or</u></p> <p>(ii) <u>any of the underlying procedures and/or</u></p> <p>(iii) <u>claims and/or documentation pursuant to which the Judicial Sale was obtained</u></p> <p><u>would be contrary to the public policy of that State Party.</u>"</p>
9	<p>ARTICLE 9 RESTRICTED RECOGNITION</p>	
	<p>When signing, ratifying or acceding to this Instrument, any State may</p>	<p>Malta:</p>

	<p><i>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.</i></p>	<p>Suggests moving this Article 9 to Article 10 and adds the below "Proposed Article 9 Temporary Change of Flag" (See Below)</p> <p>Croatia</p> <p>Suggests that this Article be revised in order to allow the reserve to be declared only with regard to judicial sales made in the territory of State Parties.</p> <p>Italy:</p> <p>Proposes the deletion of this Article in its entirety.</p>
	<p><u>PROPOSED NEW REPLACEMENT ARTICLE 9 TEMPORARY CHANGE OF FLAG</u></p>	
		<p>Malta</p> <p>Proposes the following Article as Article 9 (and moving the current Article 9 to Article 10)</p> <p><i>If a Ship registered in one State is permitted to fly temporarily the flag of another State, the following shall apply:</i></p> <p><i>(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</i></p>

	<p><u>of the register in that State.</u></p> <p><u>(b) The law of the State of registration shall be determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges.</u></p> <p><u>(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.</u></p> <p><u>(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.</u></p> <p><u>(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.</u></p> <p><u>(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.</u></p> <p><u>(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.</u></p>	
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