

## **Comments and amendment proposals on the Second Working Draft of Instrument on Recognition of Foreign Judicial Sales of Ships**

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### **1 Introduction**

This paper introduces the attitude of China Maritime Law Association (hereinafter referred to as “CMLA”) towards the CMI’s drafting of the Instrument on Recognition of Foreign Judicial Sales of Ships, expounds the basic principles which are proposed to be followed in the Instrument, comments and puts forward some specific amendment proposals on the Second Working Draft of the Instrument on Recognition of Foreign Judicial Sales of Ships (hereinafter referred to as “the Instrument”).<sup>1</sup>

### **2 Attitude of CMLA towards the Instrument**

CMLA believes that the adoption of uniform rules to govern the recognition of foreign judicial sales of ships will promote international harmonization and unification of the law in this area, in reducing or removing legal obstacles, effectively contribute to the economic and legal certainty and significantly safeguard the interests of the *bona fide* purchaser and other interested persons concerning judicial sale of ships, and improve the efficiency of such recognition.

China is one of the biggest shipping countries in the world. Since the establishment of the ten maritime courts in China in the 1980s, many merchant ships, domestic or foreign, have been sold in judicial sales. At the same time, Chinese shipping companies or ship scrapping companies purchased ships in foreign judicial sales. No doubt, along with the economic and shipping development, judicial sales of ships in China and purchase of ships in foreign judicial sales by Chinese companies will continue.

Thus, CMLA is in favor of the making of the Instrument, appreciates the great efforts made by CMI so far, supports and actively participates in the CMI’s drafting of the Instrument.

### **3 Basic principles to be followed in the Instrument**

Needless to say, the realization of the purposes of this Instrument as illustrated above necessitates the adoption of appropriate basic principles. The following basic principles are proposed to be followed in the Instrument: -

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Some comments and proposals expressed in this paper reflect those of the working group organized by China Maritime Law Association (CMLA) for the purpose of studying CMI’s drafting of the Instrument on Recognition of Foreign Judicial Sales of Ships. The group is led by Judge Wang Shumei of the Supreme People’s Court and consists of experts from the Secretariat of CMLA, maritime judges, professors of maritime law, maritime lawyers and in-house lawyers from shipping companies.

<sup>1</sup><http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html>

### **3.1 Facilitating the international harmonization and unification of law**

An international instrument is in essence a compromise among the contracting States. Thus, the Instrument shall have its primary function to facilitate the international harmonization and unification of the law on the recognition of foreign judicial sales of ships and the issues related thereto on a basis of equality, equity, common interest and the well-being of all peoples. For this purpose, the Instrument shall contain as many fundamental and practicable provisions as may attract wide acceptance by the States, especially those States where judicial sale of ships or recognition of foreign judicial sales of ships happen more often. Thus, facing the discrepancies in the matters of civil, procedural or even administrative law<sup>2</sup> in this area in the various States, it is important to seek common ground while reserving discrepancies which are unable to achieve compromise. This being so, it may sometimes be appropriate or even necessary to expressly provide that certain issues shall be left to national law.

### **3.2 Protecting the interests of the *bona fide* purchaser**

The Instrument is intended to govern the recognition of foreign judicial sale of ships and the related issues of registration or deregistration of ships. The contents of the Instrument mainly involve the interests of three parties in a judicial sale of ship, i.e. the owner of a ship prior to judicial sale, the holder or holders of mortgage, “hypothèque”, charge or maritime lien attached to a ship prior to judicial sale, and the purchaser or subsequent purchaser of a ship from judicial sale.

From the point of interests and benefits which may be available in a judicial sale of ship, the previous owner is able to use the proceeds of sale for liquidation of his debts, the holders shall be entitled to get compensations for their credits from the proceeds of sale, and purchaser shall acquire clean title to the ship. The interests and benefits available to the previous owner and the holders are certain in most cases. It seems clear that, if the purchaser who has paid the price of ship in a judicial sale is unable to acquire a clean title to the ship or the title will be lost after judicial sale, the credibility of judicial sale shall be discounted or even significantly discounted and, as a result, not many persons will be willing to purchase ships from judicial sales which will in turn affect the interests and benefits available to the holders and also the previous owner.

As a matter of balancing the interests and benefits available to the previous owner, the holders of mortgage, “hypothèque”, charge or maritime lien, and the purchaser or subsequent purchaser as a result of a judicial sale of ship, therefore, one basic principle to be followed in the Instrument is to provide necessary and sufficient protection to the *bona fide* purchaser or subsequent purchaser. As required by this principle, the provisions of this Instrument shall reflect the sufficient protection of the purchaser’s interests with

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<sup>2</sup> In China, the registration and deregistration of merchant ships is in the charge of the institutions of Maritime Safety Administration (MSA) which are administrative organs mainly in accordance with *The Regulations governing Registration of Ship, 1994* which can be deemed as of the nature of administrative law.

respect to the effect of judicial sale, registration of ship, recognition of judicial sale and action challenging judicial sale around providing him with clean title to the ship with legal certainty. This principle is proposed to be followed with priority, but seems not fully or sufficiently reflected in the Second Working Draft Instrument as analyzed below.

### **3.3 Protecting the interests of the interested persons**

While protection of the interests of the *bona fide* purchaser in a judicial sale shall be of primary concern in the Instrument, protection of the interests of the holders of mortgage, “hypothèque”, charge or maritime lien and the previous owner shall not be ignored. As abovementioned, the Instrument shall entitle the holders to get compensations for their credits from the proceeds of sale, and enable the previous owner to use the proceeds of sale for liquidation of his debts. It may happen that a judicial sale is not conducted pursuant to this Instrument in practice if the Instrument is put in force in the future. As legal relief, consequently, it is necessary to provide opportunity for the holders or the previous owner to raise action challenging a judicial sale or objection to registration of a ship in the name of purchaser who is not *bona fide*, in order to ensure their respective lawful interests. However, exercise of such rights shall be restricted in order to avoid misuse thereof and prejudice to the lawful interests of a *bona fide* purchaser or subsequent purchaser.

## **4 Specific comments and amendment proposals on the Instrument**

### **4.1 Improvement of the definitions**

Article 1 of the Instrument contains sixteen definitions. CMAL is of the view that these definitions be necessary and that some of them are appropriate, while the others need be improved.

#### **4.1.1 “Certificate” (Definition 1)**

In this definition, “Certificate” includes “*a certified copy thereof*”, i.e. a certified copy of the original duly authorized certificate. This being so, the expression of “*or a copy thereof duly certified*” in Paragraphs 1 & 3 of Article 6, Paragraphs 2 & 4 of Article 7 is redundant and can be deleted. Alternatively, the expression of “*a certified copy thereof*” in this definition shall be deleted, and the expression of “*or a copy thereof duly certified*” in Paragraphs 1 & 3 of Article 6, Paragraphs 2 & 4 of Article 7 remain as it is.

#### **4.1.2 “Court” (Definition 3)**

This definition seems too complicated. It had better express the ordinary meaning of a court of law in the first place, and does not need to indicate every effect of judicial sale of ship. Thus, this definition may be amended to read as follows: -

*“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 law of the State to sell or order the sale of a ship and to deal with judicial issues in relation to recognition of Judicial Sales of Ships accomplished in any other State.*

#### 4.1.3 “Judicial sale of a ship” or “judicial sale” or “sale” (Definition 7)

As provided for in Article 4, giving clean title to the ship to the purchaser pursuant to judicial sale is conditional. Thus, this definition may be simplified and does not need to indicate the effect of judicial sale of ship by deleting the expression of *“by which clean title to the ship is given to the Purchaser and the proceeds of sale are made available to the creditors”*. Therefore, this definition may be amended to read as follows: -

*“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 takes place.*

#### 4.1.4 “Owner” or “Shipowner” (Definition 10)

The current definition is limited to the registered owner only, but does not cover the situation where the ownership of a ship has not been registered. In practice, it may occur that the ownership of a ship is not registered at the time of judicial sale. Therefore, as a matter of scope of application, it need be considered whether the Instrument shall be applicable to judicial sale of a ship the ownership of which has not been registered. In addition, it need be considered whether the Instrument shall be applicable to judicial sale of a state-owned ship engaged in commercial service. It is proposed that the Instrument be applicable to judicial sale of such a ship and that the definition of shipowner in 1992 CLC be adopted. Thus, this definition may be amended to read as follows: -

*“Owner” or “Shipowner” means the person or persons registered in the register of ships in the State of Registration as the owner of the Ship or, in the absence of registration, the person or persons owning the Ship. However, in the case of a Ship owned by a State and operated by a company which in that State is registered as the Ship’s operator, “owner” or “Shipowner” shall mean such company.*

#### 4.1.5 “Purchaser” (Definition 12)

This definition needs to express the ordinary meaning of a purchaser, i.e. a person who has paid the purchase price for something. A simple definition of “Purchaser” may be as follows: -

*“Purchaser” means the person who has purchased a ship pursuant to a Judicial Sale.*

Noticeably, Article 4 sets forth conditions upon transfer of title to a ship to the purchaser. Therefore, the expression of “*who has acquired title to a ship pursuant to a Judicial Sale*” in this definition may literally cause misunderstanding that a purchaser shall unconditionally acquire title to a ship pursuant to a Judicial Sale. Therefore, as an alternative, this definition may be amended to read as follows: -

*“Purchaser” means the person who has purchased a ship and acquired title to the ship pursuant to a Judicial Sale under this Instrument.*

#### 4.1.6 “Ship” (Definition 13)

It need be considered whether a ship under construction shall be expressly covered by this definition. A ship under construction is proposed to be covered, as mortgage is often established on a ship under construction as a means of financing. A ship under construction may be subject to possessory lien exercised by the shipbuilder where she is not owned by the shipbuilder as agreed upon in the shipbuilding contract and the shipbuilding price has not been paid in full. Thus, this definition may be amended to read as follows: -

*“Ship” means any ship including a ship under construction capable of being an object of a Judicial Sale under the law of the State in which the Sale takes place.*

#### 4.1.7 “State of registration” (Definition 15)

Where a ship is under a bareboat charter, it may occur in practice that the ship is registered in the State where the bareboat charterer is located and her permanent registration is suspended during the period of hire. In such a situation, it may need to indicate how to determine the State of registration. It is proposed that, if a ship is under bareboat charter which is registered in the State of the bareboat charterer besides her permanent registration, “State of registration” shall mean the State of her permanent registration.

This being so, this definition may be amended to read as follows: -

*“State of registration” means the State in whose register of Ships a ship is permanently registered at the time of its Judicial Sale. Where a Ship is under bareboat charter which is registered in the State of the bareboat charterer besides her permanent registration, “State of registration” shall mean the State in whose register of the Ship is permanently registered.*

#### 4.1.8 “Subsequent purchaser” (Definition 16)

Similar to the definition of “Purchaser”, this definition needs to express the ordinary meaning of a subsequent purchaser and may be amended to read as follows: -

*“ Subsequent purchaser” means the person who has purchased from a Purchaser or its sub-purchaser a ship which was sold pursuant to Judicial Sale and acquired title to the ship under this Instrument.*

#### **4.2 Notice of judicial sale**

Article 3 of the Instrument contains provisions concerning notice of judicial sale of a ship to be provided by the court conducting judicial sale. Obviously, prior notice of judicial sale of a ship to her registered owner and the holders of the registered mortgages, “hypothèques” or charges etc. is important to enable them to exercise their respective statutory rights and thus to protect their respective lawful interests. Therefore, such notice is necessitated by the basic principle as illustrated in 3.3.

On the other hand, provision of such notice by the court conducting judicial sale proves not always easy in practice. It may occur that the court is unable or feel difficult to find out the specific mailing address or their electronic contacting detail of the registered shipowner or the holders of registered mortgages, “hypothèques” or charges, because these information sometimes are not clearly indicated in the ship’s certificates, or can be easily obtained by the court conducting judicial sale where the registry of a ship is not located in the State where the court is located. A ship flying a flag of convenience may be registered in a State with which the State where the court is located has no diplomatic relation to enable service of notice via diplomatic way. However, if notice can be served onto the shipmaster onboard, the registered shipowner may easily know the information of the arrest and the consequential judicial sale via the shipmaster. At least in China, notice of judicial sale and the registration of credits prior to the judicial sale is given by press announcement, i.e. newspapers or other media. However, it seems doubtful that the shipowner or the holders of mortgages, “hypothèques” or charges etc. actually know the information of judicial sale via press announcement.

As an issue of balance, therefore, while the court shall be obliged to provide notice of judicial sale, the convenience and ability of the court in providing such notice need be considered. For this purpose, it is advisable that a court be allowed to serve notice onto the shipmaster onboard. Where a foreign ship is to be sold in judicial sale and the ship’s flag State has an embassy or consulate in the State in which the judicial sale shall takes place, notice can be given by the court to such embassy or consulate, because the embassy or consulate is easy to be notified by the court conducting judicial sale and to notify the authority in charge of the ship’s registry of the flag State. Therefore, the court conducting judicial sale needs to notify either the authority in charge of the ship’s registry of the flag State or its embassy or consulate. Such notification may make the information of judicial sale accessible to the registered shipowner and holders of registered mortgages, “hypothèques” or charges. Press announcement as supplementary means of notice may be maintained.

In view of the above, it is proposed that Sub-paragraphs (a), (c) & (d) of Paragraph 1 of Article 4 be amended to read as follows, unless the expression of “*In addition*” in Paragraph 3 is replaced by “*Alternatively*” : -

Sub-paragraph (a) shall be amended as “*The registered owner of the ship. A notice provided to the master onboard a ship shall be deemed as having provided to her registered owner*”.

Sub-paragraphs (b) & (c) shall be put together and amended as “*All holders of registered mortgages, ‘hypothèques’ or charges, or maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims and contacting address or other contacting information*”.

Sub-paragraph (d) shall be amended as “*The authority in charge of the ship’s register in the State of Registration or the Embassy or Consulate of the ship’s flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State*”.

Being so amended, Paragraph 1 shall read as follows: -

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. A notice provided to the master onboard a ship shall be deemed as having provided to her registered owner;*
  - (b) *All holders of registered mortgages, ‘hypothèques’ or charges, or maritime liens, provided that the Court conducting the Judicial Sale has received notice of their respective claims and contacting address or other contacting information; and*
  - (c) *The authority in charge of the ship’s registry in the State of Registration or the Embassy or Consulate of the ship’s flag State to the State in which the Judicial Sale takes place, unless no such Embassy or Consulate is established in such State.*

#### **4.3 Effect of judicial sale**

Article 4 of the Instrument contains provisions concerning the effect of judicial sale mainly for the purpose of giving clean title to the ship to the purchaser, provided that the judicial sale lawfully takes place. For this purpose, the ownership in the ship existing prior to her Judicial Sale shall be extinguished and all mortgagees, “hypothèques” or charges, maritime and other liens, and encumbrances shall cease to attach to the ship sold in judicial sale. Article 4 of the Instrument expresses such an effect.

As provided for in Article 4, such an effect is conditional upon that the ship was within the jurisdiction of the State in which the judicial sale was accomplished at the time of the sale and that the judicial sale was conducted in accordance with the law of the State in which the sale was accomplished and the provisions of the Instrument. These two conditions are appropriate. However, the question is who shall bear the onus of proof, i.e. shall the purchaser prove that

the two conditions have been met or shall an interested person prove to the contrary?

To follow the basic principle to provide necessary and sufficient protection to the *bona fide* purchaser as illustrated in 3.2, it seems appropriate that the above effect of judicial sale shall be presumed and thus the onus of proof shall be on an interested person challenging the effect of judicial sale.

It is understood that the expression of “*all rights and interests*” in Paragraph 1 of Article 4 means or mainly means the ownership of the shipowner as provided for in the First Working Draft. Under the Chinese law, judicial sale shall extinguish the ownership of the previous shipowner. To avoid possible understanding of “*all rights and interests*” beyond the ownership of the shipowner existing prior to Judicial Sale, it seems advisable that the expression of “*all rights and interests*” be replaced by “*without prejudice to the entitlement of the creditors to get compensation from the proceeds of Judicial Sale pursuant to the law of the State where Judicial Sale takes place, all proprietary rights and interests*”.

In view of the above, it is proposed that Paragraph 1 of Article 4 be amended to read as follows:

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*Unless the Interested Person proves:*

- (a) *That the ship was not in the area of the jurisdiction of the State in which the Judicial Sale was accomplished at the time of the judicial Sale, or*
- (b) *That the judicial Sale was not conducted in accordance with the law of the State in which the judicial Sale was accomplished and the provisions of this Instrument,*

*without prejudice to the entitlement of the creditors to get compensation from the proceeds of Judicial Sale pursuant to the law of the State where Judicial Sale takes place, all proprietary 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.*

#### **4.4 Deregistration and registration of ship**

Article 6 of the Instrument contains provisions concerning deregistration and registration of the ship sold in judicial sale. In normal course, a ship shall be deregistered in the previous ship’s register and then registered in the new ship’s register after she has been sold in judicial sale. Deregistration is a condition for new registration in the name of the purchaser under the widely adopted principle of not allowing dual registration of a ship. And new registration is a condition for the use of the ship by the purchaser. Therefore, it’s of great importance to ensure deregistration for the purpose of new registration, as required by the

basic principle to provide necessary and sufficient protection to the *bona fide* purchaser as illustrated in 3.2.

Generally speaking, however, it seems this principle is not well followed in this Article and that this Article 6 should be amended in favor of new registration in the name of purchaser in the following two aspects: -

4.4.1 Obligation of previous owner to apply for deregistration & purchaser's entitlement to applying for new registration

It is advisable to amend Paragraph 1 of this Article and provide the obligation of the previous owner to apply to the registry for deregistration within certain days after the judicial sale. In addition, it may occur that the previous owner of the ship fails to apply or timely apply to the registry for deregistration after the Judicial Sale, or the registry fails to delete or timely delete the previous registration or to issue a certificate of deregistration as in the case of "Galaxias".

<sup>3</sup> As a result, the purchaser will be unable to register the ship in his name, which will cause prejudice to the interests of the purchaser. Consequently, it seems necessary to provide that the purchaser should be entitled to apply for registration of the ship in his name.

Therefore, two paragraphs are proposed to be added. One paragraph as new Paragraph 1 of this Article shall provide the obligation of the previous owner to apply for deregistration. The other as new Paragraph 5 of this Article shall provide to the effect that failure of the previous owner in applying for deregistration or failure of the registry in deleting the registration or in issuing a certificate of deregistration upon application of either the previous owner or the purchaser shall not cause prejudice to the effect of judicial sale as provided for in Article 4 of the Instrument, nor to the registration of the ship by virtue of the law of the State where the registry or new registry is located upon application of the purchaser with production of a certificate of judicial sale provided for in Article 5 of the Instrument. That is, the issue whether a ship can be registered in the absence of a certificate of deregistration shall be left to the law of the State where the purchaser seeks registration in his name, which is in conformity with the basic principle as illustrated in 3.1.

4.4.2 Registration in the name of purchaser not to be affected by challenge action or objection raised by an interested person

It may occur that, 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, an interested person brings an action challenging the judicial sale before the court conducting the judicial sale, based upon which the interested person raises an objection to the deletion or the registration or the issuance of certificate of deregistration. Paragraph 4 of

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<sup>3</sup> (1988) LMLN, No.240, p.2. The Greek registered ship "Galaxias" was arrested and sold according to the order of the Canadian court "free and clear of all encumbrances". The Minister of Greek Merchant Marine objected to the issuance of the Registration Deletion Certificate by the Greek Shipping Registry in Piraeus and made it contingent on the satisfaction of the claims raised against "Galaxias" by the Greek Seamen's Union.

Article 6 provides that, if the registrar receives such an objection supported by evidence proving such a challenging action, 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.

It can be anticipated that, however, if 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 as stated in this Paragraph, the interests of the purchaser may be seriously prejudiced, because in that case the ship may not be registered in the name of the purchaser even for a couple of years during which the challenge action raised by an Interested Person will be pending and the purchaser will be unable to use the ship. It seems also doubtful that the registry of a ship shall be bound by such a challenge action or objection where a certificate of judicial sale provided for in Article 5 of the Instrument has been provided to the registry. For example, registration of a ship in China conducted by the Maritime Safety Administration (MSA) shall not be bound by such a challenge action or objection where a Certificate provided for in Article 5 of this Instrument has been provided.<sup>4</sup>

Therefore, it is advisable to amend Paragraph 4 of Article 6 as new Paragraphs 6 & 7.

The new Paragraphs 6 of Article 6 shall provide to the effect that If, before the deletion of any registered mortgages, “hypothèques” and charges, and before 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 judicial sale has been brought pursuant to Article 8 of the Instrument, the registration of ship in the name of purchaser and the issuance of certificate of deregistration shall not be affected by such challenge action or objection under the applicable national law. Thus, the issue of effect of such challenge action or objection on the registration of ship in the name of Purchaser or the issuance of certificate of deregistration shall be left to the national law of the State where such registration or issuance is sought in conformity with the basic principle as illustrated in 3.1.

The new Paragraphs 7 of Article 6 shall provide to the effect that, if the final decision of the challenge action finds that the purchaser or subsequent Purchaser was not *bona fide* and declares withdrawal of the certificate of judicial sale as provided for in Article 5 of the Instrument, the registrar shall not register the ship in the name of purchaser or issue the certificate of deregistration. If the ship has already been registered in the name of purchaser or the certificate of deregistration has been issued, the registrar shall withdraw the registration or the certificate of deregistration. Such a provision is in conformity with the basic principle as illustrated in 3.3.

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<sup>4</sup> The Regulations Governing Registration of Ships of 1994 provides in Article 13 of Chapter Two “Registration of ship’s ownership” that, where a ship is acquired by way of enforced sale pursuant to law or court’s judgement, the legally effective document proving the acquirement of ship’s ownership shall be provided for the application for registration of ship’s ownership.

Thus, it is proposed that this Article be amended to read as follows: -

1. *The previous owner shall apply to the Registrar of the Registry where the ship was registered prior to her Judicial Sale for deregistration within seven working days after the Judicial Sale.*
2. *Subject to the provisions of Paragraph 7 of this Article, upon application of the previous owner as provided for in the preceding Paragraph or upon production by a Purchaser of a Certificate provided for in Article 5 of this Instrument, 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.*
3. *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.*
4. *The Registrar may also request the Purchaser to submit a duly certified copy of the said Certificate for its files.*
5. *Failure of the previous owner in performing the obligation as provided for in Paragraph 1 of this Article or failure of the Registrar of the Registry where the ship was registered prior to its Judicial Sale in deleting the ship from the Register or issuing a certificate of deregistration upon application of either the previous owner or the Purchaser shall not cause prejudice to the effect of Judicial Sale and all registered mortgages, "hypothèques" or charges shall be deemed as deleted except those assumed by the purchaser, nor to the registration of the ship by virtue of the law of the State where the Registry is located upon application of the Purchaser with production of a Certificate provided for in Article 5 of this Instrument.*
6. *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 Judicial Sale has been brought pursuant to Article 8 of this Instrument, the registration of Ship in the name of Purchaser or the issuance of a certificate of deregistration shall not be affected by such challenge action or objection by virtue of the law of the State where such registration or issuance is sought.*

7. *Notwithstanding anything provided for in Paragraph 6, where, as a result of the challenge action referred to in Paragraph 6, the Court in which the challenge action has been brought or its court of appeal or appeals renders final decision that the Purchaser or a Subsequent Purchaser was not bona fide and declares withdrawal of the Certificate provided for in Article 5 of this Instrument, the Registrar shall not register the Ship in the name of Purchaser or issue the certificate of deregistration, or, if the ship has been registered in the name of Purchaser or the certificate of deregistration has been issued, shall withdraw the registration or the certificate.*

#### **4.5 Recognition of judicial sale**

Article 7 of the Instrument is the provisions concerning recognition of judicial sale.

Paragraph 1 of this Article provides that 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. However, it seems not easy to understand the significance of this Paragraph, because, unlike the case of recognition and enforcement of a foreign arbitration award or judgement, it seems unnecessary, at least in China, for a purchaser or subsequent purchaser to apply to a court to recognition of a foreign judicial sale for the purpose of registration of the ship in his name. Therefore, it seems that Paragraph 1 is redundant and may be deleted. In addition, it seems advisable for CMI to investigate, if necessary or helpful, in what jurisdictions and how often the issue of recognition of foreign judicial sale occurs. Based upon such investigation, possibly the title of the Instrument and the titles of Articles 7 & 8 need be reconsidered as regards the adoption of the word "*recognition*".

Paragraph 4 of Article 7 provides to the effect that, where an interested person brings an action challenging a judicial sale against the purchaser or subsequent purchaser or the ship, the court shall dismiss the action or reject the relevant claim upon production by the purchaser or subsequent purchaser of the certificate of judicial sale, unless the interested person furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of the Instrument. Such wording appears to reflect the basic principle as illustrated in 3.2, but in fact it may be contrary to this basic principle.

It seems doubtful that an action challenging a judicial sale can be brought by an interested person against the purchaser or subsequent purchaser even if there exists any of the circumstances provided for in Article 8 of the Instrument, unless it proves that the purchaser or subsequent purchaser was not *bona fide* in the judicial sale. If an interested person wins in a challenging action, the legal relief available to him shall be basically the compensation from the proceeds of the ship in judicial sale, unless it proves that the purchaser or subsequent purchaser was not *bona fide* in the judicial sale. That is to say, by virtue of the theory of *bona fide* acquirement of ownership under civil law, even if there exists any of the circumstances provided for in Article 8 of the Instrument, the ownership of the ship of the purchaser or a subsequent purchaser who was *bona fide* and paid for the price in the judicial sale shall not be

deprived. Therefore, to follow the basic principle as illustrated in 3.2, it is proposed that this Paragraph be amended to read as follows: -

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, unless the Interested Person furnishes proof evidencing that the Purchaser or a Subsequent Purchaser was not bona fide in the Judicial Sale.*

#### **4.6 Circumstances in which recognition of judicial sale may be refused**

Article 8 of this Instrument provides the circumstances in which recognition of judicial sale may be refused by court at the request of an interested person. An interested person, i.e. the owner of a ship prior to her judicial sale or the holder of a mortgage, “hypothèque”, charge or maritime lien attached to the ship prior to her judicial sale is given the right to apply to a competent court for refusal of the recognition of judicial sale. Such a right reflects the basic principle as illustrated in 3.3. However, the necessity in reality for recognition of judicial sale seems doubtful as discussed in 4.5 *supra* and the necessity for refusal of recognition is based upon the necessity for recognition. Consequently, the necessity in reality for giving an interested person the right to apply for refusal of recognition of judicial sale seems also doubtful.

Paragraph 1 of Article 8 describes the three circumstances to be proven by an interested person under which a court may refuse recognition of a judicial sale. The word “*may*” in the first line literally appears to give discretion to the court. It seems appropriate that word “*may*” shall be replaced by “*shall*”.

As regards the first circumstance described in Subparagraph (a), judicial sale of a ship is at least in most cases based upon arrest of a ship. And arrest of a ship is conditional upon the fact that the ship at the time of arrest is physically in the area of the jurisdiction of the State in which the court conducting judicial sale is located. In addition, the certificate of judicial sale provided for in Article 5 is issued by the court conducting the judicial sale. In practice, it occasionally happens that a ship under arrest escapes or otherwise departs from the jurisdiction of the State in which the court arrested the ship is located. However, if the ship under arrest is not physically in the area of the jurisdiction of such State anymore for whatever reasons, it seems difficult to imagine how the court which arrested the ship is able to conduct a judicial sale and issue the certificate provided for in Article 5. Therefore, such a circumstance does not logically happen in reality. Thus, it is proposed that the necessity for Subparagraph (a) be investigated and reconsidered.

As regards the second circumstance described in Subparagraph (b), if a court is allowed to refuse recognition of judicial sale merely due to the fact that an interested person has brought a challenging action, it may cause prejudice to the interests of the purchaser or subsequent

purchaser and not be in conformity with the basic principle as illustrated in 3.2. In addition, Subparagraph (b) seems logically in conflict with Paragraph 4 of Article 7, because the expression in this Subparagraph of pending of an action challenging the judicial sale seems logically in conflict with the expression in Paragraph 4 of Article 7 of dismissal of a challenging action. That is, the existence of a challenging action itself cannot be taken as the ground for dismissal thereof. It seems clear that pending of an action challenging the judicial sale before a competent court may only necessitate pending of recognition of judicial sale. Thus, Subparagraph (b) is proposed to be deleted.

It is advisable to reconsider whether the content of Subparagraph (b) in the First Working Draft, i.e. the judicial sale was not accomplished in accordance with the law of the State in which judicial sale took place or the provisions of this Instrument, need be restored in this Instrument.

It is also advisable to reconsider whether the effect of non-recognition of judicial sale be expressly provided in the Instrument.

#### **4.7 Restricted recognition of judicial sale**

Article 9 of this Instrument contains provisions of restricted recognition of judicial sale. Noticeably, the Instrument mainly governs the so-called recognition of foreign judicial sale of a ship, but its content also covers some other issues relating to judicial sale, e.g. deletion of registration of ship and registration of ship in the name of purchaser after judicial sale. However, the content of this Article is literally limited to recognition of judicial sale. Consequently, it may happen that a court of a State which has made the stipulated declaration is not obliged to recognize a foreign judicial sale, but its register may still be obliged to follow the judicial sale and register the ship after judicial sale.

Thus, it seems advisable that the title of this Article be changed into "*Restricted Application*". And the expression of "*the recognition of a*" in the first sentence be deleted and, as a result, the expression in the first sentence shall be in line with that in the second sentence.

## **5 Conclusions**

Based upon all the above analysis, the following conclusions may be drawn: -

- 5.1 CMLA believes that the adoption of this Instrument will promote international harmonization and unification of the law in the area of recognition of foreign judicial sales of ships, supports and actively participates in the CMI's drafting of the Instrument;
- 5.2 Three basic principles need be followed in the Instrument, i.e. facilitating the international harmonization and unification of the law, protecting the interests of the *bona fide* purchaser, and protecting the interests of the interested persons. Among these basic principles, the second one is of priority, but seems not well followed in

the Second Working Draft;

- 5.3 The Second Working Draft has formed a good framework and contains the basic provisions of this international instrument. On the other side, besides logical amendments, improvements need be made on some of the provisions of the Draft, especially those of Article 6 regarding deregistration and registration of ship, in conformity with the three basic principles and the practical needs in reality.