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Judicial Sale of Ships: Proposed Draft Instrument Prepared by the Comité Maritime International

Note by the Secretariat

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I. Introduction

1. In preparation for the fiftieth session of the Commission (Vienna, 3–21 July 2017), the Comité Maritime International (CMI) submitted a proposal (the “CMI proposal”) for possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/923). The CMI proposal outlined certain problems associated with the non-recognition in one State of judgments ordering the sale of a ship that emanated from another State.¹ In particular, the CMI proposal noted that a failure to recognize the clean title acquired by the purchaser under the law of the State of sale led to difficulties in deregistering the ship from its presale registry and gave rise to the risk of subsequent arrest of the ship for presale claims.
2. The CMI proposal expressed the view that these problems could be addressed by a simple, largely procedural, international instrument. To this end, it referred to a draft convention on the recognition of foreign judicial sales of ships, which was approved by the CMI Assembly in 2014. The text of the draft convention, known as the “Beijing Draft”, is reproduced in the annex to this note.
3. At a high-level colloquium held in Valletta, Malta, on 27 February 2018, the CMI proposal received support from a cross section of the international maritime industry, including representatives of the Baltic and International Maritime Council (BIMCO), the International Transport Workers Federation (ITF) and the Federation of National Associations of Ship Brokers and Agents (FONASBA), as well as ship financiers, shipowners, bunker suppliers, ship repairers, harbour authorities and ship registries.
4. For the fifty-first session of the Commission (New York, 25 June–13 July 2018), a follow-up proposal from the Government of Switzerland included the outcomes and conclusions of the colloquium. It noted that there was consensus among delegates and panellists that the Beijing Draft would provide a helpful reference if work were to be taken up on the topic by UNCITRAL. It also stated that the work of CMI in developing the Beijing Draft “provides a useful starting point to further UNCITRAL work, providing guidance for a working group and indicating the direction that might be taken” (A/CN.9/944/Rev.1).
5. Consistently with this proposal, the Working Group may wish to use the Beijing Draft as a basis for discussions at its thirty-fifth session.

II. About the Beijing Draft

6. The Beijing Draft was prepared by an international working group (IWG) established by the Executive Council of CMI, in consultation with the various national maritime law associations that are members of CMI.
7. The IWG was established following discussion of the topic of the judicial sale of ships at the CMI Athens Conference in October 2008.² On the basis of preliminary research, including a survey of law and practice in various jurisdictions on the basis of a questionnaire completed by national maritime law associations,³ the Executive Council mandated the IWG to prepare a draft instrument modelled on the “structure and logic” of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).⁴ The IWG prepared text for the draft

¹ For the convenience of the Working Group, the text of the CMI proposal is reproduced in [A/CN.9/WG.VI/WP.81](#).

² The discussion at the Athens Conference was based on a paper presented by Henry Hai Li entitled “A Brief Discussion on Judicial Sale of Ships”, *CMI Yearbook 2009* (Antwerp, 2009), p. 342.

³ For a synopsis of responses to the questionnaire, see Francesco Berlingieri, “Synopsis of the Replies from the Maritime Law Associations”, *CMI Yearbook 2010* (Antwerp, 2011), p. 247.

⁴ *Report of the International Working Group on the Preparation of the Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships*, p. 3, available on

instrument over two rounds of consultations with national maritime law associations.⁵ The text was presented to the CMI Beijing Conference in October 2012,⁶ where, after three days of discussion, a draft instrument was drawn up. This draft, together with commentary prepared by the IWG,⁷ was circulated to the national maritime law associations for further comment. A revised draft, together with revised commentary and a final report of the IWG, was then presented to the CMI Hamburg Conference in June 2014 for approval.⁸

8. In addition to the Beijing Draft and commentary, several papers have been produced in the context of the CMI project that discuss various legal aspects of the judicial sale of ships. These papers are available on the “Judicial Sale of Ships” page of the CMI website, <https://comitemaritime.org/work/judicial-sale-of-ships/>, as well as being published in the CMI Yearbook.

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⁵ For a synopsis of comments received from national maritime law associations during the second round of consultations, see Andrew Robinson, “Concise Summary of Various Commentaries Received relating to the 2nd Draft Instrument”, *CMI Yearbook 2013* (Antwerp, 2013), p. 132. Individual responses from some national maritime law associations are available on the “Judicial Sale of Ships” page of the CMI website, <https://comitemaritime.org/work/judicial-sale-of-ships/>.

⁶ “A Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships (known as the “Beijing Draft”), Done at Beijing on 19 October 2012”, *CMI Yearbook 2013*, p. 213.

⁷ “Commentary on the Beijing Draft a Proposed Draft International Convention on Recognition of Foreign Judicial Sales of Ships”, *CMI Yearbook 2013*, p. 220.

⁸ The revised draft, revised commentary and final report are available on the “Judicial Sale of Ships” page of the CMI website, <https://comitemaritime.org/work/judicial-sale-of-ships/>.

Annex

Draft International Convention on Foreign Judicial Sales of Ships and their Recognition

The States Parties to the present Convention,

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

CONCERNED that any uncertainty for the prospective Purchaser regarding the international Recognition of a Judicial Sale of a Ship and the deletion or transfer of registry may have an adverse effect upon the price realized by a Ship sold at a Judicial Sale to the detriment of interested parties;

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

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

CONSIDERING further that the objective of Recognition of the Judicial Sale of Ships requires that, to the extent possible, uniform rules are adopted with regard to the notice to be given of the Judicial Sale, the legal effects of that sale and the deregistration or registration of the Ship.

HAVE AGREED as follows:

Article 1. Definitions

For the purposes of this Convention:

(a) "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in article 5;

(b) "Charge" includes any charge, Maritime Lien, lien, encumbrance, claim, arrest, attachment, right of retention or any other rights whatsoever and howsoever arising which may be asserted against the Ship;

(c) "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser;

(d) "Competent Authority" means any Person, Court or authority empowered under the law of the State of Judicial Sale to sell or transfer or order to be sold or transferred, by a Judicial Sale, a Ship with Clean Title;

(e) "Court" means any judicial body established under the law of the State in which it is located and empowered to determine the matters covered by this Convention;

(f) "Day" means calendar day;

(g) "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a registered Mortgage/Hypothèque or Registered Charge attached to the Ship immediately prior to its Judicial Sale;

(h) "Judicial Sale" means any sale of a Ship by a Competent Authority by way of public auction or private treaty or any other appropriate ways provided for by the law of the State of Judicial Sale by which Clean Title to the Ship is acquired by the Purchaser and the proceeds of sale are made available to the creditors;

(i) “Maritime Lien” means any claim recognized as a maritime lien or *privilège maritime* on a Ship by the law applicable in accordance with the private international law rules of the State of Judicial Sale;

(j) “Mortgage/Hypothèque” means any mortgage or hypothèque effected on a Ship in the State of Registration and recognized as such by the law applicable in accordance with the private international law rules of the State of Judicial Sale;

(k) “Owner” means any Person registered in the register of ships of the State of Registration as the owner of the Ship;

(l) “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;

(m) “Purchaser” means any Person who acquires ownership in a Ship or who is intended to acquire ownership in a Ship pursuant to a Judicial Sale;

(n) “Recognition” means that the effect of the Judicial Sale of a Ship shall be accepted by a State party to be the same as it is in the State of Judicial Sale;

(o) “Registered Charge” means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale;

(p) “Registrar” means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires;

(q) “Ship” means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State of Judicial Sale;

(r) “State of Registration” means the State in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale;

(s) “State of Judicial Sale” means the state in which the Ship is sold by way of Judicial Sale;

(t) “State of Bareboat Charter Registration” means the State which granted registration and the right to fly temporarily its flag to a Ship bareboat chartered-in by a charterer in the said State for the period of the relevant charter;

(u) “Subsequent Purchaser” means any Person to whom ownership of a Ship has been transferred through a Purchaser;

(v) “Unsatisfied Personal Obligation” means the amount of a creditor’s claim against any Person personally liable on an obligation, which remains unpaid after application of such creditor’s share of proceeds actually received following and as a result of a Judicial Sale.

Article 2. Scope of application

This Convention shall apply to the conditions in which a Judicial Sale taking place in one State shall be sufficient for recognition in another State.

Article 3. Notice of Judicial Sale

1. Prior to a Judicial Sale, the following notices, where applicable, shall be given, in accordance with the law of the State of Judicial Sale, either by the Competent Authority in the State of Judicial Sale or by one or more parties to the proceedings resulting in such Judicial Sale, as the case may be, to:

(a) The Registrar of the Ship’s register in the State of Registration;

(b) All holders of any registered Mortgage/Hypothèque or Registered Charge provided that these are recorded in a ship registry in a State of Registration which is open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registrar;

(c) All holders of any Maritime Lien, provided that the Competent Authority conducting the Judicial Sale has received notice of their respective claims; and

(d) The Owner of the Ship.

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

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

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

(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 7 Days prior to the Judicial Sale; and

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

4. The notice specified in paragraph 3 of this article shall be in writing, and given in such a way not to frustrate or significantly delay the proceedings concerning the Judicial Sale:

(a) Either by sending it by registered mail or by courier or by any electronic or other appropriate means to the Persons as specified in paragraphs 1 and 2; and

(b) By press announcement published in the State of Judicial Sale and in other publications published or circulated elsewhere if required by the law of the State of Judicial Sale.

5. Nothing in this article shall prevent a State Party from complying with any other international convention or instrument to which it is a party and to which it consented to be bound before the date of entry into force of the present Convention.

6. In determining the identity or address of any Person to whom notice is required to be given other parties and the Competent Authority may rely exclusively on information set forth in the register in the State of Registration and if applicable in the State of Bareboat Registration or as may be available pursuant to article 3(1)(c).

7. Notice may be given under this article by any method agreed to by a Person to whom notice is required to be given.

Article 4. Effect of Judicial Sale

1. Subject to:

(a) The Ship being physically within the jurisdiction of the State of Judicial Sale, at the time of the Judicial Sale; and

(b) The Judicial Sale having been conducted in accordance with the law of the State of Judicial Sale and the provisions of this Convention,

any title to and all rights and interests in the Ship existing prior to its Judicial Sale shall be extinguished and any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship and Clean Title to the Ship shall be acquired by the Purchaser.

2. Notwithstanding the provisions of the preceding paragraph, no Judicial Sale or deletion pursuant to paragraph 1 of article 6 shall extinguish any rights including, without limitation, any claim for Unsatisfied Personal Obligation, except to the extent satisfied by the proceeds of the Judicial Sale.

Article 5. Issuance of a Certificate of Judicial Sale

1. When a Ship is sold by way of Judicial Sale and the conditions required by the law of the State of Judicial Sale and by this Convention have been met, the Competent Authority shall, at the request of the Purchaser, issue a Certificate to the Purchaser recording that:

(a) The Ship has been sold to the Purchaser in accordance with the law of the said State and the provisions of this Convention free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser; and

(b) Any title to and all rights and interests existing in the Ship prior to its Judicial Sale are extinguished.

2. The Certificate shall be issued substantially in the form of the annexed model and shall contain the following minimum particulars:

(a) The State of Judicial Sale;

(b) The name, address and, unless not available, the contact details of the Competent Authority issuing the Certificate;

(c) The place and date when Clean Title was acquired by the Purchaser;

(d) The name, IMO number, or distinctive number or letters, and port of registry of the Ship;

(e) The name, address or residence or principal place of business and contact details, if available, of the Owner(s);

(f) The name, address or residence or principal place of business and contact details of the Purchaser;

(g) Any Mortgage/Hypothèque or Charge assumed by the Purchaser;

(h) The place and date of issuance of the Certificate; and

(i) The signature, stamp or other confirmation of authenticity of the Certificate.

Article 6. Deregistration and registration of the Ship

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with article 5, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall delete any registered Mortgage/Hypothèque or Registered Charge, except as assumed by the Purchaser, and either register the Ship in the name of the Purchaser or Subsequent Purchaser, or delete the Ship from the register and issue a certificate of deregistration for the purpose of new registration, as the Purchaser may direct.

2. If the Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with article 5, the Registrar of the Ship's registry in such State shall delete the Ship from the register and issue a certificate to the effect that the permission for the Ship to register in and fly temporarily the flag of the State has been withdrawn.

3. If the Certificate referred to in article 5 is not issued in an official language of the State in which the above-mentioned register is located, the Registrar may request the Purchaser or Subsequent Purchaser to submit a duly certified translation of the Certificate into such language.

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

Article 7. Recognition of Judicial Sale

1. Subject to the provisions of article 8, the Court of a State Party shall, on the application of a Purchaser or Subsequent Purchaser, recognize a Judicial Sale conducted in any other State for which a Certificate has been issued in accordance with article 5, as having the effect:

(a) That Clean Title has been acquired by the Purchaser and any title to and all the rights and interests in the Ship existing prior to its Judicial Sale have been extinguished; and

(b) That the Ship has been sold free of any Mortgage/Hypothèque or Charge, except as assumed by the Purchaser.

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 that had arisen prior to the Judicial Sale, the Court shall dismiss, set aside or reject the application for arrest or release the Ship from arrest upon production by the Purchaser or Subsequent Purchaser of a Certificate issued in accordance with article 5, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in article 8.

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

4. No Person other than an Interested Person shall be entitled to take any action challenging a Judicial Sale before a competent Court of the State of Judicial Sale, and no such competent Court shall exercise its jurisdiction over any claim challenging a Judicial Sale unless it is made by an Interested Person. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser or Subsequent Purchaser of that Ship.

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

Article 8. Circumstances in which Recognition may be suspended or refused

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

(a) Recognition of a Judicial Sale may be refused by a Court of a State Party, at the request of an Interested Person if that Interested Person furnishes to the Court proof that at the time of the Judicial Sale, the Ship was not physically within the jurisdiction of the State of Judicial Sale.

(b) Recognition of a Judicial Sale may be:

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

(ii) Refused by a Court of a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the competent Court of the State of Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified the Judicial Sale and its effects,

either after suspension or without suspension of the legal effect of the Judicial Sale.

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

Article 9. Reservation

State parties may by reservation restrict application of this Convention to recognition of Judicial Sales conducted in State Parties.

Article 10. Relations with other International Instruments

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

ANNEX TO THE DRAFT INTERNATIONAL CONVENTION ON FOREIGN JUDICIAL SALES OF SHIPS AND THEIR RECOGNITION

Certificate

Issued in accordance with the provisions of article 5 of the International Convention on Foreign Judicial Sales of Ships and their Recognition

This is to certify that the Ship described below has been sold by way of Judicial Sale and all conditions required by the law of the State of Judicial Sale and by the International Convention on Foreign Judicial Sales of Ships and their Recognition (the “Convention”) have been met, and that Clean Title as defined by the Convention has been transferred to the named Purchaser and any title to and all rights and interests in the Ship existing prior to the Judicial Sale are extinguished and any Mortgage or Charge, except as assumed by the Purchaser, shall cease to attach to the Ship.

- 1. **State of Judicial Sale**
- 2. **Competent Authority issuing this Certificate**
 - 2.1 Name
 - 2.2 Address
 - 2.3 Telephone/fax/email, if available
 - 2.4 Place and date Clean Title acquired by Purchaser
- 3. **Ship**
 - 3.1 Name
 - 3.2 IMO number or Distinctive number or letters
 - 3.3 Place of issuance of the distinctive number or letters
 - 3.4 Port of registry
- 4. **Owner(s)**
 - 4.1 Name
 - 4.2 Address or residence or principal place of business
 - 4.3 Telephone/fax/email
- 5. **Purchaser**
 - 5.1 Name
 - 5.2 Address or residence or principal place of business

5.3 Telephone/fax/email

6. Holder of the Assumed Mortgage/Hypothèque or Charge

6.1 Name

6.2 Address or residence or principal place of business

6.3 Telephone/fax/email

6.4 Maximum amount of each Mortgage/Hypothèque or Charge assumed by the Purchaser (if available)

At.....
(place)

On
(date)

.....
Signature and/or stamp
