

Memorandum

To: Dr. & Prof. Henry Hai Li, Chair,
Subcommittee on International Recognition
of Judicial Sales of Ships

Date: August 31, 2012

cc: Andrew Robinson, Aurelio Fernandez-Concheso, Frank Smeele, Benoit Goemans, Louis N. Mbanefo, Klaus Ramming, Jonathan Lux, Karl-Johan Gombrii, Nigel H. Frawley

From: Francis X. Nolan, III

Re: Comments of the U.S. MLA on Second Working Draft Instrument on Recognition of Foreign Judicial Sales of Ships

Article 3, Notice of Judicial Sale

This Article provides that the Court in the State where a judicial sale takes place has the obligation to ensure that certain notices are given. This formulation is not acceptable under the U.S. constitutional system, which is structured as three separate but equal branches—executive, legislative and judicial. An international agreement entered into by the executive, and ratified by the legislative, cannot order the judiciary to do anything. Congress may only empower the judiciary to act. Whether this issue exists in other States considering this draft is not certain. However, we believe the problem can be avoided if the concern of Article 3 is approached from a different angle. We would suggest the following for consideration as a substitute for the first two lines of Article 3.1:

“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.”

In this connection, the proviso in Article 3.1(c) should also be deleted and reliance placed on either filed liens of record (where that is possible) or on appearances resulting from actual notice or notice in the media. U.S. Courts will not track actual notice of lien claims.

Since not all “Ships” have IMO numbers, Article 3.2(a) should be revised to read as follows:

“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.”

Article 3.3 should be clarified to better define what “press announcement” requires in the electronic age. As written, the words “press announcement” are ambiguous. They could be construed as an announcement (oral or written) to the media or, as probably intended, an announcement in a newspaper paid for by either the Court or an interested party. Moreover, in the United States, it is not uncommon that a Court, on application of a party, will approve advertising online on a ship broker’s website, which can more effectively reach a larger market of potential buyers.

Article 4, item (a), should be revised by deleting the words “being in the area of” and substituting the word “within” for the sake of precision. This same change should be made in Article 8.1(a).

Article 5 raises concerns of judicial power in the United States system, similar to the issues posed in Article 3. In ship sale practice, the buyer must present a bill of sale to evidence the change of ownership both to an existing flag administration and, if applicable, to a new flag administration where a registry change is contemplated. In the case of judicially ordered sales, this practice is no different. In the U.S., the moving party at judicial sale applies to the Court for an order confirming the sale and ordering the marshal to issue a bill of sale “free and clear.” The bill of sale itself contains all the information and carries all the weight of any certificate evidenced by the Draft’s language requiring a separate certificate. We should delete this requirement for a separate certificate and rely, as we all do now, on a bill of sale by the Court or at its order. This change would require modification in Article 7.2, Article 7.4 and Article 8 to add “Bill of Sale or” before “Certificate.”

Article 7.4 should be revised to avoid going beyond the Sub-Committee’s mandate. The goal is to draft a treaty which resolves both title and registry in order to avoid difficulties in reregistering vessels following judicial sale. The purpose is not to deprive claimants of rights to claim damages for wrongful arrest, fraud or other matters collateral to the judicial foreclosure. We suggest that Article 7.4 be restated as follows:

“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.

A further concern is raised in Article 6 by certain provisions of U.S. law which prohibit transfer, by sale or otherwise, of vessels currently or most recently documented under U.S. flag to non-citizens without the prior approval of the U.S. Maritime Administration. We need to seek clarity on whether this concern is accommodated by the language in Article 8.2 of the Draft allowing a State to refuse recognition of a Judicial Sale that “would be contrary to the public policy of that State Party.” In any event, U.S. Courts are not likely to recognize Judicial Sales conducted with a lack of integrity, regardless of whether or not they are conducted in a State

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party to this Convention. Arguably, this is also accommodated within the public policy exclusion.

MARKED
FOR COMMENTS per
NOLAN MEMO of
August 31, 2012

Instrument on Recognition of Foreign Judicial Sales of Ships

(Second Working Draft)

[Preamble: - - -]

Article 1 Definitions

For the purposes of this Instrument:

1. "Certificate" means the original duly authorized certificate, or a certified copy thereof, provided in terms of Article 5.
2. "Charge" means any registerable charge of the same nature as a mortgage or "hypothèque" effected on a ship and recognized as such by the law applicable in accordance with the private international law rules of the State in which the ship is sold by way of Judicial Sale.
3. "Court" means any competent judicial body defined as a court by the law of the State in which the Judicial Sale takes place which is empowered under the laws of the State to sell or order the sale of a ship free and clear of any and all mortgages, "hypothèques" or charges, and all maritime and other liens and other encumbrances of whatsoever nature, and to deal with all issues in relation to recognition of Judicial Sales of Ships accomplished in any other State.
4. "Day" means any calendar day.
5. "Deficiency Amount" means any amount of a creditor's claim against any person personally liable on an obligation which is secured by a mortgage, or "hypothèque" or charge, 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.~~ *REVISE*
 - (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~~ *REVISE*
 - (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,~~ *REVISE*
 - (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.

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AND
EXPAND*

4. Article 4 Effect of Judicial Sale

Subject to:

- within*
- (a) the ship being ~~in the area~~ ^{within} 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.

either a bill of sale or

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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

COMMENT

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.

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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.

*Bill of Sale
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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

BILL of SALE OR

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

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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.

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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.

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