

ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO

10 VIA ROMA - 16121 GENOVA

Tel. 010-586.441
Fax 010-594.805
E-mail presidenza@aidim.org
Website www.aidim.org

Genoa, 8 August 2013

COMMENTS TO
**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)

The Italian MLA submits the following comments and suggestions in respect of the Beijing Draft:

Art. 1

- There is a definition (no. 4) of "Competent Authority" but not of "Competent Court". In all likelihood there would be an overlapping of such Authority and of such Court but since they may in some jurisdictions differ, it would be preferable to add also such definition.
- There is a definition (n. 11) of "Mortgage": "means any mortgage or *hypothèques* effected on a Ship....". Reference is also made, a few times (nos. 3, 4, 7, 8) to "Mortgages or Charges" (3, 4, 7) or to "Mortgage or registered Charge" (8).
- Reference to "Mortgages or Registered Charges" is then made in:
 - art. 3,1(b): "registered Mortgages or Registered Charges";
 - art. 4(b): "Mortgages or Registered Charges";
 - art. 5: "Mortgages or Registered Charges";
 - art. 6,1: "registered Mortgages or Registered Charges";
 - art. 7,1(ii): "registered Mortgages and Registered Charges"
- It is felt that reference should be made either to the mortgage and to the hypothec in acknowledgment of the existence of such similar, although different, registerable charges in common law and in civil law.
- Still on the definition (no. 11) of "Mortgage", it is felt that, as to the law recognizing mortgages and hypothecs, reference should be made to the law of the State where the ships is registered rather than to the law of the State in which the ship is sold.
- It is felt that also the definition of "Charge" in art. 1,2 should be amended accordingly and as a consequence also the definition of "Clean Title" in art. 1,3 and of "Competent Authority" in art. 1,4 and of "Interested Person" in art. 1.8 should be similarly amended.

Article 7(1)

The sentence reading: "shall recognize a Judicial Sale conducted in any other State Party with a certificate issued..." is not clear. It is suggested to replace the words "with a certificate" by "on the basis of a certificate".

Article 8

- *Paragraph 1*

In the first line it is suggested to replace “Court of the State Party” by “Court of a State Party”.

- *Paragraph 2(a)*

Same comment on the reference to the words “Court of the State Party” in the first line.

The words in the third line “has been commenced on notice to the Purchaser” are not clear. It is suggested to replace them with “and notice thereof has been given to the Purchaser”

- *Paragraph 2)(b)*

Same comment on the reference to the words “Court of the State Party” in the first line.

The rest of the provision is unclear. If the refusal of recognition requires the declaration of the nullity of the Judicial Sale, there does not seem to be any need that such refusal be preceded by a suspension of the legal effect of the judicial sale. In any event such suspension would not necessarily be subject to appeal and very likely would not be ordered with a judgment “or similar document”(besides the difficulties of establishing what “similar document” means). It is suggested therefore to delete the words “after suspension of the legal effect of the Judicial Sale in a judgment or similar document no longer subject to appeal”.

* * *

A draft with the suggested amendments is enclosed.

Genoa, 8th August 2013

"MARKED-UP" AMENDMENTS TO
**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)

CONSIDERING 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 of maritime claims and enforcement of judgments or arbitral awards or other enforceable documents against the Owners of Ships;

CONCERNED that uncertainty for the prospective Purchaser about the international Recognition of foreign Judicial Sales of Ships and transfer of registry may have an adverse effect upon the level of proceeds generated by a Ship sold at a Judicial Sale to the detriment of interested parties;

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

CONSIDERING that in principle once a Ship is sold by way of a Judicial Sale, the Ship should no longer be subject to arrest for any claim arising prior to its Judicial Sale; and CONSIDERING that the most convenient forum for assessing whether or not a Judicial Sale is regular or effective is the Court of the State in which the Judicial Sale took place, therefore only the competent Court in that State should have jurisdiction over actions challenging the Judicial Sale.

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly authorized document, or a certified copy thereof, as provided for in Article 5.
 2. "Charge" includes any ~~charge~~ **mortgage, hypothec, other registered charge**, lien, *privilege*, encumbrance, claim, arrest, attachment, right of retention or notice of interest whatsoever and howsoever arising in relation to the Ship.
 3. "Clean Title" means free and clear of all ~~Mortgages or Charges~~.
 4. "Competent Authority" means any Person, Court or authority which is empowered under the laws of the State in which the Judicial Sale takes place to sell or transfer or order to be sold or transferred a Ship free and clear of any and all ~~Mortgages or Charges, all Maritime Liens and other liens, and other encumbrances of whatsoever nature and howsoever arising Charges~~.
- 4bis **"Competent Court"** means the Court of the State in which the Judicial Sale has taken place or in which legal proceedings challenging the Judicial Sale have been brought

5. "Court" means any judicial body established under the law of the State in which it is located and empowered to determine the matters covered under this Convention.
6. "Day" means any calendar day.
7. "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 Charge~~, which remains unpaid after application of such creditor's share of proceeds actually received following and as a result of a Judicial Sale.
8. "Interested Person" means the Owner of a Ship immediately prior to its Judicial Sale or the holder of a ~~Mortgage or Registered~~ **any Charges** attached to the Ship immediately prior to its Judicial Sale.
9. "Judicial Sale" means any sale of a Ship accomplished by a Competent Authority 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 Judicial Sale takes place by which Clean Title to the Ship is given to the Purchaser and the proceeds of sale are made available to the creditors.
10. "Maritime Lien" means any claim recognized as a maritime lien or *privilege maritime* 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.
11. "Mortgage" or "**Hypothec**" means any mortgage or "~~hypothèque~~**hypothec**" ~~effected registered~~ 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~~ **of Registration of the Ship**.
12. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
13. "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.
14. "Purchaser" means any Person to whom the property in a Ship is transferred or is intended to be transferred pursuant to a Judicial Sale.
15. "Recognition" means that a Judicial Sale of a Ship has the same effect in the State in which Recognition is sought as it does in the State in which that Judicial Sale was accomplished.
16. "Registered Charge" means any Charge entered in the register of the Ship the subject of the Judicial Sale.
17. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
18. "Ship" means any ship or other vessel capable of being an object of a Judicial Sale under the law of the State in which the Judicial Sale takes place.
19. "State" means any member State of the United Nations.
20. "State of Registration" means the State in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.

21. "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 that charter.
22. "Subsequent Purchaser" means any Person to whom property in a Ship has been transferred through a Purchaser.

Article 2 Scope of Application

This Convention shall apply to the Recognition in a State Party of a Judicial Sale taking place in the territory of another State Party.

Article 3 Notice of Judicial Sale

1. No State is required by this Convention to recognize a Judicial Sale accomplished in another State unless the party seeking Recognition establishes that the following notices, where applicable, have been provided prior to such Judicial Sale either by the Competent Authority in such State or by one or more parties to the proceedings resulting in such Judicial Sale, in accordance with the laws of such State, to:

- (a) The authority in charge of the Ship's register in the State of Registration;
- (b) All holders of registered Mortgages, **Hypothees** or **other** Registered Charges;
- (c) All holders of Maritime Liens, 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 provided to the authority in charge of the Ship's register in such State.

3. The notice required by paragraphs 1 and 2 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 of the Ship, the IMO number (if assigned) and the name of the Owner or the bareboat charterer, as appearing in the registry records (if any) in the State of Registration (if any) or the State of Bareboat Charter Registration (if any), **as the case may be.**
- (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 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 either given by registered mail, or given by any electronic or other appropriate means [which

provide confirmation of receipt]¹, to the Persons as specified in paragraphs 1 and 2, if known. In addition, the notice shall be given by press announcement in the State in which the Judicial Sale is conducted, **the State of Registration of the Ship and the State of Bareboat Charter Registration (if any)** and if deemed appropriate by the Competent Authority conducting the Judicial Sale, in other publications.

Article 4 Effect of Judicial Sale

Subject to:

- (a) the Ship being physically within the jurisdiction of the State in which the Judicial Sale is accomplished, at the time of the Judicial Sale and
- (b) the Judicial Sale having been conducted in accordance with the law of the State in which the Judicial Sale is accomplished and the provisions of this Convention all rights, title and interests in the Ship existing prior to its Judicial Sale shall be extinguished and all Mortgages, **Hypothecs** or **other** Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, 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 or deletion pursuant to paragraph 1 of Article 6 of this Convention shall extinguish any remedies including, without limitation, any claims for Deficiency Amounts, other than those enforceable against the Ship the subject of the Judicial Sale.

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 Judicial Sale is made and by this Convention have been met, the Competent Authority 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 Convention free of all Mortgages or Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances of whatsoever nature and howsoever arising, and (2) all rights, title and interests existing in the Ship prior to its Judicial Sale are extinguished.

Article 6 Deregistration and Registration of the Ship

1. Upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry where the Ship was registered prior to its Judicial Sale shall be bound to delete all registered Mortgages, **Hypothecs** or **other** Registered 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 Ship was flying the flag of a State of Bareboat Charter Registration at the time of the Judicial Sale, upon production by a Purchaser of a Certificate provided for in Article 5 of this Convention, the Registrar of the Ship's registry in such State shall be

¹ Notes: Unresolved issue, 1. Concern that any deviation of MLM could immediately put MLM countries in breach / a point to be checked. 2. If lack of receipt invalidates the Judicial Sale, the purpose of this Convention is defeated.

bound to delete the Ship from the register and to issue a certificate to the effect that the permission for the ship to register in and fly temporarily the flag of the State is withdrawn.

3. If the Certificate as provided for in Article 5 of this Convention 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.

Article 7 Recognition of Judicial Sale

1. Subject to the provisions of Article 8 of this Convention, the Court of each State Party on the application of a Purchaser or Subsequent Purchaser shall recognize a Judicial Sale conducted in any other State Party with **on the basis of** a Certificate issued as provided for by Article 5 of this Convention, as having the effect:

- (i) that the ownership of the Ship has been transferred to the Purchaser and all rights, title and interests in the Ship existing prior to its Judicial Sale have been extinguished; and
- (ii) that the Ship has been sold free of all ~~registered~~ Mortgages, **Hypothecs and other** Registered Charges, except those assumed by the Purchaser, all other Charges, all Maritime Liens and other liens, and all encumbrances and claims of whatsoever nature and howsoever arising.

2. Where a Ship which was sold by way of 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 Convention, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 8 of this Convention.

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

4. No Person other than an Interested Person as defined by this Convention 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 Convention. No remedies shall be exercised either against the Ship the subject of the Judicial Sale or against any *bona fide* Purchaser of that Ship.

5. No claim challenging a Judicial Sale shall be admitted unless it is presented within three months of the date of the Judicial Sale as recorded in the Certificate. This three-month period shall not be subject to any suspension, interruption or extension whatsoever.

6. In the absence of proof that a circumstance exists under Article 8 of this Convention, a Certificate issued as provided for in Article 5 of this Convention shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 4 of this Convention, 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 the 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 in which the Competent Authority issuing the Certificate provided for in Article 5 is located.

2. Recognition of a Judicial Sale may be

a) 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~~ **and** notice **thereof has been given** to the Purchaser and the Competent Court has suspended the legal effect of the Judicial Sale; and

b) refused by a Court of the a State Party, at the request of an Interested Person, if that Interested Person furnishes to the Court proof that the Competent Court ~~after suspension of the legal effect of the Judicial Sale in a judgment or similar judicial document no longer subject to appeal has subsequently nullified~~ the Judicial Sale and its effects.

3. 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 contrary to the public policy of that State Party.

Article 9 Relation 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.

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