

JUDGMENTS
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**LETTER FROM THE PRESIDENT OF THE COMITÉ MARITIME INTERNATIONAL (CMI)
ON THE RECOGNITION OF JUDICIAL SALES OF SHIPS**

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**LETTRE DU PRÉSIDENT DU COMITÉ MARITIME INTERNATIONAL (CMI)
PORTANT SUR LA RECONNAISSANCE DES VENTES FORCÉES DE NAVIRES**

*Information Document No 7 of February 2017 for the attention of the Special Commission
of February 2017 on the Recognition and Enforcement of Foreign Judgments*

*Document d'information No 7 de février 2017 à l'attention de la Commission spéciale
de février 2017 sur la reconnaissance et l'exécution des jugements étrangers*

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COMITÉ MARITIME INTERNATIONAL

PRESIDENT

16 December 2016

Marta Pertegas
Permanent Bureau
Hague Conference on Private International Law
Churchillplein 6b
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The Netherlands

By email mp@hcch.nl

Recognition of Judicial Sales of Ships

Dear Marta

I refer to your meeting with Taco van der Valk, the President of the Netherlands Maritime Law Association and a member of the Executive Council of CMI in late September.

As he explained to you the CMI concluded work a couple of years ago on a draft Instrument dealing with the topic of Recognition of Judicial Sales of Ships which has been problematic in a number of jurisdictions over a number of years.

It had been hoped that the IMO Legal Committee would take up this work and bring it to fruition at a diplomatic conference. Unfortunately the IMO Legal Committee does not seem to have any appetite to take on new work. At its meeting in June we were unable to persuade the IMO Legal Committee that this topic should be added to its agenda.

As a result of Taco's meeting with you at the end of September, we have studied the 2016 Preliminary Draft Convention which has been prepared by the Hague Conference and believe that the topic of Judicial Sales could be dealt with in the context of that work.

As you may know the work of the CMI is done through meetings of a designated International Working Group and International Sub-Committee meetings (the latter being open to all interested CMI member Maritime Law Associations and Consultative members as well as invitees who have a particular interest in the topic).

The International Working Group on Recognition of Judicial Sales of Ships has been chaired since its inception by Henry Hai Li (China), and his Rapporteurs are Jonathan Lux (UK) and Andrew Robinson (South Africa). (Their full contact details can be found on the CMI website at

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www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships together with all the members of the International Working Group as well as many of the papers that have been produced on this topic. I am **attaching** a hard copy of the contact details.

After your meeting with Taco at the end of September I asked the International Working Group to consider how best the CMI draft Instrument might be brought within the 2016 Preliminary Draft Convention of the Hague Conference. I am informed by Andrew Robinson, the principal draftsman, that he was unable to merge the two texts into an integral document, principally because the styles adopted for the two texts are very different and the Judicial Sales wording is perhaps more technically driven than the Hague Conference's.

I am **attaching** the wording that the International Working Group came up with. As you will see it incorporates a new Chapter III - Recognition of Judicial Sale of Ships and references to that topic and other relevant amendments have been inserted into the Hague Conference's draft at various places, such as: the Title; Article 1 paragraphs 1 and 2; Article 2 paragraphs 1(j), 2 and 4; Article 3 has been amended in the opening line and at paragraph 2 and the title of Chapter 11 has been amended.

I also take this opportunity of **attaching** the material that was prepared and put before the IMO Legal Committee meeting in June this year, as it gives a comprehensive background to why the CMI considered it was necessary to embark on this work and identified many of the cases which have occurred around the world as a result of the failure of the present system, reliant as it is upon comity and mutual recognition under customary international law.

I am mindful that I believe that there is due to be a meeting at the Hague Conference in relation to this topic in February next year and therefore wanted to forward this material to you at the earliest opportunity. If any further information is required before any such meeting, I, and the International Working Group, will do our best to deal with any enquiries which you have arising from this material. As I am based in Sydney, and Andrew Robinson is in South Africa, I suspect we will both be on leave for some part of the next few weeks but are both available to respond to emails. I am copying this letter to Taco van der Valk in case a face to face meeting with someone from the CMI would, in your view, speed up the process, and confirm he is readily available should you think that would be useful. Equally, if necessary we could arrange for Jonathan Lux to travel from London to the Hague provided his other commitments allow.

I look forward to hearing from you and take this opportunity of wishing you a Happy Christmas and New Year.

Yours faithfully



Stuart Hetherington

2016 PRELIMINARY DRAFT HAGUE CONVENTION

**Recognition and enforcement of civil and commercial judgements and the
Judicial sale of ships**

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters and to the recognition of the judicial sales of ships. It shall not extend in particular to revenue, customs or administrative matters.

2. This Convention shall apply to the recognition and enforcement in one Contracting State of a judgment given in another Contracting State and to the recognition of the judicial sale of a ship in one Contracting State by another Contracting State.

Article 2

Exclusions from scope

1. This Convention shall not apply to the following matters –
 - a) the status and legal capacity of natural persons;

 - b) maintenance obligations;

- c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;
- d) wills and succession;
- e) insolvency, composition and analogous matters;
- f) the carriage of passengers and goods;
- g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage;
- h) liability for nuclear damage;
- i) the validity, nullity, or dissolution of legal persons or associations of natural or legal persons, and the validity of decisions of their organs;
- j) the validity of entries in public registers, save for ship's registers;
- k) defamation.

2. Notwithstanding paragraph 1, a judgment and/or a judicial sale is not excluded from the scope of this Convention where a matter excluded under that paragraph arose merely as a preliminary question in the proceedings in which it was given, and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 1 arose by way of defence does not exclude a judgment from the Convention, if that matter was not an object of the proceedings.

3. This Convention shall not apply to arbitration and related proceedings.

4. A judgment and/or a judicial sale is not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, was a party to the proceedings.

5. Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.

Article 3

Definitions

1. In respect of Chapter I and Chapter II of this Convention –

a) "defendant" means a person against whom the claim or counterclaim was brought in the State of origin;

b) "judgment" means any decision on the merits given by a court, whatever it may be called, including a decree or order, and a determination of costs or expenses by the court (including an officer of the court), provided that the determination relates to a decision on the merits which may be recognised or enforced under this Convention. An interim measure of protection is not a judgment.

2. In respect of Chapter III of this Convention –

"judicial sale" has the meaning set out in Article 17 (8) below.

3. An entity or person other than a natural person shall be considered to be habitually resident in the State –

a) where it has its statutory seat;

- b) under whose law it was incorporated or formed;
- c) where it has its central administration; or
- d) where it has its principal place of business.

CHAPTER II – RECOGNITION AND ENFORCEMENT OF A JUDGMENT

Article 4

General provisions

1. A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.
2. Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin.
3. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.
4. If a judgment referred to in paragraph 3 is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired, the court addressed may –
 - a) grant recognition or enforcement, which enforcement may be conditional on the provision of such security as it shall determine;

- b) postpone the recognition or enforcement; or
- c) refuse the recognition or enforcement.

A refusal under sub-paragraph c) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 5

Bases for recognition and enforcement

1. A judgment is eligible for recognition and enforcement if one of the following requirements is met –

- a) the person against whom recognition or enforcement is sought was habitually resident in the State of origin at the time that person became a party to the proceedings in the court of origin;
- [b) the natural person against whom recognition or enforcement is sought had his or her principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;]
- c) the person against whom recognition or enforcement is sought is the person that brought the claim on which the judgment is based;
- d) the defendant maintained a branch, agency, or other establishment without separate legal personality in the State of origin at the time that person became a party to the proceedings in the court of origin, and the

claim on which the judgment is based arose out of the activities of that branch, agency, or establishment;

- e) the defendant expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given;
- [f) the defendant entered an appearance before the court of origin without contesting jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin;]
- g) the judgment ruled on a contractual obligation and it was given in the State in which performance of that obligation took place or should have taken place under the parties' agreement, or, in the absence of an agreed place of performance, under the law applicable to the contract, unless the defendant's activities in relation to the transaction clearly did not constitute a purposeful and substantial connection to that State;
- h) the judgment ruled on a tenancy of immovable property and it was given in the State in which the property is situated;
- [i) the judgment ruled on a contractual obligation secured by a right in rem in immovable property, if the claim was brought together with a claim relating to that right and the immovable property was located in the State of origin;]
- j) the judgment ruled on a non-contractual obligation arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred;

- k) the judgment ruled on an infringement of a patent, trademark, design, [plant breeders' right,] or other similar right required to be [deposited or] registered and it was given by a court in the State in which the [deposit or] registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument;
- l) the judgment ruled on the validity, [ownership, subsistence] or infringement of copyright or related rights [or other intellectual property rights not required to be [deposited or] registered] and the right arose under the law of the State of origin;
- m) the judgment concerns the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, and the State of origin is –
- (i) designated in the trust instrument as a State in which disputes about such matters are to be determined;
- (ii) the State whose law is expressly or impliedly designated in the trust instrument as the law governing the aspect of the trust that is the subject of the litigation that gave rise to the judgment; or
- (iii) the State expressly or impliedly designated in the trust instrument as the State in which the principal place of administration of the trust is situated.

This sub-paragraph only applies to judgments between persons bound by the terms of a trust regarding internal aspects of that trust.

[n) the judgment ruled on a counterclaim –

(i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim;

(ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.]

[o) the judgment revised or overturned a previous judgment that was eligible for recognition and enforcement in accordance with this Convention and was given by a court of the State that gave such previous judgment.]

2. If recognition or enforcement is sought against a natural person acting primarily for personal, family or household purposes (a consumer) in matters relating to a consumer contract, or against an employee in matters relating to the employee's contract of employment –

a) sub-paragraph 1 e) applies only if the consent was given before the court;

b) sub-paragraph 1 g) does not apply.

Article 6

Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

- a) a judgment that ruled on the registration or validity of patents, trademarks, designs[, plant breeders' rights,] or other similar rights required to be [deposited or] registered shall be recognised and enforced if and only if the State of origin is the State in which [deposit or] registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;
- b) a judgment that ruled on rights *in rem* in immovable property shall be recognised and enforced if and only if the property is situated in the State of origin;
- c) a judgment that ruled on a tenancy of immovable property for a period of more than six months shall not be recognised and enforced if the property is not situated in the State of origin and the courts of the Contracting State in which it is situated have exclusive jurisdiction under the law of that State.

Article 7

Refusal of recognition or enforcement

1. Recognition or enforcement may be refused if –
 - a) the document which instituted the proceedings or an equivalent document, including a statement of the essential elements of the claim –
 - (i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting

notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

(ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

- b)* the judgment was obtained by fraud;
- c)* recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State [and situations involving infringements of security or sovereignty of that State];
- d)* the proceedings in the court of origin were contrary to an agreement or a designation in a trust instrument under which the dispute in question was to be determined in a court other than the court of origin;
- e)* the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- f)* the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same subject matter, provided that the earlier judgment fulfills the conditions necessary for its recognition in the requested State.

2. Recognition or enforcement may be refused or postponed if proceedings between the same parties on the same subject matter are pending before a court of the requested State, where –

a) the court of the requested State was seised before the court of origin;
and

b) there is a close connection between the dispute and the requested State.

A refusal under this paragraph does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 8

Preliminary questions

1. Where a matter excluded under Article 2, paragraph 1, or a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled arose as a preliminary question, the ruling on that question shall not be recognised or enforced under this Convention.

2. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 1 or 3, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.

3. However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph a), recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –

- a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph *a*); or
- b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph *b*) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 9

Damages

1. Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered.
2. The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 10

Judicial settlements (transactions judiciaires)

Judicial settlements (*transactions judiciaires*) which a court of a Contracting State has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment[, provided that such settlement is permissible under the law of the requested State].

Article 11

Documents to be produced

1. The party seeking recognition or applying for enforcement shall produce –
 - a) a complete and certified copy of the judgment;
 - b) if the judgment was given by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;
 - c) any documents necessary to establish that the judgment has effect or, where applicable, is enforceable in the State of origin;
 - d) in the case referred to in Article 10, a certificate of a court of the State of origin that the judicial settlement or a part of it is enforceable in the same manner as a judgment in the State of origin.

2. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require any necessary documents.

3. An application for recognition or enforcement may be accompanied by a document relating to the judgment, issued by a court (including an officer of the court) of the State of origin, in the form recommended and published by the Hague Conference on Private International Law.

4. If the documents referred to in this Article are not in an official language of the requested State, they shall be accompanied by a certified translation into an official language, unless the law of the requested State provides otherwise.

Article 12

Procedure

1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

Article 13

Costs of proceedings

No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.]

Article 14

Equivalent effects

A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible,

be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.

Article 15

Severability

Recognition or enforcement of a severable part of a judgment shall be granted where recognition or enforcement of that part is applied for, or only part of the judgment is capable of being recognised or enforced under this Convention.

Article 16

Recognition or enforcement under national law

Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

CHAPTER III – RECOGNITION of JUDICIAL SALE of SHIPS

Article 17

Definitions

For the purposes of this Chapter:

1. "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in Article 5.
2. "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.

3. "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser.

4. "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.

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 by this Convention.

6. "Day" means calendar day.

7. "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.

8. "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.

9. "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.

10. "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.

11. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.

12. "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.

13. "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.
14. "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.
15. "Registered Charge" means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale.
16. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
17. "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.
18. "State of Registration" means the state in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.
19. "State of Judicial Sale" means the state in which the Ship is sold by way of Judicial Sale.
20. "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.
21. "Subsequent Purchaser" means any Person to whom ownership of a Ship has been transferred through a Purchaser.
22. "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 18

Scope of Application of Chapter III

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 19

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 of this Article; 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 19(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 20

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 22 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 21

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 22

Deregistration and Registration of the Ship

1. Upon production by a Purchaser or Subsequent Purchaser of a Certificate issued in accordance with Article 21, 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 21, 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 21 is not issued in an official language of the State in which the abovementioned 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 23

Recognition of Judicial Sale

1. Subject to the provisions of Article 24, 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 21, 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 21, unless the arresting party is an Interested Person and furnishes proof evidencing existence of any of the circumstances provided for in Article 24.

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 24 exists, a Certificate issued in accordance with Article 21 shall constitute conclusive evidence that the Judicial Sale has taken place and has the effect provided for in Article 20, but shall not be conclusive evidence in any proceeding to establish the rights of any Person in any other respect.

Article 24

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:

1. 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.

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 23 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
 - b) 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.
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 manifestly contrary to the public policy of that State Party.

Article 25

Reservation

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

Article 26

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.

[Final clauses in respect of signature, ratification, acceptance, approval, accession,

denunciation, coming into force, language, amendment etc. shall be drafted later and separately]

LEGAL COMMITTEE
103rd session
Agenda item 13

LEG 103/13
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ANY OTHER BUSINESS

Proposal to add a new output to develop a new instrument on Foreign Judicial Sales of Ships and their Recognition

Submitted by China, the Republic of Korea and the Comité Maritime International (CMI)

SUMMARY

Executive summary: This document proposes a new output for the Legal Committee to develop an international convention on the foreign judicial sale of ships and their recognition based on the draft convention prepared by CMI to ensure that the purchaser of a ship in a judicial sale can be confident of obtaining clean title to the ship

Strategic direction: 1 and 12.2

High-level action: 1.3.3

Planned output: No related provision

Action to be taken: Paragraph 10

Related documents: LEG 102/11/2

1 Introduction

1.1 This document is submitted in accordance with paragraph 4.7 of the *Guidelines on the Organization and Method of Work of the Legal Committee* (LEG.1/Circ.7) regarding the submission of proposals for new unplanned outputs.

1.2 This document provides the rationale for, and an outline of, a draft international convention on the foreign judicial sales of ships and their recognition (the draft convention) which was approved by the Assembly of the 41st International Conference of the Comité Maritime International (CMI), held in Hamburg on 17 June 2014.

1.3 Many hundreds of ships are sold each year through some competent form of judicial sale. The underlying cause or causes of a judicial sale may be numerous, but usually relate to

the non-payment of debts due and owing, and, on occasion, following forfeiture by the State. Purchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation.

1.4 There is currently no international instrument that addresses the recognition of judicial sales. Nor is there any instrument that adequately protects purchasers from prior claims and which addresses the de-registration on re-flagging and re-registration of ships from and to national registries. Proper registration of ships is key to the sound governance of maritime safety, marine environment protection and marine technical issues.

1.5 The purpose of the draft convention is to ensure that the purchaser of a ship in a judicial sale can be confident of obtaining clean title to the ship, free of and unencumbered by any mortgages or similar liens or charges placed on the ship prior to the judicial sale and is able, against presentation of a suitable certificate issued by the court which conducted the judicial sale, to delete and re-register the ship in the purchaser's selected registry.

1.6 This, in turn, will enable the purchased ship to trade freely; and to ensure that the ship will realize a greater sale price which will benefit all the related parties, including creditors and the shipowners - and by so doing, the draft convention will promote the smooth and efficient flow of seaborne trade and a reduction in the risks associated with such trade through the cooperation of States who become parties to the convention (State parties).

1.7 The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The draft convention will permit banks to provide ship finance confident in the knowledge that the ship will realize its full market value at a judicial sale and not the reduced value realisable where there is the risk, as at present, that the ship may be arrested for claims predating the judicial sale.

1.8 Most importantly, the judiciaries of many countries have observed that the need to recognize judicial sales by foreign, competent courts forms part of the comity of nations and contributes to the general well-being of international trade.

1.9 IMO, as the sole United Nations specialized agency with responsibility for the promotion of safe and efficient international shipping practices should, it is submitted, be part of the process in developing this much needed international framework for the judicial sale of ships.

2 IMO's objectives

2.1 It is submitted that the proposal is within the scope of IMO's objectives to ensure and strengthen the linkage between safe, secure, efficient and environmentally friendly maritime transportation, and the development of global trade and the world economy. It is indisputable that the carriage of goods in ships is the cornerstone of global trade and a major driver of world economies – over 90% of world trade moves by sea.

2.2 It is further submitted that the IMO's involvement in issues of this kind has precedent as evidenced by:

- (1) the *International Convention on Maritime Liens and Mortgages, 1993* which was adopted by the United Nations/International Maritime Organization Conference of Plenipotentiaries on a Convention on Maritime Liens and Mortgages held in Geneva from 19 April to 7 May 1993; and

- (2) the *International Convention on Arrest of Ships, 1999* which was adopted at the United Nations/International Maritime Organization Diplomatic Conference on Arrest of Ships held in Geneva from 1 to 12 March 1999.

2.3 Both of these conventions were convened by the Secretary-General of UNCTAD and the Secretary-General of IMO.

2.4 It is also submitted that the development of the convention could also be linked to the effective implementation of the SOLAS requirement for a Continuous Synopsis Record (chapter XI-1, regulation 5 of SOLAS), as the convention would avoid problems with registration so that the issuance of the CSR would be facilitated.

2.5 Issues relevant to the ownership and registration of ships are pivotal to the sound administration and safety of maritime transportation. The judicial sale of ships is a regular and inevitable consequence of doing maritime business. Competently conducted judicial sales should, generally:

- (1) allow claimants to satisfy debts;
- (2) provide purchasers, and subsequent purchasers, with the security that they can trade their vessel on a global basis with the knowledge that the ship can be permanently registered in a registry of their choice;
- (3) allow purchasers to trade with the vessel and ensure that trade will not be hindered by the arrest, attachment or detention of the vessel for debts that arose prior to the judicial sale;
- (4) enhance the quality of shipping through encouraging the proper management of ships by facilitating their appropriate registration.

3 Compelling need

3.1 As there is currently no international instrument dealing with the recognition of foreign judicial sales of ships it can be said, with some confidence, that in this regard maritime transportation is neither secure nor efficient and hinders rather than promotes global trade and the world economy. The need for intervention by inter-governmental and international organisations has been clearly recognised both judicially and by national and international maritime bodies. The recognition of foreign judicial ship sales is fundamental to international maritime law.

3.2 The difficulties that arise when one country will not recognise an order for the judicial sale of a ship in another country has been succinctly summarised as follows:

- (1) It is an affront to the Court and the State ordering the sale;
- (2) It represents a refusal by that country to abide by the decisions of a Court in another country, and an exception to a rule honoured by every nation in the world.

- (3) If other countries, or other debtors, decided to follow this bad example, it could create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations¹.

3.3 The difficulty of dealing with the recognition of judicial sales at an international level has also been highlighted. In the Canadian case of the ship "*Galaxias*"² (which is summarised in annex 2) the Court noted that:

- (1) whilst a purchaser on a judicial sale will take a clean title free and clear of all encumbrances according to the laws of Canada and notwithstanding that it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, however this was not an area over which a national jurisdiction exercises control, nor is it appropriate that it attempt to do so;
- (2) international regulation of the judicial sales was necessary; and
- (3) in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This would not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with.³

3.4 In commenting on judicial orders for the sales of ships that did not ensure the passing of clean title, the same Court noted that admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales of vessels and render some ships completely unsaleable. The legitimate claims of many local and foreign creditors would thus be defeated by the resulting ridiculously low payments into Court of purchase prices⁴.

3.5 These views have been echoed in other judgments of courts in many jurisdictions but it is submitted that the above extracts are sufficient evidence of the effect of the non-recognition of judicial sales on efficient maritime transportation, the development of global trade and the world economy.

3.6 In order for the recognition of foreign judicial ship sales to be uniformly accepted by way of an international instrument, the intervention of the IMO in co-ordinating with other international bodies who have a mutual interest in such an instrument will be of considerable benefit to the international maritime community.

3.7 The IMO has stated that its highest priority is the safety of human life at sea with a particular focus on eliminating shipping that fails to meet and maintain technical, operational and safety management standards. As a high level action in this regard, the IMO intends

¹ The Associate Chief Justice Noel in *Vrac Mar Inc. v. Demetrios Karamanlis et al* [1972] FC 430 at p434 (Canada)

² (1988) LMLN 240, being a judgment of the Federal Court of Canada

³ At page 11 of the judgment

⁴ At page 12 of the judgment

keeping under review and supporting flag, and Port State implementation for enhancing and monitoring compliance.

3.8 Whilst national vessel registries may reflect the registered ownership of vessels, many registries may not, for various policy reasons, follow changes in the ownership of ships. Whilst ownership identity is nonetheless an important function of a ships' registry, the primary function of a register is to give a vessel "nationality". A vessel acquires thereby the privileges, protections and the burdens of vessels operating under allegiance to the sovereign.

3.9 It is submitted that the IMO has an interest in the efficient administration of ships' registries. The de-registration and re-registration from and into ships' registries of ships sold by judicial sale would add support both to the IMO strategic direction and to the proposed high level action.

3.10 While there has been no exhaustive compilation of data on the number of ships sold by way of judicial sale, the data from four significant maritime jurisdictions in Asia (Republic of Korea, China, Singapore and Japan) shows that, during the period 2010–2014, more than 480 ships were sold by way of judicial sale per year in these countries.

3.11 It follows that the number of ship sales that would benefit from the certainty provided by the draft convention would run to thousands of ships a year. It is submitted that this information, alone, establishes a compelling need for such an international instrument.

3.12 The courts have also noted a compelling need for an international regime dealing with the recognition of judicial sales of ships as set out in the aforementioned extracts from the judgment in the "*Galaxias*".

3.13 In addition, in the English case "*Acrux*"⁵ (a summary of which is set out in annex 2) Mr Justice Hewson confirmed that Courts must recognise:

"proper sales by competent Courts of Admiralty, or prize, abroad – it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"⁶.

3.14 Whilst many judicial sales proceed as intended, problems still arise, some of which become the subject matter of further lengthy and costly judicial intervention.

3.15 There are a number of reported decisions where various problems are encountered. Summaries of the following cases that reflect the global nature of the problem are set out in annex 2: The "*Acrux*"⁷ (England), the "*Galaxias*"⁸ (Canada), the "*Great Eagle*"⁹ (South Africa), the "*Union*"¹⁰ (China), the "*Katerina*"¹¹ (The Netherlands), the "*Ahmet Bay*"¹² (USA) and the "*Sam Dragon*"¹³ (Ireland).

⁵ [1962] Vol.1 Lloyds Law Reports at p405

⁶ At p409

⁷ [1961] 1 Lloyds Report at p405

⁸ [1988] LMLN No. 240 at p2

⁹ [1994] 1 SA 65(c)

¹⁰ [2005] Jin Hai Fa Shang Chu Zi No. 401 – Judgment of the Tianjin Maritime Court

¹¹ [KG04/912P], LJN: DB 4789

¹² 623 F.SUP.2d635

¹³ [2012] JEHC 240

3.16 If the proposed draft convention had been in force and ratified by the countries concerned, then in all probability the disputes which formed the subject matter of these cases would not have arisen and there would have been a very considerable saving of legal costs in the greater interests of the maritime industry as a whole.

3.17 Even where problems do not become the subject of further judicial involvement, the commercial and legal costs incurred in dealing with these issues are considerable, and the delays and interruptions to the owner's rights to trade the vessel severely interrupted. In most circumstances, the innocent owner is faced with a ship that has been arrested by a claimant.

3.18 As was recognised by Mr Justice Didcott (in an arrest case, not involving a judicial sale) in the South African case of the *mv Paz*¹⁴ (a summary of which is set out in annex 2): "It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo."

3.19 In certain jurisdictions (such as China) the ship registration authorities will not accept foreign court documents as effective documents for the registration and de-registration of ships.

3.20 The proposal for approval of the final text of the draft convention was made by the China Maritime Law Association at the CMI Assembly in Hamburg in 2014. The proposal was supported by 24 acceptances with two abstentions and no vote against. The 24 acceptances comprise the National Maritime Law Associations of Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Malta, the Netherlands, New Zealand, Nigeria, Norway, Republic of Korea, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. The two abstentions were the National Maritime Law Associations of Brazil and Poland.

3.21 The CMI, heeding the concerns of various National Maritime Law Associations, recognized that the needs of the maritime industry and ship finance required 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.

4 Analysis of the issue

4.1 Any uncertainty for the prospective purchaser regarding the international recognition of a foreign judicial sale of a ship and the deletion or transfer of registry may have an adverse effect upon the price realised by a ship sold under judicial sale to the detriment of interested parties and the maritime industry as a whole.

4.2 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 transfer of the ownership in the ship.

4.3 It is important to highlight the important legal principle that flows from a judicial sale that once a ship is sold by way of a judicial sale, the ship should, with only very limited exceptions no longer be subject to arrest for any claim arising prior to its judicial sale.

¹⁴ 1984 (3) 261 (D)

4.4 The objective of the recognition of a judicial sale of a ship requires that, to the extent possible, uniform rules are adopted with regard to the notice of the judicial sale, the legal effects of that sale and de-registration or registration of the ship.

4.5 These then were the issues that the draft convention, the text of which is set out in annex 1, sought to address, as follows:

- (1) As the draft convention was to focus on the recognition of judicial sales, the structure of the instrument was, initially, modelled on the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958*.
- (2) **Article 1** provides a list of definitions which has proved most useful in keeping the balance of the articles concise. Care has been taken to align definitions with those adopted by other conventions, in particular the *International Convention on Maritime Liens and Mortgages, 1993*.
- (3) **Article 2** provides that the convention shall apply to the conditions in which a judicial sale taking place in one State shall be sufficient for recognition in another.
- (4) **Article 3** sets out the parties to whom notice of the pending judicial sale must be given. It also requires such notice to be given by the competent authority in the State of the judicial sale. The article sets out what information should be set out in the notice. In all other respects, the notice is to be given in accordance with the law of the State of the judicial sale.
- (5) **Article 4** determines the effect of a judicial sale. The basic concept being that any title to and rights and interests in the ship that is the subject of the judicial sale shall be extinguished and any mortgage or similar charge will cease to attach to the ship and clean title to the ship will be acquired by the purchaser. The sale will not, however, extinguish any personal rights that a claimant may have against the owner or any other person personally liable to the creditor (to the extent that the debt has not been extinguished by the proceeds of the sale of the ship).
- (6) **Article 5** provides for the minimum content and mechanics of issuing a certificate of judicial sale by the competent authority. This certificate confirms that the ship has been sold in accordance with the laws of the State and the provisions of the convention. The certificate is to be issued substantially in the form of a model certificate annexed to the convention. In the absence of proof of circumstances referred to in article 8, the certificate shall be regarded, in terms of article 7, as conclusive evidence that the judicial sale has taken place and has the effect provided for in article 4.
- (7) **Article 6** provides that, against production of the article 5 certificate, the registry where the ship was registered prior to the judicial sale shall delete all mortgages or similar charges and either register the ship in the name of the new purchaser, or delete the ship from that register and issue a certificate of deregistration so that the ship can be registered elsewhere. Where the ship was on bareboat charter, and was flying the flag of a state of bareboat charter registration, then the ship shall be deleted from that registry against production of the certificate.

- (8) **Article 7** provides that subject to article 8, the court of a State party shall, on the application of a purchaser, recognize a judicial sale conducted in another State where that State has issued an article 5 certificate and regard that sale as having passed clean title to the purchaser, and that the ship was sold free of any mortgage or similar charge. If the ship sold by way of a judicial sale has been arrested, or its arrest is sought, for a claim that arose prior to the judicial sale, then the court shall dismiss or set aside the arrest, or reject any application for the ships arrest. The only exception is if the arresting party is an "interested person" (defined as the pre-sale owner or the holder of certain registered charges) and is able to show that circumstances exist that bring that persons case with the parameters of article 8.
- (9) **Article 8** sets out the circumstances in which the recognition of a judicial sale will be suspended or refused at the request of the interested person. The sale will not be recognized if it is shown that the ship was not physically within the jurisdiction of the State where the judicial sale took place. Recognition will be suspended where the sale is being challenged in the court of the State of judicial sale. Recognition will be refused where it can be shown that the sale has been nullified by a competent court of the State of judicial sale or where recognition would be manifestly contrary to public policy.
- (10) **Article 9** allows State parties to restrict the application of the convention to recognition of judicial sales conducted in State parties.
- (11) **Article 10** provides that nothing in the convention shall derogate from any other basis for the recognition of judicial sales under any other bi-lateral or multi-lateral convention, instrument, agreement or principle of comity.

5 Analysis of the implications

5.1 If an international convention can prevent ships from being arrested unnecessarily, and international trade and maritime commerce from being disrupted then, it is submitted, a compelling need for such an instrument is clearly made out. Further examples, of the compelling need for the proposed convention will appear from the submissions made in the further information provided below.

5.2 There is currently no suitable international instrument that recognises the judicial sale of ships and the manner in which a competent sale of a ship should be carried out.

5.3 As a result problems have arisen, and will continue to arise, with regard to the arrest, attachment or detention of ships by debtors with claims arising prior to the judicial sale.

5.4 It is not considered that the proposal will have any major implications on cost to the maritime industry. Almost all jurisdictions already require some form of certification of a judicial sale, so this is unlikely to present an additional, or significant additional, burden on either the purchaser or the maritime administration.

5.5 The Checklist for identifying administrative requirements and burdens as set out in annex 4 of the *Guidelines on the Organization and Method of Work of the Legal Committee* (LEG.1/Circ.7) has been completed and is set out in annex 3 to this document.

6 Benefits

6.1 The recognition of foreign judicial sales will create certainty to innocent purchasers that they have clean title and can trade the vessel without disruption from debts that arose prior to judicial sale. Purchasers will be able to de-flag ships from the erstwhile owner's registry and re-flag them in a registry of their choice.

6.2 The innocent purchaser will be able to take title to its vessel secure in the knowledge that the validity of the judicial sale will not be challenged.

7 Industry standard

7.1 There are no applicable industry standards. Three existing conventions bear mention, however.

7.2 The *International Convention on Maritime Liens and Mortgages, 1993* has not been successful as it contains controversial provisions which do not solve the problems of the recognition of foreign judicial sales, and the wording with respect to recognition is more in the nature of denying recognition, rather than granting recognition of the judicial sale. However, wherever possible, the draft convention has been prepared so that its provisions do not conflict with those set out in the *Maritime Liens and Mortgages Convention*.

7.3 Whilst the *International Convention Relating to the Arrest of Sea-going Ships, 1952* seeks to regulate the claims that can be enforced by the arrest of a vessel, it does not provide for the judicial sale of a ship.

7.4 The *International Convention on the Arrest of Ships, 1999* mentions the judicial or forced sale of ships, but only in the context of its article 3.3, allowing, as an exception to the general rule, the arrest of a ship owned by a person not liable for the claim.

8 Output

8.1 Specific

The draft convention addresses the specific issues and problems that had been encountered due to the non-recognition of foreign judicial sales.

8.2 Measureable

The output is measurable with a view to the number of ratifications the new convention may achieve and hence, the number of judicial sales that will be covered by the convention.

8.3 Achievable

The draft convention has already been prepared by the CMI through the considerable contribution of numerous National Maritime Law Associations and the convention has the sponsorship of two countries, 24 National Maritime Law Associations (this figure is likely to increase) and the CMI and it is reasonable to expect that, with the assistance of the IMO, it will be acceptable to a large number of countries.

8.4 Realistic

Bearing in mind the support given to the draft convention thus far, it is submitted that the general acceptance of the draft convention is a realistic outcome.

8.5 Time-bound

The development of the convention is time-bound and it will have specific entry into force conditions.

9 Priority/urgency

9.1 Issues arising in respect of the non-recognition of judicial sales are ongoing. Given the current depressed state of the shipping market, judicial sales are likely to increase over the foreseeable future.

9.2 It is therefore proposed that the development of the draft convention is added as a new output to the agenda of the Legal Committee.

Action requested of the Legal Committee

10 The Committee is invited to consider the proposal in this document and agree to add a new output to develop a new instrument on foreign judicial sales of ships and their recognition, and to take action as appropriate

ANNEX 1

Draft International Convention on Foreign Judicial Sales of Ships and their Recognition (Known as the "Beijing Draft")

(Done at Beijing on 19 October 2012, amended at Dublin in 2013 and at Hamburg in 2014)

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 realised 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 de-registration or registration of the Ship.

HAVE AGREED as follows:

Article 1 Definitions

For the purposes of this Convention:

1. "Certificate" means the original duly issued document, or a certified copy thereof, as provided for in Article 5.
2. "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.
3. "Clean Title" means a title free and clear of any Mortgage/Hypothèque or Charge unless assumed by any Purchaser.
4. "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.

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 by this Convention.
6. "Day" means calendar day.
7. "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.
8. "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.
9. "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.
10. "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.
11. "Owner" means any Person registered in the register of ships of the State of Registration as the owner of the Ship.
12. "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.
13. "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.
14. "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.
15. "Registered Charge" means any Charge entered in the registry of the Ship that is the subject of the Judicial Sale.
16. "Registrar" means the registrar or equivalent official in the State of Registration or the State of Bareboat Charter Registration, as the context requires.
17. "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.
18. "State of Registration" means the state in whose register of ships ownership of a Ship is registered at the time of its Judicial Sale.
19. "State of Judicial Sale" means the state in which the Ship is sold by way of Judicial Sale.
20. "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.

21. "Subsequent Purchaser" means any Person to whom ownership of a Ship has been transferred through a Purchaser.

22. "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:

- i. The State of Judicial Sale;
- ii. The name, address and, unless not available, the contact details of the Competent Authority issuing the Certificate;
- iii. The place and date when Clean Title was acquired by the Purchaser;
- iv. The name, IMO number, or distinctive number or letters, and port of registry of the Ship;
- v. The name, address or residence or principal place of business and contact details, if available, of the Owner(s);
- vi. The name, address or residence or principal place of business and contact details of the Purchaser;
- vii. Any Mortgage/Hypothèque or Charge assumed by the Purchaser;
- viii. The place and date of issuance of the Certificate; and
- ix. 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 abovementioned 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:

1. 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.

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 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

b) 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.

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 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.

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

Annex

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, **On**

(place)

(date)

.....

Signature and/or stamp

ANNEX 2

List of Case Summaries*

- 1 The "*Acrux*"¹ (United Kingdom) (1962)
- 2 The "*Norsland*"² (Canada) (1972)
- 3 The "*Paz*"³ (South Africa) (1984)
- 4 The "*Galaxias*"⁴ (Canada) (1988)
- 5 The "*Great Eagle*"⁵ (South Africa) (1991)
- 6 The "*Katerina*"⁶ (The Netherlands) (2004)
- 7 The "*Union*"⁷ (China) (2006)
- 8 The "*Ahmet Bey*"⁸ (United States) (2009)
- 9 The "*Sam Dragon*"⁹ (Ireland) (2012)

* For full copy of the report or memorandum of these cases, please contact Henry Hai Li at henryhaili@henrylaw.cn or Andrew Robinson at Andrew.Robinson@nortonrosefulbright.com

¹ [1961] 1 Lloyd's Reports at p.405

² 1972 CarswellNat 18, FC 430

³ 1984 (3) SA 261 (N)

⁴ [1988] LMLN No.240 at p.2

⁵ 1994 (1) SA 65 (C)

⁶ 2004 [KG04/912P], LJN:BB 4789, Schip & Schade 2007, 108

⁷ [2005] Jin Hai Fa Shang Chu Zi No. 401 – Judgment of the Tianjin Maritime Court

⁸ 2009 Civil Action No. 07-3518, United States District Court, E.D. Pennsylvania

⁹ 2012 JEHC 240

1 The Acrux - (1961) 1 Lloyd's Rep., pp 405-410.

On 16 December 1960, in a suit commenced by a French company for necessities, the Italian steamship *Acrux* owned by an Italian company was arrested in the United Kingdom of Great Britain and Northern Ireland. Later on, appraisal and sale of the ship was ordered by the Court in order to satisfy the judgment given by the Court in respect of the claim. The order for sale was suspended at the application of the shipowner's liquidator from Italy, but was restored as a result of the intervention of an Italian bank, being the mortgagees of the ship. The ship was sold on 27 April 1961 by the Admiralty Marshal. The proceeds of the sale were less than the sum claimed by the mortgagees. The Court was later informed by the Admiralty Marshal that the purchaser of the *Acrux* was unable to secure permanent registration of the ship in his desired country, because he was unable to obtain a certificate of deletion from the Italian Register of Ships, evidencing that the order for sale of the Admiralty Court was not recognized in Italy and that according to Italian law, the mortgagees could start an executive procedure on the ship not only in Italy but even in other countries. For this reason, an undertaking was required from the mortgagees by the Court not to commence proceedings *in rem* or any similar proceedings abroad against the *Acrux* in respect of the claims pursued by the mortgagees in the motion before the Court.

The undertaking was given by the mortgagees as required by the Court, but no report was made as to whether the purchaser obtained the necessary certificate of deletion from the Italian Register of Ships and secured the permanent registration of the ship in his desired country.

In this case, Mr. Justice Hewson stated:

"It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, consented to the sale to an innocent purchaser, would thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership. This Court recognises proper sales by competent Courts of Admiralty, or prize, abroad – it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade"¹⁰.

2 The Norsland - 1972 CarswellNat 18, FC 430

In a motion filed with the Federal Court of Canada – Trial Division (the "Court") by a company called Vrac Mar Inc. (the "Suppliant") being the successful bidder for the ship M/V *Norsland* in a court sale dated 18 August 1971, under an order made by the Court on 18 August 1971, extended by a further order on 13 September 1971, the Suppliant asked the Court to make an order to allow subrogation of rights in its favour for the sum of \$3,943.95 paid to the Government of Panama holding an alleged maritime lien on the ship for arrears of certain taxes incurred in 1969, 1970 and 1971.

The order for sale of the ship *Norsland* made by the Court provided that sale of the ship should be as follows:

"That the basis of the sale of the ship Norsland shall be as is, where is, as she now lies afloat at Longue Pointe, particulars not guaranteed, free and clear of all liens, charges, mortgages, encumbrances and claims and with a clean bill of sale."

¹⁰ (1961) 1 Lloyd's Reports at p.409

The Suppliant contended that when it paid a price of \$111,000 for the ship, it was guaranteed that it would receive ownership of the latter and the said ship would be free of any encumbrance or maritime or other lien. It stated, however, that unfortunately the said ship was not free of any encumbrance, since in order to have the ship registered with the Canadian Ministry of Transport, it had to carry out certain formalities called "Proof surrender Panama documentation" and furnish proof that the *Norsland's* register was closed. Whereas, the Government of Panama refused to close the *Norsland's* register as long as the abovementioned arrears of taxes were unpaid. The Suppliant stated that it was accordingly obliged to incur considerable expenses and pay certain sums of money in order to have the ship registered in Canada. The said \$3,943.95 paid to the Republic of Panama through the legal firm Lette, Marcotte, Biron and Sutto was one of the sums paid by the Suppliant.

The Court allowed subrogation of rights in the Suppliant's favour for the amount of money paid to the Republic of Panama, but subject to the apportionment and priority of these amounts, as well as entitlement, being determined in court at the final decision on claims and their priority.

In the order, the court stated:

"... the Republic of Panama, after filing a caveat for \$2,585.15, refuses to comply with the proceedings for sale of this ship, and observe the order of this Court giving the purchaser a clear title. I do not for the moment wish to characterize this action by that country, I would say nevertheless that the refusal to comply with a judgment of this Court after filing a claim, in addition to being an affront to a Canadian court, represents a refusal by that country to abide by the decisions of a court in another country, and an exception to a rule honored by every nation in the world. Indeed, if other countries, or other debtors, decided to follow this bad example, it would create confusion in an area which can be effectively controlled only with the good faith of all seafaring nations."¹¹

3 **The Paz** – 1984 (3) SA 261 (N)

A Nigerian company applied for arrest of the ship *Paz*, which was registered in Panama and presumably owned by a Panamanian company. The applicant's claim against the ship related to loss of or damage to cargo conveyed from Antwerp to Lagos almost five years previously. Litigation over the claim was pending in Hong Kong, China, where an action *in rem* had been instituted in the High Court. Because the ship was due to call at Durban in order to refuel, the applicant applied as a matter of urgency for an order to be issued by a court in South Africa for the arrest of the ship so as to provide it with security for the judgment which it hoped it would one day be awarded in Hong Kong, China.

Mr. Justice Didcott of the Natal Provincial Division, a single judge hearing the matter in the first instance, considered that the arrest of the ship raised an important question of judicial policy, namely whether or not that Court should, as he put it, allow itself to be "transformed into some sort of judicial Liberia or Panama", to be "turned into a Court of convenience for the wandering litigants of the world".

On 23 March 1984, a judgment was issued by the Court and the application for arrest was dismissed.

It was recognized by Mr. Justice Didcott that:

"It is a serious business to attach a ship. To stop or delay its departure from one of our ports, to interrupt its voyage for longer than the period it was due to remain, can have

¹¹ 1972 CarswellNat 18, FC 430

and usually has consequences which are commercially damaging to its owner or charterer, not to mention those who are relying upon its arrival at other ports to load or discharge cargo.”¹²

4 The *Galaxias* - (1988) LMLN No.240, p2

In September 1986, the Greek registered ship, the *Galaxias* was arrested in Canada, and several claims were made on the ship, including a “somewhat novel” claim for a maritime lien purportedly legislated by the Greek government in favour of the Greek Seamen’s Union. Subsequently, a Sheriff of British Columbia was appointed as a Deputy Marshal to carry out the commission of sale of the *Galaxias*. The ship was sold according to the order of the court “as is, where is” and “free and clear of all encumbrances”. Whereafter, the purchaser soon became uneasy with respect to the attitude taken by the Minister of Merchant Marine in Greece regarding the transfer of title of the *Galaxias* clear of all encumbrances in the Greek Shipping Registry in Piraeus. The Minister objected to the issuance of the necessary Deletion Certificate and made it contingent on the satisfaction of the claims raised against the *Galaxias* by the Greek Seamen’s Union.

The Sheriff commenced an action against the purchaser seeking a declaration that he had fulfilled his duty with respect to the order of sale or commission of sale, and that the bill of sale did convey title in the *Galaxias* to the purchaser “free and clear of all encumbrances.” On the other hand, the purchaser filed a defence and counterclaimed with respect to the costs and damages which it claimed were brought about by the failure of the Deputy Marshal to convey the ship “free and clear of all encumbrances”, and as it presently stood, unregistrable in the Greek Shipping Registry.

It was held by the court, inter alia, that on one hand the Sheriff was entitled to the declaration sought by him, on the other hand, the purchaser would take free and clear of all encumbrances according to the laws of Canada.

Mr. Justice Rouleau held as follows:

“The purchaser will take free and clear of all encumbrances according to the laws of Canada and although it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, this is not an area over which the Federal Court exercises control, nor is it appropriate that it attempt to do so”.

In addition, Mr. Justice Rouleau made the following pertinent comment regarding the need for international intervention:

*“I would like to add ... that in order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This does not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognised in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with”.*¹³

¹² 1984 (3) SA 261 (N)

¹³ At page 11 of the judgment

In commenting on judicial orders for the sales of ships that did not ensure the passing of "clean" title, the Judge stated:

"However, admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales of vessels and render some ships completely unsalable. The legitimate claims of many Canadian and foreign creditors would thus be defeated by the resulting ridiculously low payments into Court of purchase prices".¹⁴

5 The *Great Eagle* - 1994 (1) SA 65 (C)¹⁵

In July 1991, a Cypriot company (the "Claimant") instituted an action *in rem* against a Panamanian company (the "Respondent"), which was commenced by the arrest of the m.v. *Great Eagle* at Saldanha Bay, South Africa. The main claim was for a *declarator* that the Claimant was owner of the ship and entitled to its possession, although the ship had been sold by a court in Qingdao, China. The Claimant was therefore challenging the validity of the judicial sale in China. The alternative claim, on the premise that the Claimant was not the owner and that the owner was liable to the Claimant *in personam*, was for the recovery of damages in the amount of \$4.4 million arising from the concerted fraudulent actions of a number of parties which resulted in the Claimant being dispossessed of the ship at Qingdao, China, and the Respondent becoming its current registered owner.

It was accepted by the Respondent that up to 30 May 1991 the Claimant was the owner and under his ownership the ship was named *Mnimysyni*. However, on that date the ship was auctioned by the Qingdao Maritime Court, China, and, as the purchaser of the ship under the judicial sale, the Respondent became the owner of the ship. The Respondent filed an application for the release of the ship and argued on three grounds, namely (1) as a matter of statutory interpretation, the Act¹⁶ does not empower an action *in rem* where the action and the arrest are directed at the Claimant's own ship, as is the case in a vindicatory claim; (2) the Claimant had no *prima facie* case justifying the action and the accompanying arrest; and (3) the Court was not the appropriate forum for the matter to be heard and jurisdiction should be declined in terms of the Act.

It was concluded by the Court that (1) where a claimant seeks to vindicate a ship to which it claims ownership, the Act empowers him to arrest and take proceedings against it *in rem*. It followed that the Respondent's first ground failed; and (2) the Claimant had failed to make out a *prima facie* case in respect of the cause of the action, which meant the second ground on which the Respondent had based his application was successful. Being so, the court found it unnecessary to deal with the third ground, namely the *forum non conveniens* point. It was ordered by the Court *inter alia* that the ship be released from arrest and that the Claimant's action was dismissed with costs.

It might be interesting to mention that in another action¹⁷ following the second arrest of the ship for the same matter commenced by the abovementioned Claimant, views in respect of the *forum non conveniens* point were expressed by the Court that if the Claimant was advised that it has a *prima facie* case against the Respondent, i.e. the purchaser at the judicial sale, the appropriate forum to have such case established is the relevant Chinese Court, and not a South African one.

¹⁴ At page 12 of the judgment

¹⁵ The judgment was delivered on 28 October 1991

¹⁶ The Act refers to the Admiralty Jurisdiction Regulation Act 105 of 1983

¹⁷ 1992 (4) SA 313 (C), the judgment was delivered on 9 April 1992

6 The *Katerina* - Schip & Schade 2007, 108: Court of Amsterdam, 7 May 2004, No. KG04/912P

In 2004, Eta Petrol Akaryakit Ve Nakliyatı A.S., a Turkish company (the "ETA"), effected conservatory arrest by the Court of Amsterdam of the ship *Katerina* on the ground that, although in 2003 this ship, then named *Hidir Selek*, had been judicially sold in China at the application of a bank holding a mortgage on the ship, the judicial sale did not proceed normally and honestly. Therefore, the ownership of the ship never passed to any other person, thus ETA was still the owner of the ship. On the other hand, Esquire Management Co. ("Esquire"), the registered owner of the ship *Katerina* at the time of the arrest applied to the court to lift the arrest effected by ETA.

The Court issued a judgment holding that the arrest effected by ETA should be lifted, and the judgment was issued on the basis of the following facts:

- a. On 5 January 1996, ETA and the Hamburgische LandesBank (presently: HSH NordBank A.G., the "Bank") entered into a loan agreement for \$13,500,000 for the purchase by ETA of the ship *Hidir Selek*. Clause 5 of the loan agreement provided that ETA shall register the ship in the ship's register of Istanbul, Turkey. In clause 12 it was provided that German law is the applicable law and that the submission to a certain jurisdiction shall not (and shall not be construed so as to) limit the right of the Bank to take proceedings against the borrower in whatever jurisdiction shall the Bank deemed fit.
- b. On 26 March 1996, ETA and the Bank concluded a mortgage agreement in connection with the abovementioned loan. Clause 17 (a) provided that this mortgage shall be construed and enforceable in accordance with the laws of the Republic of Turkey.
- c. After obtaining an order for arrest on 7 June 2003 from the maritime court in Tjianjin, China, on 8 June 2003 the Bank effected an arrest of the ship *Hidir Selek* for arrears in the repayment of the loan. On 29 July 2003, the court in Tianjin ordered the judicial sale of the ship. On 21 August 2003 the Tianjin court published a notice with regard to the judicial sale of the ship.
- d. In Lloyd's List of 6 October 2003, ETA published a statement with the following contents:

"WARNING
To the shipping world and to the public about the illegitimate auction of M/V *Hidir Selek*."
- e. On 9 October 2003, the judicial sale at Tianjin took place, whereby sixteen bidders were present. The ship was purchased for \$6,840,000 by First Shipping Limited. Subsequently, First Shipping Limited sold the ship on for the same amount to Esquire. On 22 October 2003, the Tianjin court issued three documents with regard to the judicial sale of the ship, i.e. a certificate of transference of ownership of Turkish-registered M/V *Hidir Selek*, a civil ruling ((2003) HSCZ no. 343-12) ordering the release of the vessel and an "order of release of ship" (HFSCZ no. 343-13). On 23 October 2003, the ship was transferred to Esquire.
- f. On 24 October 2003, the ship, renamed *Katerina*, was entered into the ship's register of the Marshall Islands in the name of *Esquire*. The ship *Katerina* was burdened with two ship mortgages in favour of the Bank.
- g. In February 2004, ETA arrested the ship *Katerina* in Singapore. In this matter summary proceedings took place. In a judgment dated 16 March 2004 the Singapore court issued

an "Order of Court", to the effect that the arrest be lifted, and that the Plaintiffs [ETA] do pay the Defendants damages for wrongful arrest of the vessel *Katerina*, to be assessed by the Registrar and that ETA shall pay the legal costs in the amount of \$5,000 to Esquire.

- h. On 19 April 2004, ETA obtained an order from the injunction judge of the court of Amsterdam for effecting the conservatory arrest of the ship *Katerina*, but it had done nothing with this order for arrest.
- i. On 26 April 2004, ETA requested and obtained an 'Einstweilige Verfügung' (provisional measure) from the Amtsgericht Brake, Germany. The court bailiff handed down the court measure on board the ship. However, the ship *Katerina* left the German port.
- j. After obtaining the order for arrest from the injunction judge at Amsterdam, on 27 April 2004 ETA effected a conservatory arrest of the ship *Katerina* to the detriment of Esquire.
- k. On 5 May 2004, the Turkish court issued an "injunction order", whereby (amongst other things) it was provided that the ship was under arrest and that no changes can be effected onto its registration.

In the judgment, it is held by the court, inter alia, that:

"...
The above leads to the conclusion that the auction has taken place in China according to Chinese law, the consequences of this auction with regard to the ownership of the ship are governed by Chinese law. The parties agree that according to Chinese law ownership has passed to First Shipping Limited and that this company has resold and delivered the ship to Esquire. Esquire has therefore acquired the ownership of the ship, and therefore the conservatory arrest applied for by ETA was effected wrongfully. This arrest must therefore be lifted. This is not effected by the fact that Esquire having ignored an 'Einstweilige Verfügung' (provisional measure) of the German court has let the ship leave the port of Brake, since this is a matter between the German judicial authorities and Esquire and does not affect the ownership of the ship."

7 The Union - 2005 Jin Hai Fa Shang Chu Zi No. 401.

On 24 June 2005, the ship, *Union*, which was registered in Belize was arrested by Tianjin Maritime Court of the People's Republic of China at the application of a French bank based in Paris, for enforcement of a mortgage on the ship *Phoenix*, which was the former name of the ship then registered with the name of *Union*. The mortgage was effected on the ship *Phoenix* for the purpose of securing a loan in the sum of 5 million US dollars, and registered on 4 November 1999 in Saint Vincent and the Grenadines, and was further registered in the Russian Federation later in November 1999 when the ship was bareboat chartered to a Russian company. In order to recover from the borrower the outstanding balance of the loan which was in the sum of \$2 million, a judgment had been obtained in the mortgagee's favour from the Commercial Court of Paris in September 2003. However, the judgment was not performed or satisfied by the borrower. In the lawsuit filed with the Chinese Maritime Court by the French bank, it was claimed that the duly registered mortgage on the ship *Phoenix* (whose current name was *Union*), should be recognized by the Court and enforceable on the ship irrespective of the change of her name and registration. In opposition, the current registered owner of the ship filed a defence and counterclaimed with respect to the costs and damages which were allegedly brought about by the wrongful arrest of the ship by the French bank.

It was contended by the current shipowner that the ship, *Phoenix*, was arrested in May 2003 and auctioned in November 2004 by the Court of Rason, the Democratic People's Republic of Korea (hereinafter referred to as the "DPRK Court") on the applications of a number of claimants for unpaid crew wages and port charges, and for repayment of outstanding loans. The purchaser of the ship was a local company, who after the sale registered the ship on a temporary basis with the local maritime administration under its name, with a new ship's name of *Rason*. In June 2005, the purchaser sold the ship to the current shipowner who in turn registered the ship in Belize on 7 July 2005 under its name, with the current ship's name, i.e. *Union*. Apart from the above, it was ascertained by the Maritime Court that after the sale of the ship by the DPRK Court the registration of the ship and the mortgage in Saint Vincent and the Grenadines was not deleted.

Due to the fact that neither of the parties had sought to apply or provided any material to prove the contents of the applicable foreign laws (including the laws of Saint Vincent and the Grenadines, the DPRK and Belize), the Chinese Maritime Court applied the Chinese laws to all the issues disputed in this case.

One of the issues in this case was whether or not the order of sale made by the DPRK Court should be recognized as an effective court order, thus accepting the judicial sale as valid and the prior mortgage extinguished.

It was held by the Maritime Court, inter alia, that (1) after the sale of the ship by the DPRK Court, all charges and encumbrances, including the French bank's mortgage on the ship were all extinguished given the fact that the registration of the ship and the mortgage in Saint Vincent and the Grenadines was not deleted; (2) to ascertain the fact that the ship had once been sold by the DPRK Court is just a matter of fact being investigated by this court, that does not involve any recognition or enforcement by this court of any judgment or order of the DPRK Court; and (3) it is not within the jurisdiction of this court to examine and judge whether or not the ship sold by the DPRK Court was in accordance with the DPRK law, including whether or not a proper notice has been sent to the French bank and/or the ship's register in Saint Vincent and the Grenadines. Based on these grounds, the claims of the mortgagee were dismissed by the Maritime Court.

Perhaps, it is worth mentioning that the appeal by the mortgagee was also rejected by the High Court of Tianjin¹⁸.

8 *The Ahmet Bey* – 623 F. Supp. 2d 635 Goldfish Shipping, S.A. v. HSH Nordbank AG. Civil Action No. 07-3518. United States District Court, E.D. Pennsylvania. April 1, 2009

In early 2003, Odin Denizcilik, A.S. (the "Odin"), a company incorporated in Turkey, was the owner of the ship *Ahmet Bey* (the "Ship") flying a Turkish flag, HSH Nordbank AG (the "Nordbank") held a first mortgage on the ship. Odin defaulted on the mortgage, Nordbank had the ship arrested in the Port of Philadelphia, and the Marshal sold the ship to Goldfish Shipping, S.A. (the "Goldfish") in a judicial mortgage foreclosure sale.

After the foreclosure sale, Odin had the ship arrested in Barcelona, Spain and Ravenna, Italy, claiming continued ownership of the ship.

On August 24 2007, Goldfish commenced the instant action before the U.S. District Court against Nordbank seeking damages associated with Odin's two seizures of the ship. The crux of the First Amended Complaint filed by Goldfish was that Nordbank had failed to deliver the ship to Goldfish "free and clear" of Odin's claims to the ship. Goldfish asserted that Odin

¹⁸See Judgment [2006] Jin Gao Min Si Zhong Zi No. 95

remained the registered owner of the ship on the Turkish Registry of Shipping, and that Nordbank should therefore be liable for the damages that Goldfish suffered on account of Odin's arrests of the ship in Barcelona and Ravina.

It was held by the Court that all of Goldfish's claims failed because they rested on the premise that the ship had not been sold "free and clear of all liens, claims and encumbrances." The Court explained that Goldfish's reliance on this premise was fatal to its claims because the ship had been sold pursuant to the Ship Mortgage Act, which, by its terms, mandates that the ship had been "sold free of all ... claims."

As regards the argument put forward by Goldfish that Nordbank violated some other duty, either in contract or in tort, to either delete the ship from the Turkish Registry or unconditionally consent to the ship's deletion from the registry in order to extinguish that "indicia of ownership", the Court found, inter alia, as a matter of law that the Marshal was the seller of the ship, that title to the ship was transferred directly from Odin to Goldfish, and that no duties attached to Nordbank on account of its alleged status as the "seller". Goldfish had also provided no authority that supported its assertion that Nordbank's status as "beneficiary of or" initiator of the foreclosure sale gave rise to a legally enforceable duty to delete, or to consent to the deletion of, the ship from the Turkish Registry.

Perhaps, it is interesting to note that in another action¹⁹ also in relation to this ship, the court concluded:

"...We have been involved in litigation with these parties since 2003, when Nordbank first sought to have the vessel arrested. We entertained Odin's challenge to the arrest, both ordered and confirmed the Marshal's sale of the vessel in order to satisfy Nordbank's lien, ordered that the Marshal deliver title to the vessel to Goldfish 'free and clear of all claims, liens, or encumbrances,' and oversaw the distribution of the proceeds. We also entertained and resolved an action that Goldfish filed against Odin for damages it suffered on account of Odin's improper arrest of the vessel in Barcelona, and Goldfish subsequently received compensation for those damages from the proceeds of the re-sale."

9 The Sam Dragon – 2012 IEHC 240

The plaintiff in this case was SPV Sam Dragon Inc., a company incorporated under the laws of Panama and the owner of the vessel *Sam Dragon*, formerly named the *Pretty Flourish* ("Vessel"), which was the subject of a judicial sale in Belgium. The defendant was GE Transportation Finance (Ireland) Limited, a company incorporated in Ireland, which provided a loan facility to a company of the Republic of Korea called Samsun Logix Corporation ("Samsun"), the shipowner of the vessel prior to the judicial sale. The defendant held a mortgage on the vessel as security for the loan facility to Samsun.

The plaintiff's claim in the Irish Courts in this action was brought as the purchaser of the vessel in the judicial sale, for damages and expenses incurred by it in registering the vessel on the Shipping Register of Hong Kong, China. The plaintiff claimed that additional charges and expenses arose as a result of the failure of the defendant to comply with the plaintiff's request to remove the entry of the mortgage from the Ship's Register in the Republic of Korea. It had always been the intention of the plaintiff to register the vessel in the Ship Registry of Hong Kong, China. However, full registration on the Shipping Register of Hong Kong, China can only be secured upon production of a Deletion Certificate from the vessel's former registry. The plaintiff also claimed that it was required to seek registration of the vessel under a flag of

¹⁹ 2008 WL 4809410. *Goldfish Shipping, S.A. v. HSH Nordbank AG*, Civil Action No. 07-3518. Nov. 3, 2008

convenience and that it had registered the vessel in Panama on a temporary basis and could not register the vessel in Hong Kong, China on a permanent basis until the entry in the Register of the Republic of Korea was finally deleted.

In order to determine whether the defendant had a legal liability, the court had to decide whether there was a legal duty on the mortgagee of a vessel to take affirmative steps to delete the entry of the mortgage on the ship's register in the circumstances where there has been a judicial sale in a country other than the country of the registration.

As the case involved parties from a number of countries and legal issues arising in several jurisdictions, this raised a question as to what law should apply. Does one law apply to the arrest proceedings in Belgium and another law apply to the questions surrounding the issue of removal of the entry of the mortgage from the ship's register in the Republic of Korea?

By the time the case concluded, it was agreed between the parties that Belgium law applied to the first issue. The remaining question was whether Belgium law or the law of the Republic of Korea applied to the second alleged wrongful act?

As to that issue the judge held that

"Having considered the evidence, it seems to me that the country most connected with the alleged wrong arising out of the failure by the defendant to delete the entry of the mortgage from the Korean Register is [the Republic of] Korea, and that the consequences in other jurisdictions were 'indirect consequences' within the meaning of Article 4(1) of the Rome II Regulation. Accordingly, I hold that Korean law applies to this issue."

After hearing evidence given by a number of expert witnesses from different jurisdictions, the judge further held that

"I am satisfied that the defendant was not obliged to voluntarily delete the mortgage either before they received payment out of the proceeds of sale of the Vessel or otherwise." "Accordingly, the plaintiff's claim fails."²⁰

²⁰2012 IEHC 240

RECOGNITION OF FOREIGN JUDICIAL SALES OF SHIPS

CHAIRMAN

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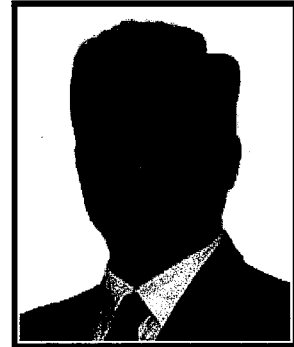
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PAST MEETINGS

- 14-17 June 2014, Hotel Atlantic Kempinski, Hamburg, Germany
- 28-29 September 2013, Shelbourne Hotel , Dublin, Ireland
- 15-18 October 2012, Beijing Kempinski Hotel, Beijing, China
- 27 September 2011, the Offices of the Norwegian Shipowners' Association at Radhusgaten 25, Oslo, Norway
- 24-27 October 2010, Marriott Plaza Hotel, Buenos Aires, Argentina
- 22 September 2009, De Doelen Concert Hall and Conference Centre, Rotterdam, the Netherlands

DOCUMENTS PRODUCED

- Report given to the General Assembly at the 2015 Istanbul Colloquium
- Questionnaire - Recognition of Foreign Judicial Sales of Ships
- IWG Report to the ExCo on the Project of Judicial Sales of Ships
- First Draft Instrument on Recognition of Foreign Judicial Sales of Ships
- Commentary on the First Draft Instrument
- Second Working Draft of Instrument on Recognition of Foreign Judicial Sales of Ships
- Commentary on Second Draft Instrument
- Concise Summary of Various Commentaries Received Relating to the Second Draft Instrument
- Beijing Draft
- Commentary on the Beijing Draft
- Report of the CMI IWG at the Beijing Conference
- Revised Beijing Draft
- Commentary on Revised Beijing Draft
- IWG Report on the Proceedings of the CMI ISC Meeting on JSS at Dublin
- IWG Report on Preparation of the Draft Convention on JSS
- Draft International Convention on Foreign Judicial Sales of Ships and their Recognition

DOCUMENTS OF INTEREST

1. Paper presented at the Athens Conference in 2008

A Brief Discussion on Judicial Sales of Ships

2. Papers presented at the Colloquium in Buenos Aires in 2010

A Brief Introduction to the Topic by Henry Hai Li

Summary and Comments on First Group of Questions by Aurelio Fernández-Concheso

Summary and Comments on Second Group of Questions by Benoit Goemans

Summary and Comments on Third Group of Questions by Louis Mbanefo

Summary and Comments on Fourth Group of Questions by Frank Smeele
Summary and Comments on Fifth Group of Questions by Andrew Robinson
Summary of the Discussion at the Session on JSS by Jonathan Lux

3. Papers presented at the Beijing Conference in 2012

Opening Note by Henry Hai Li
Paper of Jan-Erik Poetschke
Paper of Lawrence Teh
Paper of William Sharpe
Paper of Frank Smeele
Paper of James Zhengliang Hu
Paper of Andrew Robinson

4. Written Comments by NMLAs on the First Draft Instrument

Dominican MLA Comments on 1st Draft Instrument
Italian MLA Comments on 1st Draft Instrument
German MLA Comments on 1st Draft Instrument
Brazilian MLA Comments on 1st Draft Instrument
Croatia MLA Comments on 1st Draft Instrument
China MLA Comments on 1st Draft Instrument

5. Written Comments by NMLAs on the Second Draft Instrument

Dominican MLA Comments on 2nd Draft Instrument
Norway MLA Comments on 1st Draft Instrument
China MLA Comments on 1st Draft Instrument
French MLA Comments on 1st Draft Instrument
Malta MLA Comments on 1st Draft Instrument
Irish MLA Comments on 1st Draft Instrument
Japan MLA Comments on 1st Draft Instrument
USA MLA Comments on 1st Draft Instrument
Croatia MLA Comments on 1st Draft Instrument
British MLA Comments on 1st Draft Instrument

6. Written Comments by NMLAs on the Beijing Draft

German MLA Comments on Beijing Draft
Japan MLA Comments on Beijing Draft
Malta MLA Comments on Beijing Draft
China MLA Comments on Beijing Draft
Italian MLA Comments on Beijing Draft
Canadian MLA Comments on Beijing Draft
Croatia MLA Comments on Beijing Draft
Belgium MLA Comments on Beijing Draft
Greece MLA Comments on Beijing Draft
French MLA Comments on Beijing Draft
Turkey MLA Comments on Beijing Draft
British MLA Comments on Beijing Draft

7. Written Comments by NMLAs on the Revised Beijing Draft

China MLA Comments on Revised Beijing Draft
Japan MLA Comments on Revised Beijing Draft
Spanish MLA Comments on Revised Beijing Draft
British MLA Comments on Revised Beijing Draft
Korean MLA Comments on Revised Beijing Draft

8. . New York Conference 2016

A Brief Introduction of the Recent Development of the Beijing Draft, by Henry Hai Li
The need of a convention on foreign judicial sales of ships and their recognition, by Giorgio Berlingieri
The CMI Draft Convention on Recognition of Foreign Judicial Sales of Ships – Moving forward with the IMO, by Andrew Robinson
The CMI Draft Convention on Recognition of Foreign Judicial Sales of Ships – The Journey thus far, by Jonathan Lux

RECENT DEVELOPMENTS