

Council on General Affairs and Policy of the Conference – March 2017

Document	Preliminary Document <input type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input checked="" type="checkbox"/>	No 2 of March 2017
Title	Proposal by the Comité Maritime International (CMI) <i>(available in English only)</i>	
Author	Comité Maritime International (CMI)	
Agenda item	Item IV.9a	
Mandate(s)	n.a.	
Objective	Discuss possible new Convention on Judicial Sales of Ships	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input checked="" type="checkbox"/>	
Annexes	Draft International Convention on Foreign Judicial Sales of Ships and their Recognition prepared by CMI	
Related documents	n.a.	



COMITE MARITIME INTERNATIONAL

PRESIDENT

Draft Instrument on the Judicial Sale of Ships

Comité Maritime International (CMI)

The CMI has been in existence since 1897 when it was formed by a number of far sighted representatives in both government and business who were dedicated to seeking to achieve uniformity in international law in relation to shipping. The object of the CMI, as enunciated in Article 1 of its Constitution, is:

"to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of the CMI.

The Consultative Members of the CMI include the Baltic and International Maritime Conference, the International Bar Association, the International Maritime Organization (IMO), the International Chamber of Shipping, the International Group of P&I Clubs, the International Union of Marine Insurance, and many others.

Many of the conventions that govern international shipping today had their origins in work done by the CMI on such topics as collisions, salvage, arrest, limitation of liability, and many others, but perhaps best known is in the area of liability where its work on the Hague Rules stood the test of time from 1923 to the late 1970s when the Hamburg Rules were prepared under the auspices of UNCTAD. Most recently it drafted for UNCITRAL what has become known as the Rotterdam Rules, which still await international ratification. The CMI is also the custodian of the York Antwerp Rules which govern the law relating to General Average.

Background to the Judicial Sales project

Following on a paper given by Professor Henry Li of China in 2007 which drew attention to problems arising around the world from the failure to give recognition to judgments in other

jurisdictions ordering the sale of ships, the Executive Council of the CMI proposed that a working group conduct a preliminary study of the issues in relation to the Judicial Sale of Ships. That study drew to light a number of judicial pronouncements from various jurisdictions that highlighted difficulties that parties had experienced in having a foreign judicial sale of a ship recognised by another court. In one Canadian decision the court went so far as to say that the matter could only be repaired by an international instrument regulating the judicial sale of ships and their enforcement. The work of the group resulted in the draft Instrument, which is attached to this paper, being finalised and approved at the Assembly meeting of the CMI in Hamburg in 2014. It is often referred to as the "Beijing Draft", as it was at the Beijing Conference in 2012 that the great majority of the work leading to the finalisation of this draft was accomplished.

Recent Events

Representatives of the CMI attended the recent meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments of the HCCH, held between 16 and 24 February 2017 at which a presentation was made on behalf of the CMI to suggest that the CMI's draft Instrument on the Judicial Sale of Ships could be accommodated within that work. It was decided, however, by that Commission, not to proceed down that route.

The IMO

The CMI has worked with the IMO Legal Committee in the preparation of a number of international conventions over the years and in particular the IMO was involved in the development of the International Conventions on Maritime Liens and Mortgages, 1993 and the Arrest of Ships, 1999, both of which were the result of work done by the CMI. It was not surprising that an approach was made to the IMO Legal Committee in 2015 to add this work to its agenda.

An initial presentation was made to the IMO Legal Committee in 2015. Two sponsors were required for that work and in the lead up to the IMO Legal Committee meeting in 2016 China and South Korea agreed to sponsor this work.

The draft report of the IMO Legal Committee on the work of its 103rd Session, dated 10 June 2016, (LEG103/WP.1/Add.1) notes that the following views were expressed:

- "While most delegations felt that this was an important subject of interest to the Committee, some argued that the development of a new instrument on the Foreign Judicial Sales of Ships and their Recognition was a matter of private and commercial law and did, therefore, not fall within the remit of the Committee, in particular with a view to Articles 2 and 3 of the IMO Convention;
- It was also argued that the proposed output did not fit within the scope of Strategic Directions 1 and 12.2 and it also did not fall under the proposed High-level Action 1.3.3;

- Others, however, held that IMO's past involvement in similar legislative initiatives was a strong argument that this issue was in fact within the Organisation's scope and that the Legal Committee was the proper forum to discuss this issue further, also with a view to Article 1 of the IMO Convention;
- Many delegations who spoke were of the opinion that, if this issue was pursued at all, it should be done in cooperation with UNCTAD;
- Considering the question as to whether or not there was a compelling need for the development of a relevant instrument, the Legal Committee was divided as to whether the co-sponsors had provided enough evidence in this regard;
- Some delegations highlighted that they accepted foreign judicial sales of ships in their national legislation and that it entailed a lot of benefits, in particular because it provided certainty towards stakeholders;
- It was pointed out that this was also an important issue from the perspective of the port industry, as arrests of vessels can negatively affect the efficient port operations; and
- Some delegations felt that they needed further information as to whether this was, in fact, within the remit of the Organisation, and that further work needed to be done, before discussing this further at the next session."

In the event the IMO Legal Committee did not accept the proposal for the inclusion of this work to develop a new instrument on the Judicial Sales of Ships and their recognition. It was, however, left open for the matter to be raised again at a later date. It should also be noted that an informal approach was made by the Secretariat of the Legal Committee to UNCTAD and the response received was not favourable.

Judicial Sale of Ships

Many legal systems recognize the Judicial sale of ships in another jurisdiction and that where a ship is sold by way of a Judicial sale, all claims that lie against that ship (in particular any maritime liens or mortgages) are extinguished and the purchaser acquires a clean title to the ship that is free of such claims.

However, each legal system has developed its own approach to the administration and conduct of such sales, and, from time to time, problems have been experienced in deleting the ship from its erstwhile register, in registering the ship in a new registry, and in the purchaser having to defend old claims that arose against or in respect of the ship prior to its Judicial sale.

Indeed, some jurisdictions flatly refuse to recognize any Judicial sale unless that sale was made through its own courts. There are numerous cases where such non-recognition has led to

considerable prejudice to the purchaser of a ship on a Judicial sale. Attached to the material produced to the IMO was a summary of a number of legal cases reported from around the world.

The Judicial sale of ships following their arrest is a common occurrence. It sometimes occurs prior to any judgment being obtained against a debtor. The alternative in many cases is for the ship arrested to remain idle until such time as the merits of the claim have been determined. During this time the ship loses value and cannot be utilized in the trade for which it was built and purchased.

It follows that, absent the securing of a claim in some manner or form, the prompt sale of an arrested ship is usually regarded as being the most beneficial outcome for all parties, including the claimants and the shipowners.

But such sales whether pre or post judgment, will only be supported, and proper values for ships fetched, if the prospective purchasers can be confident of receiving the vessel with a clean title, free of any encumbrances and capable of being deleted from its old registry and registered in a new register of the purchaser's choice. Thereafter the purchaser must also be able to trade the ship without it being subject to arrest in respect of any claim arising prior to its Judicial sale.

In the circumstances it was felt that a fairly simple, largely procedural, international instrument addressing the recognition of foreign Judicial sales would fill a gap left open by the International Convention on Maritime Liens and Mortgages, 1993, the International Convention Relating to the Arrest of Sea-Going Ships, 1952 and the International Convention on the Arrest of Ships, 1999.

Stuart Hetherington

February 2017

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 Ship³ 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]

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