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Secured transactions: Preparation of Protocols to the Cape Town Convention –

Ships and maritime transport equipment

(memorandum prepared by the Secretariat)

<i>Summary</i>	<i>To provide an update on developments with respect to the possible preparation of a Protocol to the Cape Town Convention on ships and maritime transport equipment</i>
<i>Action to be taken</i>	<i>To take note of developments and consider whether further feasibility study on a Protocol to the Cape Town Convention on ships and maritime transport equipment should remain on the Work Programme for 2017 – 2019 and at what level of priority</i>
<i>Priority</i>	<i>Low</i>
<i>Related documents</i>	<i>UNIDROIT 2013 – C. D. (92) 5 (c)/(d) (Part A); UNIDROIT 2016 – C.D. (95) 13 rev. (Part B(2)(a))</i>

INTRODUCTION

1. The purpose of this memorandum is to provide an update to the initial study prepared by the UNIDROIT Secretariat with regard to the possible preparation of a Protocol to the Cape Town Convention on ships and maritime transport equipment (hereinafter the '2013 Study').¹ Pursuant to this activity's low-level priority on UNIDROIT's Work Programme, the Secretariat has monitored developments in the field. Part I provides a brief update on those developments and Part II provides an update on particular aspects of the 2013 Study.²

¹ See UNIDROIT 2013 – C.D. (92) 5 (c)/(d) (hereinafter "2013 Study").

² For additional background on the possible preparation of a new Protocol to the Cape Town Convention on ships and maritime transport equipment, see UNIDROIT 2016 – C.D. (95) 13 rev., paras. 29-33 (providing background in the context of the draft Triennial Work Programme 2017-2019).

I. RECENT DEVELOPMENTS

A. Interest from the African Shipowners Association in a possible Maritime Protocol

2. The Secretariat, upon an invitation from the African Shipowners Association, was represented at an African Maritime Conference in Lagos, Nigeria (28-30 September 2015), at which interest was expressed in a possible Maritime Protocol to the Cape Town Convention. It was expressed that such a Protocol could enhance African shipowners' access to foreign capital and reduce transactional costs. The Secretariat, moreover, requested any information that the African Shipowners Association and other stakeholders could provide going forward with respect to the questions of "whether market practice has found or could find alternative solutions in the absence of internationally harmonised rules and whether the extension of the Cape Town Convention system to ships could be a suitable response to the legal challenges in this respect."³ On 5 May 2016, the Secretary-General of UNIDROIT, Mr José Angelo Estrella Faria received a letter from the Secretary-General of the African Shipowners Association, Ms Funmi Folorunso, which is included in Annex 1.

B. The International Working Group at the *Comité Maritime International*

3. Following correspondence between the Secretary-General of UNIDROIT and the President of the *Comité Maritime International* ('CMI'), Mr Stuart Hetherington, the CMI established an International Working Group ('CMI/IWG') on the topic of "Ship Financing Security Practices"⁴ in order to ascertain *inter alia* whether there is a need for a possible Maritime Protocol to the Cape Town Convention.⁵ The CMI/IWG is intended "to go beyond the strict information gathering on the actual financing practices of the maritime industry as requested by UNIDROIT" and to "seek to assess what the views of the various national [Maritime Law Associations] are with regard to the extension of Cape Town to Shipping."⁶

4. In April 2016, the CMI/IWG made available a questionnaire concerning the current situation regarding maritime security interests and the needs of the industry.⁷ The CMI/IWG is next scheduled to meet jointly with the US Maritime Law Association's Marine Financing Committee in a session entitled "Maritime security and the degree of comfort being offered by flag states and international conventions" as part of the CMI's 42nd International Conference in New York on 4 May 2016.⁸

³ See UNIDROIT 2013 – A.G. (72) 4, paras. 22-23.

⁴ The CMI/IWG is chaired by Ann Fenech (Malta) and includes Allen Black (USA), Camilla Mendes Vianna Cardoso (Brazil), Sheng Chen (China), David Osborne (United Kingdom), Souichirou Kozuka (Japan), Stefan Rindfleisch (Germany), and Andrew Tetley (France). See CMI, Ship Financing Security Practices, <http://www.comitemaritime.org/Ship-Financing-Security-Practices/0,27150,115032,00.html> (last visited 26 April 2016).

⁵ See Report for the CMI Assembly (9 June 2015), available at <http://comitemaritime.org/Uploads/Work%20In%20Progress/Assembly%20attachment%2015.pdf> (last visited 13 April 2016).

⁶ *Id.*

⁷ Ship Finance Security Practices Questionnaire, available at <http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Ship%20Financing%20Security%20Practice%20to%20Presidents%20re%20Questionnaire%20on%20Ship%20Financing%20Security%20Practices%20-%20290316.pdf> (last visited 13 April 2016).

⁸ See CMI 42nd International Conference 2016, New York, Programme, available at <http://www.cmi2016newyork.org/s/CMI-New-York-Programme-Ver-32-m832.pdf> (last visited 19 April 2016).

II. UPDATES TO THE 2013 STUDY

A. Economic significance of consensual security over ships (see para. 8 *et seq.* of the 2013 Study)

5. The value of consensual security over ships remains economically significant. Seaborne trade has increased by 3.8 per cent in 2013 and by 3.4 per cent in 2014 to a total of 9.84 billion tons in 2014, and the world's commercial fleet grew by 3.5 per cent in 2014 to 89,464 vessels representing a total tonnage of 1.75 billion deadweight tons.⁹ Even though the average age of the world fleet increased in 2014, ship finance is still reported to have had a global volume of between 80 and 90 billion USD in 2014.¹⁰

B. Existing and projected international instruments regarding proprietary security over ships (see para. 48 *et seq.* of the 2013 Study)

6. In 2014, the Republic of the Congo acceded to both the International Convention on Maritime Liens and Mortgages of 1993¹¹ and the International Convention on the Arrest of Ships of 1999.¹² Apart from these accessions, the status of existing international instruments in the field of security interests in ships has remained unchanged since 2013. Thus, consistent with the observation in the 2013 Study, the International Convention on Maritime Liens and Mortgages of 1993 still has not attracted as much support as originally expected.¹³

C. Proposal for an International Instrument for the Recognition of Judicial Sales of Ships (see para. 67 *et seq.* of the 2013 Study)

7. After several meetings and discussions between 2009 and 2014, the CMI's International Working Group on Recognition of Foreign Judicial Sales of Ships presented a draft international convention on the foreign judicial sales of ships and their recognition to the CMI's 41st International Conference in Hamburg in June 2014, where the draft was approved by the CMI Assembly.¹⁴ The draft was supported by 24 National Maritime Law Associations, with two abstentions and no votes against.¹⁵

⁹ See UNCTAD, *Review of Maritime Transport 2015*, UNCTAD/RMT/2015 at x, available at http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf. The *Review of Maritime Transport 2015* notes *inter alia* that "[e]nhancing the sustainability and resilience of maritime transport entails some cost implications and calls for additional resources. However, in an era of increasingly constrained national budgets, finding innovative ways to mobilize the requisite sources is critical. New sources and mechanisms and greater private sector involvement such as through public-private partnerships is important. In terms of innovative financing mechanisms, climate finance could emerge as an important channel for mobilizing additional resources, including for maritime transport." *Id.* at 25-26.

¹⁰ See OECD Council Working Party on Shipbuilding, Workshop on Supply and Demand in the Shipbuilding Industry, https://www.oecd.org/sti/ind/Item%202.2%20HDA%20Conseil-%20Impact%20of%20Ship%20Financing_Final.pdf (last visited 14 April 2016).

¹¹ The Convention now has 18 State Parties. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-4&chapter=11&lang=en (last visited 13 April 2016).

¹² The Convention now has 11 State Parties. See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XII-8&chapter=12&lang=en (last visited 13 April 2016).

¹³ See 2013 Study, para. 6.

¹⁴ See Resolution adopted at the CMI Assembly on 17 June 2014, available at <http://comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html> (last visited 19 April 2016).

¹⁵ See Proposal submitted by China, the Republic of Korea and the Comité Maritime International, para. 3.20, available at <http://comitemaritime.org/Uploads/Work%20In%20Progress/Judicial%20Sales/The%20Proposed%20Draft%20International%20Convention%20on%20Foreign%20Judicial%20Sales%20-%202016.pdf> (last visited 19 April 2016).

8. The draft international convention was presented to the Legal Committee of the International Maritime Organization ('IMO') at its 102nd session in April 2015.¹⁶ The IMO Legal Committee considered that the instrument might be included in its work programme, subject to it being co-sponsored by one or more Member States.¹⁷ Some concerns, however, were expressed as to whether the IMO is the appropriate forum for such a convention.¹⁸ On 31 March 2016, China, the Republic of Korea and CMI submitted a Proposal to add a new Output to develop a new Instrument on Foreign Judicial Sales of Ships and their Recognition to the IMO Legal Committee's 103rd session, which will be held in London from 8-10 June 2016.¹⁹

D. Ships and maritime equipment as registrable assets (see para. 74 *et seq.* of the 2013 Study)

9. As noted in the 2013 Study, the establishment of an International Registry would entail defining which ships and maritime equipment should be covered by the registration system.²⁰ The 2013 Study suggested a cross-reference to the definition of the term "ship" in the Geneva Convention on the Conditions for the Registration of Ships of 1986 (the 'Geneva Convention of 1986').²¹ Pursuant to Article 2 of that Convention, "ship" means any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons." Since 2013, however, there have been no additional ratifications of the Geneva Convention of 1986, and it has not yet entered into force.²²

10. Article 2 of the Geneva Convention of 1986, moreover, does not define the term 'vessel' itself. It limits the scope of application to self-propelled vessels with a minimum tonnage of 500 gross tons and only encompasses seagoing vessels used in international seaborne trade.²³ As pointed out in the 2013 Study,²⁴ a technical requirement as adopted in Article 2 of the Geneva Convention of 1986 may be desirable to limit the scope of application of the possible Maritime Protocol to ships of a certain size. While the requirement of use in international seaborne trade might overly limit the scope of the possible Protocol, a minimum tonnage requirement or a requirement as to the size of the vessel, for example, might warrant consideration.²⁵

¹⁶ See IMO Legal Committee, 102nd Session Summary, <http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-102nd-session.aspx> (last visited 27 April 2016).

¹⁷ See *id.*

¹⁸ See Report of the CMI IWG on Recognition of Foreign Judicial Sales of Ships, <http://comitemaritime.org/Uploads/Judicial%20Sales/Assembly%20attachment%209.pdf> (last visited 14 April 2016).

¹⁹ See Proposal submitted by China, the Republic of Korea and the Comité Maritime International, available at <http://comitemaritime.org/Uploads/Work%20In%20Progress/Judicial%20Sales/The%20Proposed%20Draft%20International%20Convention%20on%20Foreign%20Judicial%20Sales%20-%202016.pdf> (last visited 19 April 2016).

²⁰ See 2013 Study, para. 75.

²¹ See *id.*

²² In order to enter into force, the Convention needs 40 Contracting States which represent at least 25 per cent of the world tonnage. Currently, 15 States have ratified the Convention of which Liberia is the only major shipping jurisdiction. Thus, an entry into force does not seem likely in the near future. See Status of the United Nations Convention on Conditions for Registration of Ships, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XII-7&chapter=12&lang=en (last visited 27 April 2016).

²³ See United Nations Convention on Conditions for Registration of Ships, art. 2, available at http://unctad.org/en/PublicationsLibrary/tdrsconf23_en.pdf (last visited 27 April 2016).

²⁴ See 2013 Study, para. 75.

²⁵ See, e.g., for New Zealand: Section 6 of the Ship Registration Act requires the registration of a vessel exceeding 24m in length under Part A of the ship registry which allows for the registration of ship mortgages.

11. As further noted in the 2013 Study,²⁶ another approach could be to refer to the national registration requirements according to the applicable law of the flag. If this solution is adopted, there would be no need for such definitions within the Protocol. A possible disadvantage of this solution, however, is that it might give rise to legal uncertainty because the registrability of an international interest under the possible Protocol would depend upon the national registration requirements. This might especially cause problems in cases where a change of flag occurs. The possible scope of application, moreover, would be very broad for States in which any vessel or other maritime object can be registered.²⁷

E. Avoiding conflicts with other international instruments concerning enforcement issues (arrest and judicial sales) (see para. 92 *et seq.* of the 2013 Study)

12. As noted above, the CMI Assembly approved a draft of an international convention on judicial sales of ships and their recognition, which has been submitted to the IMO's Legal Committee. The draft covers the prerequisites of international recognition of judicial sales of ships and their legal effects and provides *inter alia* that a judicial sale extinguishes prior rights and interests in the ship.²⁸ Due to the limited success of the International Convention on Maritime Liens and Mortgages of 1993 and its focus on security rights and interests, a stand-alone instrument on judicial sales is considered to be of added benefit by providing greater legal certainty in this regard.²⁹

13. Given their different scopes of application, substantial friction between a possible convention on judicial sales of ships and their recognition and a possible Maritime Protocol to the Cape Town Convention is not likely to arise. The draft only covers judicial sales of ships and their international recognition and aims to improve the legal position of the purchaser, whereas the Cape Town Convention covers in this regard the sale of the collateral in general as a possible remedy of the chargee.³⁰ The Cape Town Convention does not, however, address legal effects of a judicial sale. Likewise, the extinction of the security interest over the ship as a result of a judicial sale does not contradict the Cape Town Convention's provisions because the Convention does not exhaustively deal with the termination of security interests.³¹ A possible Maritime Protocol to the Cape Town Convention could, however, clarify this relationship by expressly stating that it does not affect the legal consequences of judicial sales of ships according to national law or other international instruments.³²

14. Another area to be monitored relates to the discharge of a registration. Article 6 of the draft convention on judicial sales of ships and their recognition stipulates the duty of the registrar to discharge any registered security rights or interest from the register upon the purchaser's

Pursuant to Section 8, the registration of smaller vessels is optional. Tetley, *Security Interests in Ships and Aircraft*, 2006 N.Z.L. REV. 689, 715 (2006).

²⁶ See 2013 Study, para. 75.

²⁷ See, e.g., for the registrability of maritime objects under French law, Bonassies and Scapel, *DROIT MARITIME*, paras. 145, 184 (2nd ed., 2010).

²⁸ See Draft International Convention on Foreign Judicial Sales of Ships and their Recognition Draft, arts. 2, 4(1), available at: <http://comitemaritime.org/Uploads/Judicial%20Sales/Recent%20Developments/Draft%20International%20Convention%20on%20Foreign%20Judicial%20Sales%20of%20Ships%20and%20their%20Recognition.docx> (last visited 14 April 2016).

²⁹ See 2013 Study, para. 69.

³⁰ See *id.*, para. 95.

³¹ See Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment*, OFFICIAL COMMENTARY, paras. 2.75 *et seq.* (3rd ed., 2013).

³² See 2013 Study, para. 95.

request. Pursuant to Article 20(3) of the Cape Town Convention, the discharge of the registration is subject to the consent of the party in whose favour it was made.³³ As the registrar under a possible Maritime Protocol³⁴ would not be bound by the possible convention on judicial sales like a national registrar of a Contracting State, the registration may not be discharged without such consent. A possible remedy to this problem might be a clarification in the possible Maritime Protocol that the registrar is to discharge the registration upon the purchaser's request if the State whose law is applicable to the security interest is Party to the possible convention on judicial sales. For the sake of legal certainty, the Protocol could foresee use of a declaration mechanism according to which States may declare that the security interest is to be discharged in case of a judicial sale of the vessel. In the absence of such a provision and where consent is not provided, the purchaser could be forced to bring an action against the party in whose favour the registration was made subject to the applicable domestic law. This costly and time-consuming procedure would undermine the purpose of the possible convention on judicial sales, which is intended to protect the purchaser by judicial sale and to ensure recognition of that sale.³⁵

ACTION TO BE TAKEN

15. Consistent with the 2013 Study's analysis and recommendation (see paras. 102-103 of the 2013 Study) and in light of the recent developments and updates provided above, the Secretariat recommends that further feasibility study on a Protocol to the Cape Town Convention on ships and maritime transport equipment be maintained on the Work Programme for 2017 – 2019 at a low level of priority. In this way, the Secretariat could continue to monitor developments to determine whether work in this important area is warranted and apprise the Governing Council accordingly.

³³ See Goode, *Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment*, OFFICIAL COMMENTARY, paras. 2.140, 4.149 (3rd ed., 2013).

³⁴ See 2013 Study, paras. 83-85.

³⁵ See IMO Legal Committee, 102nd Session Summary, <http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-102nd-session.aspx> (last visited 27 April 2016).



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5th May 2016

Mr José Angelo Estrella Faria.
Secretary-General
UNIDROIT

Your Excellency,

Protocols to the Cape Town Convention- Ships and Maritime Transport Equipment

We place on record our sincere appreciation of your support of the African Shipowners Association.

We are pleased to inform you that the:-

1. Association is in the final stage of setting up the Federation of African Shipping Lines. This organisation will procure more Vessels to flag African. This will require the support of International finance institutions. And the proposed protocol to the Cape Town Convention will give the needed comfort required.
2. The Nigerian government has expressed its willingness to develop a fleet and modalities are being right now worked out, and we expect that by the end of the year we expect other African countries to begin the process of National Fleet Development.

We believe that if approved the Protocol to the Cape Town Convention on Ships and maritime equipment will support the expansion of the African Fleet.

Please accept the assurances of our highest consideration.

Yours Faithfully,
For African Shipowners Association

Ms Funmi Folorunso
Ms Funmi Folorunso
Secretary General

Mr Temisan Omatseye - President
Mr Stanley Ahorlu - 1st Vice President
Madam Caroline Masala - 2nd Vice President