

HRVATSKO DRUŠTVO ZA POMORSKO PRAVO



ASSOCIATION CROATE DE DROIT MARITIME

CROATIAN MARITIME LAW ASSOCIATION

Member of Comité Maritime International

Rijeka, Republic of Croatia

Rijeka, 10 September 2012

Dear Mr. Gombrii,

Re: Comments by the Croatian Maritime Law Association on the 2nd Draft Instrument on the Recognition of Foreign Judicial sales of Ships

With reference to your letter of 2 May 2012, please find the comments by the Croatian Maritime Law Association on the 2nd draft Instrument on the Recognition of Foreign Judicial sales of Ships (hereinafter: the "Draft"), together with the proposed amendments.

Basic Principles - Geographic Scope of Application (Articles 2 and 9)

1. The Draft purports to extend the scope of application of the Instrument to all judicial sales, whether occurring in the State Parties or anywhere else in the world (Article 2).

This means that registrars and courts in the State Parties will have to create equally all judicial sales, irrespective of where they have taken place. Judicial sales taking place in non-Party States may not observe the standards of publicity required in the Instrument, and their effects should not be recognized in State Parties on the basis of the same automatism as the effects of judicial sales taking place in the State Parties.

The said automatism lies in the recognition of judicial sale on the basis of a Certificate of Judicial Sale. Such recognition is based on an assumption that the judicial sale in the issuing State was conducted in accordance with the requirements set out in Articles 3 and 4 of the Instrument. This assumption is logical in the case of judicial sales conducted in State Parties, but cannot be upheld in the case of judicial sales conducted in other States. Certificates issued

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in non-Party States (if they are issued at all) may even satisfy the formal requirements set out in Article 5 of the Instrument, but cannot guarantee that the judicial sales were actually conducted in accordance with the publicity requirements contained in the Instrument. And this may affect the quality of recognition rendered in the State Parties, by upholding the effects of judicial sales even in cases where the interests of the Interested Persons have not been safeguarded to the level provided in the Instrument.

2. If there is a political interest to have "a wide rather than a narrow scope of application", then, as a minimum, a provision should be added in Article 8, paragraph 1 of the Draft to the effect that recognition of a Judicial Sale conducted in a non-State Party may inter alia be refused if the Interested Person furnishes proof that the Judicial Sale was not in accordance with the requirements set out in Articles 3 and/or 4 of the Instrument.

3. The CMLA notes the solution contained in Article 9 of the Draft. The CMLA is of the opinion that the reserve envisaged in Article 9 should not be composed of two elements (i.e. (i) that the Judicial Sale was made in the territory of a State Party and (ii) that the Ship is flying the flag of a State Party). The way Article 9 is currently drafted, the reserve may be declared only in the way that it contains both elements. In the opinion of the CMLA, this is unnecessary. There should be a possibility to declare the reserve only with regard to the judicial sales made in the territory of State Parties.

Comments and Amendments on Individual Provisions

Attached are proposed amendments of the Croatian Maritime Law Association on individual provisions of the Draft.

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Yours sincerely,

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2nd Draft Instrument on Recognition of Foreign Judicial Sales of Ships
Comments by the Croatian Maritime Law Association on individual provisions

Draft Article	Proposed amendment / Comment	Reasons
<p><u>3, para. 1, sub-para. (e)</u></p>	<p>Retrieve the words <i>"the Embassy or Consulate of the ship's State of Registration to the State in which the Judicial Sale takes place"</i>, and add <i>"or, in case no such Embassy or Consulate is established in such State, to the nearest Embassy or Consulate of the ship's State of Registration"</i>.</p>	<p>Notification to a diplomatic or consular body of the ship's Flag State is very important for communicating the news of judicial sale into the Flag State. The CMLA notes that, as the result of the majority view in Oslo, this provision was deleted with the following reason: "the longer the list of addressees, the more chance of the notice being found to be sent insufficiently." The CMLA is of the opinion that this reason is not valid when it comes to embassies and consulates, because the chances of a notice being sent insufficiently to those addresses are next to none.</p> <p>It may also be of interest to note that the notice to be sent under sub-paragraph (d) (to the authority in charge of the ship's register in the State of Registration) will most probably be sent through the embassy or consulate of the ship's State of Registration to the State in which the Judicial Sale takes place.</p>
<p><u>4, para. 1</u></p>	<p>Replace <i>"shall be transferred to the Purchaser"</i> with <i>"shall be acquired by the Purchaser"</i>.</p>	<p>"Transferred" implies the procedure of transferring title. In many countries, the transfer of title is obtained by way of registration and the procedure is carried out by the registrar in the ship's state of registration. The effect of judicial sale is to provide the Purchaser with a title, capable of being registered in the ship register.</p>

4, para. 1	Delete the words " <i>in accordance with the law applicable</i> ".	Those words create a question as to which law is applicable, and imply that the Judicial Sale will have the result of transferring the title to the Purchaser only if the (unknown) applicable law so permits. This is all unnecessary.
5, caption (2)	At the end, insert "and that the ownership has been acquired by the Purchaser."	If acquisition of title by the Purchaser is one of the effects of the Judicial Sale pursuant to Article 4, this should be stated in the Certificate.
5	At the end of the paragraph, add: "and (3) that the Sale is not subject to regular appeal in the State in which the Sale is accomplished".	In the opinion of the CMLA, as long as any participant to the Judicial Sale has a possibility to challenge the Judicial Sale by way of a regular appeal, the Certificate should not be issued. The Certificate opens the path to international recognition, and the appeal may result in the Judicial Sale being annulled, which may create severe consequences.
5	It would be useful to provide a <u>form of such Certificate</u> (to be attached as a Schedule to the Instrument), in order to introduce uniformity and avoid doubts.	
6, para. 4	Replace " <i>shall not entertain</i> " with " <i>shall reject</i> " or " <i>shall decline</i> ".	In the context of earlier text in paragraph 4, the term " <i>shall not entertain</i> " should be taken to mean "shall not consider" or "shall not deal with". Now, where the legal action to challenge or nullify the judicial sale is finally upheld, the only logical reaction by the registrar is to reject or decline any request for deregistration or subsequent registration.

<p><u>8. para 1</u></p>	<p>Insert a new sub-paragraph (sub-para. (d)) to read:</p> <p><i>"(d) if the Judicial Sale took place in a non-Party state, that the Judicial Sale was not in accordance with the requirements set out in Articles 3 and/or 4".</i></p>	<p>If the Instrument applies to Judicial Sales conducted in any country, whether Party or not Party to the Instrument, there should be a possibility to avoid recognition of a Judicial Sale conducted in a non-Party state the on the grounds that the Judicial Sale did not meet the minimum publicity requirements set out in the Instrument. Otherwise, the requirements set out in Articles 3 and 4 would lose their basic purpose.</p>
<p><u>9</u></p>	<p>Amend the first sentence so as to read:</p> <p><i>"When signing, ratifying or acceding to this Instrument, any State may declare that (i) it will only apply the Instrument to the recognition of a Judicial Sale made in the territory of a State Party, or that (ii) it will only apply the Instrument to the recognition of a Judicial Sale made in the territory of a State Party, and the Ship is flying the flag of a State Party."</i></p>	<p>In the current text, the reserve consists of two elements (Judicial Sale carried out in a State-Party, and the ship flying the flag of a State Party). In the opinion of the CMLA, the second element need not apply jointly with the first. While the States should be given the opportunity to declare a reserve containing both elements, they should also have the opportunity to declare a reserve containing only the first element.</p>