3RD MARITIME LAW CONFERENCE IN BREMEN, 26 NOVEMBER 2016

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Conference Report

Since 2008, the international shipping industry and linked businesses face an unprecedented crisis. First, the economic downswing of 2007/2008 affected world trade and the amount of goods shipped. Then, an overcapacity of ships harmed the shipping business even more and deepened the economic peril for the industry. Inevitably, the crisis has produced large numbers of insolvencies of both shipping companies as well as maritime service providers. Due to the international character of shipping, the phenomenon of maritime cross-border insolvencies became a pressing issue.

With the topic "Maritime Cross-Border Insolvency – Between Harmonization of Law and Jurisdictional Competition", the 3rd Maritime Law Conference, which took place in Bremen on the 26th of November 2015, addressed the complex legal and practical problems involved. The biannual Bremen Maritime Law Conference Series started in 2011 and since then was hosted by the University of Bremen in collaboration with the 'Forschungsverbund Maritimes Recht', a network of research institutions and practitioners in maritime law in the Northwest of Germany. The conference welcomed around 150 participants at the venerable Schütting in Bremen, where Bremen's chamber of commerce and guild house is located since the 16th century.

The conference started with Oren Sussman's presentation: "Competition of Jurisdictions in Maritime Insolvency and Ship Arrest". Oren Sussman, Reader in Finance at the Saïd Business School, Oxford University, presented his analysis of the shipping market in respect of the numbers of insolvencies and the main locations for ship arrests. His findings were exemplified on a case study of the shipping company Eastwind. Although it went into insolvency, the number of its ships arrested was relatively low. Sussman concluded that the danger of a creditors run, the prevention of which is usually the rationale for state-regulated insolvency proceedings, is minor in the maritime industry and, therefore, the freedom of contracting should govern private restructuring. He further reasoned that the US Chapter 11 procedure is not a viable remedy and especially the procedure's characteristic automatic stay is often an unnecessary and artificial life-extending measure for the debtor with no benefit for the creditors.

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Based on data revealed by Sussman, the main jurisdictions for the arrest of ships are the UK and other Commonwealth countries. The highest numbers of arrests in relation to the actual ship traffic occur in Gibraltar, Singapore, Hong Kong and South Africa. This concentration led Sussman to the controversial conclusion that a global harmonization of the arrest and insolvency rules is not as much needed and important as claimed by legal academics, since jurisdictional competition has already led to a preferred legal regime, which can be interpreted as bottom-up harmonization.

The presentation of Oren Sussman was followed by a speech of Dr. Christoph Paulus, LL.M. (Berkeley), Professor at the Humboldt-University Berlin, who is a renowned expert in the specific legal field of international insolvency. In his speech "Maritime Insolvency and Harmonization" Paulus started off by emphasising the particular characteristics of shipping companies in insolvency: Their insolvencies are untypical, since usually there is only one main creditor – a financing bank or consortium – which is in a very strong position and often controls the whole insolvency proceeding. Also, the ship is often the only asset of the company in financial peril and has to continue to operate in order to generate revenue for the company, even after the filing for insolvency. The concentration on one mobile asset leads to problems regarding the court-granted automatic stay and the recognition of this automatic stay by foreign creditors and courts.

Looking at the maritime insolvency case numbers and their allocation in Germany, Paulus observed a move to certain courts, which he interpreted as "forum shopping". Paulus marked a distinction between "negative" and "positive" forum shopping. The negative form of forum shopping deprives the creditors of their rights and at an international level forces them into unknown foreign jurisdictions. The positive aspects of forum shopping are the specialisation of the courts at the preferred forum and the chance for both debtors and creditors to choose a forum that suits their needs. The insolvency systems in the European Union have reached a certain degree of harmonisation with the EU Regulation on Insolvency Proceedings 2000, which was redrafted in 2015. The United Nations initiatives in the field of cross-border insolvencies cumulated to the UNCITRAL Model Law on Cross-Border Insolvency in 1997. Despite these international harmonisation efforts there are still many pit holes when it comes to the interaction of insolvency and maritime law. The overlap of both systems - especially automatic stay and arrest procedures - are still unsolved. Paulus concluded, that without clear legislative guidance, courts are often left alone to decide these conflicting issues with the result of legal uncertainty.

Dr. Gralf-Peter Calliess, Professor at the Institute of Commercial Law, University of Bremen, delivered the final speech of the conference: "From Oléron to UNCITRAL: The Private International Law of Maritime Liens and Mortgages". His speech concentrated on maritime liens and ship mortgages, specific security interests of the shipping industry, and their role in the global harmonization of maritime law. Maritime liens date back to the medieval wine trading port of Oléron at the southwestern coast of France, where they were codified for the first time in favour of the crews of ships and maritime service providers. The maritime lien secures claims

against the ship. It travels with the ship and usually does not extinguish with the sale of the ship. However, its long history together with the fact that maritime liens and mortgages are well established in all leading shipping nations has not helped to find common international ground for unification. At the instigation of the Comité Maritime International (CMI) three attempts for unification have been undertaken, which resulted in the Maritime Liens and Mortgages Conventions of 1926, 1967 and 1993. Illustrated by a world map, Calliess showed that today a number of countries have signed and ratified one or more of these conventions. But not one of the leading shipping nations - UK, USA, China, Japan, Korea, Germany and Greece - became party to one of these conventions. He concluded that private law unification through international conventions has proven to be ineffective in practice.

As a consequence of such lack of international harmonization, the courts have to deal with foreign security interests in their arrest and insolvency proceedings under the applicable conflicts of law rules. In Germany, Article 45 (2) EGBGB (German Introductory Act to the Civil Code) is the central conflict rule for maritime liens and mortgages. Its consequent adherence to the principle of *lex causae* leads to the phenomenon of German courts accepting foreign maritime liens to be enforceable in German proceedings even though German law does not grant maritime liens for these particular claims. Surprisingly, the German legislator did not solve this contradiction when redrafting the German maritime law code in 2012. US courts adopt a different but similar liberal approach, whereas English courts strictly adhere to the *lex fori* principle and only accept foreign maritime liens that exist under English law as well. The differences between the conflicts of law rules, which can be indirectly chosen by virtue of forum shopping, leave much room for regulatory arbitrage. Nonetheless, Calliess concluded from the fact that ships continue to be financed that ship-owners and their creditors in practice seem to have found workable arrangements to overcome the resulting legal uncertainties.

Such workable arrangements were one topic of the following panel discussion on the question "Do we need further harmonization in maritime insolvency law?", which concluded the conference. Dr. Thilo Kuntz, LL.M., Professor at the Institute of Commercial Law of the University of Bremen, moderated the discussion between Giorgio Berlingieri, Vice president of CMI, Dr. Jan Asmus Bischoff, In house-counsel at a bank in Hamburg, Germany, Harald Köhler, Head of legal services at Bremer Landesbank in Bremen, Germany and Dr. Gerhard Liening, insolvency lawyer in Bremen, Germany.

The panellists discussed the pro and cons of further harmonization measures in the field of maritime insolvency. The practitioners remained sceptical with regard to continued treaty-harmonization of laws, as it might create more new legal problems than it solves. Instead, the expert-panel emphasised the importance of soft law instruments. It was argued that the maritime industry in general tries to avoid insolvency proceedings as they are expensive and time consuming. Especially the banks were said to prefer to negotiate out of court solutions for financially struggling shipping companies. Such agreements aim at restructuring the loan agreements or at

finding a smooth way to end the business. Reservations towards a further harmonization concerning a potential interference with existing EU insolvency regulations were expressed. In addition, it was argued that any measure weakening the position of ship mortgage holders would result in banks being less ready to grant credit to the shipping industry.

The three presentations and the panel discussion each were followed by lively debates, giving the audience, comprising academics as well as practitioners, the chance to take part in the discourse and to add valuable industry-specific insights to the debate. To be sure, the issue of maritime cross-border insolvencies will remain topical, although treaty harmonization is not only difficult to achieve, but also subject to various reservations.