

Belgische Vereniging voor Zeerecht – Association Belge de Droit Maritime

VZW – ASBL

Oprichting in 1896

Fondée en 1896

Raad van bestuur – Conseil d'Administration:
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Mr Stuart Hetherington

President of the CMI

Antwerp 25 September 2013

Dear President

Re: Judicial Sales of Ships - Beijing Draft

We refer to your letter dated 25 March 2013 concerning subject matter.

The Belgian Maritime Law Association (**BVZ-ABDM**) is satisfied with many of the amendments as they appear in the Beijing Draft International Convention on Recognition of Foreign Judicial Sales of Ships (**Beijing Draft**).

Although we very much appreciate the work done, we wish to make the following comments.

Language and legal culture

It is the position of BVZ-ABDM that the draft instrument should be made in English and French. At the Beijing Plenary Session, the French delegation reminded us that French is one of the two official languages of the CMI. It was set out by the French delegate that this is not a linguistic issue, even less a competition of linguistic influences, confessed to be lost by far and long time ago. But it is only upon drafting the instruments in both official CMI languages that possible conflicting concepts of the Common law and the Civil law become apparent and can be cured. This cannot be done after the approval of the text in one language, because it may cause the need to change the wording of the original language, in order to make two texts not only identical but also to have the same meaning notwithstanding the difference in legal culture and significance of legal concepts.

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European Union (EU)

Several provisions, among which article 7.3 and 7.4 designate a competent court for certain disputes. EU Member States are not authorized to enter into international conventions unless the EU instructs its Member States to do so. The jurisdiction provisions cannot be deleted from the draft without adversely affecting the purpose of this instrument.

In addition, in certain countries the judicial sale instrument is a court judgment, and as is the case for any jurisdiction matters, the EU Member States have transferred their sovereignty for those matters to the EU.

Further, it is also likely that article 4.3 of the Beijing Draft, commented below in relation to the MLM 1993, is not compatible with Regulation (EC) N° 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in Member States of judicial and extrajudicial documents in civil or commercial matters.

Therefore it is important to test the draft, once it is mature for this purpose, with the European Commission, Directorate General of Legal Affairs. We can arrange for a liaison with the said DG and we volunteer to do so.

MLM 1993

The Beijing Draft contains provisions governing matters also ruled by the International Convention on Maritime Liens and Mortgages, done at Geneva on 6 May 1993 (**MLM 1993**). We hereby also refer to the footnote referred to in article 3.4 of the Beijing Draft.

If the International Convention on Recognition of Judicial Sale of Ships (**JSS Convention**), when coming into effect, is on certain points incompatible with the MLM 1993, then the parties to the MLM 1993 cannot become a party to the JSS Convention without either breaching or denouncing the MLM 1993.

In Beijing, the Turkish delegation has repeatedly drawn the attention to this fact.

The BVZ-ABDM is of the opinion that this consideration has great merit. The CMI should therefore pay attention to any possible inconsistency. However the pursuit of consistency does not prevail over the goals to make an effective JSS Convention. We should have the courage to see this rather than to carry on making an instrument bound to collect dust on a shelf.

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The conflict between the MLM 1993 and the Beijing Draft mainly concerns the notice to the ship owner.

In an attempt to make the Beijing Draft compatible with article 11.3 of the MLM 1993, article 4.4. of the Beijing Draft reads as follows:

“The notice specified in paragraph 3 of this Article shall be in writing, and either given by registered mail, or given by any electronic or other appropriate means [which provide confirmation receipt] (1) ...”.

This draft refers to a footnote (1) which reads as follows:

“Notes: unresolved issue, 1. Concern that any deviation of MLM could immediately put MLM- countries in breach / a point to be checked. 2. If lack of receipt invalidates the Judicial Sale, the purpose of this Convention is defeated.”

Besides the conflict with the aforementioned Regulation (EC) n° 1393/2007, the provision in question would adversely affect the goals of the JSS Convention.

The corollary of “giving” is “receiving”. In the vast majority of cases, the shipowner does not “receive” the notice, regardless of how hard this is sought by the party initiating the judicial sale. The ship owner’s communication lines are no longer paid for so that faxes and e-mails do not get through, the office is no longer manned, the post box is taped to hinder any document to be deposited therein, etc.

An instrument which invalidates the judicial sale if a notice is not received by the ship owner, will cause ships to remain forever unsold or to enable the successful challenge of good faith judicial sales.

It is a crucial point of attention to word the notification in a way that a fair and realistic balance is found between the need to enable the Judicial sale to proceed in a valid way and the right of several parties to be aware of the sale. Thereby, one should give due regard to international conventions to which prospective parties to the JSS Convention are already party.

Does it make sense to try to re-invent the way to serve judicial documents over national frontiers, where widely ratified international instruments have already taken care of the matter ?

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Therefore, it is the opinion of the BVZ-ABDM that various existing international instruments (such as the two listed below), dealing with the service of judicial documents, be examined and considered for reference thereto in a revised Draft JSS Convention:

- Regulation (EC) N° 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in Member States of judicial and extrajudicial documents in civil or commercial matters; and
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (to see the wide spread ratification of or adhesion to this Convention, see http://www.hcch.net/index_en.php?act=conventions.status&cid=17).

Rather than avoiding this problem, it would be beneficial if the CMI could point out to the IMO this problem and suggest an amending protocol to the MLM 1993. This would not only take care of the problem of the inconsistency between both instruments, but would also dramatically increase the number of ratifications of the MLM 1993, including the ratification or adherence by major port nations. Since the CMI is the author of the MLM 1993, the success of the MLM 1993 would benefit to the CMI.

The CMI maintains outstanding contacts with the IMO, so that it appears that a well phrased proposal is likely to be welcomed by the IMO.

Challenge period: too long

Article 7.5 reads as follows:

“No claim challenging a Judicial Sale shall be admitted unless it is presented within three months of the date of the Judicial Sale as recorded in the Certificate. This three-month period shall not be subject to any suspension, interruption or extension whatsoever.”

The BVZ-ABDM applauds the review of the ability to challenge the sale. However, we are of the opinion that the 3 months period is by far too long.

No serious bidder and ship financier will take the risk to pay, finance, repair and operate a ship so long as the sale of the ship can be challenged and nullified. No prospective purchaser will effectively bid if he or she is at risk to pay for the price, be responsible for the ship but being unable to operate the ship so long as the validity of the sale of the ship can be contested, which may take years. It is therefore standard practice that the sale conditions provide for the

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duty to pay the price only after the period allowed for challenge has expired. Also, a ship will not be allowed to sail, unless the sales price is paid. The three months challenge period is too long, adding up to the, say two or three months, which have already elapsed from the start up of the foreclosure. Belgian law provides for a 15 days period as from the final adjudication, this is approximately two months and a half as from the first notification in respect of the judicial sale, and this appears to be sufficient, bearing in mind that the ship is a high loss making asset as long as not operated and that in practice, the foreclosed ship owner does not object or anyhow intervenes.

An instrument that does not take into account the reality of the proceedings will have adverse effects.

The BVZ-ABDM accordingly proposes to leave the decision on the length of the challenge period to the national legislator.

Industries concerned

The BVZ-ABDM further wonders whether the industries concerned, such as the ship owners and ship financiers have been consulted and what their opinion is. The authorities, whether national or regional (EU), that will be contacted to direct the draft to a ratification or adhesion, will no doubt ask how the industry has been involved in the law making process.

Authorities

The BVZ-ABDM has already approached the immediate advisors to the Belgian Minister of Justice and of the Belgian Minister of Foreign Affairs to inform them of the ongoing making of the JSS Convention. These advisors have expressed great confidence in the recommendation that the BVZ-ABDM will make in respect of the ratification of the JSS Convention and will give full support to the BVZ-ABDM's recommendations and endeavors in that respect. The Belgian government makes available the Belgian representation officer with the EU DG legal affairs to liaise with the EU officers in respect of this project.

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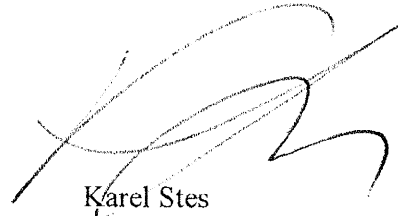
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We look forward to further discussing these issues and those raised by fellow MLA's in Dublin.

Sincerely yours,



Benoit Goemans
Vice-President



Karel Stes
President