

## **Draft Instrument on the Recognition of Foreign Judicial Sales of Ships**

Comments of the German Maritime Law Association

By email of 8 August 2011, the German Maritime Law Association (the Association) received from CMI a copy of the Draft Instrument of the Recognition of Foreign Judicial Sales of Ships (Draft) together with an invitation to respond with comments.

### General Remarks

The Draft concerns the recognition of “Judicial Sales” as defined in Art. 1 No. 8 of the Draft. A “Judicial Sale” is “... any sale of a ship ...” which satisfies certain requirements. A sale, by itself, even if carried out by or under the control of a court, is basically just a sequence of factual circumstances. It may be perhaps more correct in this regard to shift the focus of the Draft away from the sale towards the court’s ultimate decision which is, according to the law of the respective state, the basis for the passing of ownership in the vessel (and other effects) to the party who acquired the vessel (usually the highest or only bidder). This decision will be referred to as the “Final Decision”. It may either be an express order declaring the acquirer to be the new owner or an order dealing primarily with another aspect but which, based on the law of the respective state, is a requirement for the shifting of the property in the vessel to the new owner (and other effects).

Secondly, considering the idea of “Recognition”, it is perhaps not the sale which is recognized, but rather its legal effects. This is so irrespective of whether the focus is on the sale as a set of facts or on the Final Decision (see the preceding paragraph). It would seem that this concept, i.e. that certain legal effects are recognized, is also the underlying principle of the Draft, albeit not expressly spelt out.

If it is correct that the legal effects of a sale (or Final Decision) are recognised, the question arises how these effects are determined. The usual concept in European Civil Procedural Law concerning the recognition of judgements is that the relevant effects are those the decision (the First Judgement) has according to the law of the state in which it was rendered. These are accepted by the courts of other (member) states and thus extended into this state. This would apply to the full range of effects, even if a corresponding decision of a court in the state where recognition is sought (Recognising State) would not have these effects. Also, if a corresponding decision in the Recognising State would have further effects as compared to the First Judgement, its effects would not exceed those of the First Judgement.

Based on the foregoing, there seem to be two approaches the Draft may follow. Firstly, the Draft may accept the effects of the Judicial Sale (or Final Decision) in the state where the vessel was sold *in toto* and extend them as they are into the Recognising State, irrespective of what effects a corresponding decision in the Recognising State would have.

The second and perhaps better route may be that the Draft itself specifies what (minimum) effects a Judicial Sale (or the Final Decision) has in any contracting state, namely the passing of property in the vessel to the acquirer and the extinction of third party property rights in the vessel. These basic effects would then, through the Draft Instrument, be extended to other contracting states. The instrument would not be concerned with other effects of the Judicial Sale (or the Final Decision) which may be recognised by the Recognising State in accordance with its domestic procedural law. Art. 1 No. 3 of the Draft seems to address this concept by accepting as a “Court” only courts with certain powers, i.e. to sell the vessel free of any third party rights.

If the foregoing considerations are to be observed, a general overhaul of the Draft Instrument may be required.

#### EU Member States’ Restrictions

As a matter of European law, Member States are not longer competent to ratify conventions in areas where the European Union (EU) has issued legal instruments. The European Court of Justice clarified in a number of judgements that through these acts the Member State’s authorities to take care of their foreign affairs shifted over to the EU. One of the areas where there are European provisions is the recognition of foreign judgements (see Art. 32 *et. seq.* of Regulation 44/2001). As a result, it would seem that the EU Member States would be prohibited from ratifying the Draft Instrument. This probably would be so even if the focus would remain on the Judicial Sale and not on the Final Decision (see above). Therefore, in order to ensure that the Draft Instrument can be applied by the EU Member States, the Draft should allow international organisations like the European Union to become parties of the Convention.

#### Art. 1 No. 5

The “Flag State” test in Art. 1 No. 5 is two-fold and refers to (1) the flag the ship flies and (2) its entitlement to do so. Viewed together, the former is a question of fact, the latter a purely legal question. This definition deviates from the usual references to flag states, which

only rely on the right to fly the flag. The Association suggests to refer solely to flag the vessel is entitled to fly.

It would seem that the definition of Art. 1 No. 5 becomes relevant in one case only, i.e. in Art. 3 (1) (e). Also, there is an indirect reference to the Flag State in Art. 9. The Association suggests to consider to include in the definition of Art. 1 No. 5 a clarification as to which point in time is relevant, e.g. whether the respective vessel is flying the flag of a particular state before or after the Judicial Sale. Art. 3 (3) applies to the time before the Sale. This is less clear, it seems, in respect of Art. 9.

#### Art. 1 No. 9 and 10

The definitions in Art. 1 No. 9 and 10 concerning “Maritime liens” and “Mortgages” etc. both refer to the “recognition” of such rights by the law of the state in which the ship is sold. It may perhaps be confusing to use the word “to recognise” in this context, as it is a different kind of recognition as compared to the recognition of foreign Judicial Sales of ships. Rather, Art. 1 No. 9 and 10 require an investigation whether, as a matter of the particular state’s law, the requirements for a maritime lien or mortgage etc. are met.

Furthermore, Art. 1 No. 9 and 10 are provisions of an international private law nature, because they determine that, in relation to maritime liens and mortgages, the law of the state in which the ship is sold is relevant. In this context, it should perhaps be clarified whether the substantial law of the state in which the ship is sold is relevant, thus excluding the application of its international private law rules, or whether these may be applied to the effect that the maritime lien and/or mortgage is considered under the substantial law of yet another state. If this is to be avoided, the words “... to the exclusion of the international private law principles of that state” may be added to Art. 1 No. 9 and 10.

The problems EU Member States may have in ratifying the Draft in relation to the recognition aspect (see above) would not occur in respect of the points discussed here. The EU Rome I and Rome II Regulations deal with contractual and non-contractual international private law principles. The issues addressed in Art. 1 No. 9 and 10, however, would be neither of this but may be categorized as private international “property law”, in respect of which there are no EU regulations.

The definitions in Art. 1 No. 9 and 10 seem to lay down an important concept of the Draft. By focusing, in respect of “Maritime liens” and “Mortgages” etc., on the law of the state where the ship is sold, and by recognizing the effects of the Judicial Sale in that state (or the Final Decision of that state’s court), only these “Maritime liens” and “Mortgages” etc., are

extinguished. As a result, other “Maritime liens” and “Mortgages” etc. remain untouched by the Judicial Sale. Also, Art. 1 No. 9 and 10 would defeat the argument, raised before the court of a Recognising State, that the Judicial Sale was unlawful because the court accepted “Maritime liens” and “Mortgages” etc. which are unknown in the Recognizing State. If at all, this point could only be advanced in under Art. 8 (2).

#### Art. 1 No. 14

The definition of “Ship” in Art. 1 No. 14 requires that the ship is used in commercial trade. The Association suggests to consider whether this proviso should be deleted, as the same questions of recognition of foreign judicial sales of ships may arise in respect of a non-commercial vessel such as mega-yachts used for private purposes.

#### Art. 3 (3)

Within the framework of Art. 3, its paragraph (3) specifies the requirements as to the notice of the Judicial Sale to certain persons. The Association agrees that these requirements should be spelt out in the Draft rather than to rely on the domestic procedural law on the service of legal documents of the state where the vessel is sold. Perhaps Art. 3 (3) should clarify that the conditions are minimum requirements and that a state party may still apply its own law, if its requirements exceed those of Art. 3 (3).

Also, it would seem that these provisions may be in conflict with EU Regulation 1348/2000 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters. Should this be the case, the EU member states again may be prohibited from ratifying the Draft (see above).

#### Art. 5

The Association suggests to consider to include in Art. 5, which is concerned with the contents of the Certificate of Judicial Sale, a reference that the Judicial Sale (or Final Decision) has become binding on all parties and can not be challenged any more. This could be done either by way of specifying that the Certificate of Judicial Sale may only be issued once the Judicial Sale (or Final Decision) in fact has become binding. Alternatively, one may consider to require the respective court to issue a preliminary certificate and then, once the Judicial Sale (or Final Decision) is not longer subject to appeal, the final certificate. Such a provision may also render Art. 6 (4) and (5) of the Draft superfluous.

## Art. 7 (2)

The provision of Art. 7 (2) highlights the role and function of the Certificate of Judicial Sale. It serves as *prima facie* evidence that the Judicial Sale was carried out in accordance with the law of the respective state and perhaps that the Judicial Sale (or the Final Decision) is binding on all parties (see the preceding paragraph).

However, the Association suggests to consider that the use of the Certificate should not be restricted to arrest proceedings brought against the (new) vessel owner in another state, as contemplated in Art. 7 (2), but generally to all questions in respect of which the recognition of the Judicial Sale (or the Final Decision) is relevant, including arrests.

## Art. 8 (1A) (b)

Paragraph (1A) auf Art. 8 of the Draft outlines the circumstances in which the Recognition of a Judicial Sale (or of the Final Decision) may be refused. Inter alia, lit. (b) specifies that it may be claimed that the Judicial Sale was not accomplished in accordance with the law of the state in which the Judicial Sale took place or the provisions of the Draft Instrument. Taken literally, even a very minor defect concerning the proceedings in relation to the Judicial Sale, e.g. in relation to deadlines or the formalities of the notifications of the Judicial Sale, may result in a full refusal of the Recognition, possibly with severe consequences for all parties involved. The Association would suggest to abandon Art. 8 (1A) (b) completely and to leave it to the respective party to challenge the Judicial Sale (or the Final Decision) in the state where the vessel was sold. The decision whether or not a Judicial Sale was properly carried out is best left to the respective Appeal Courts of that state. Alternatively, the application of Art. 8 (1A) (b) may expressly be restricted to cases of very serious deficiencies (which then would need to be identified).

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