



Nordisk Legal Services

Den norske sjørettsforening

Att: Erik Røsæg

Georg Scheel, adm.direktør, advokat (H)
Frode Grotmol, direktør, advokat (H)
Knut Erling Øyehaug, advokat, lic. jur.
Lasse Brautaset, attorney, USA
Susan Clark, attorney, USA
Egil André Berglund, advokat
Bernard Glicksman, solicitor, England
Michael Brooks, solicitor, England
Henrik Aadnesen, advokat
Joanna Evje, barrister, England
Karl Even Rygh, advokat
Joanne Conway, solicitor, England
Camilla Bråfelt, advokatfullmektig, dr. jur.
Norman Hansen Meyer, advokat
Paige Young, attorney, USA
Ylva MacDowall Hayler, advokat

Nordisk Legal Services Pte. Ltd.
Magne Andersen, direktør, advokat
Kumarason Thangaratnam, solicitor, England
Jude McWilliams, solicitor, England

Your ref.:

Our case no.: 104 NOR

Date: 4 June 2012

Please quote the case no in all correspondence

Instrument on Recognition of Foreign Judicial Sales of Ships

Reference is made to your e-mail of 8 May 2012 where I was asked to comment on the second working draft of CMI's Instrument on Recognition of Foreign Judicial Sales of Ships (hereinafter referred to as the "Instrument").

The Instrument consists of 9 articles and regulates the recognition of foreign judicial sales of ships. There are however also some articles that are imposing requirements on how the judicial sale in a country shall be carried out and what the effects of a judicial sale shall be.

Generally, the Instrument is substantially in line with current Norwegian legislation. There are however some differences that will be emphasized in my below review of the Instrument.

* * *

Article 1 - Definitions

As a general comment the use of capital letters in the definitions and throughout the instrument appears to be inconsistent. All terms that are defined in article 1 should be written with a capital first letter. When these terms are used throughout the instrument the same should apply – all defined terms should be written with a capital letter. An example is the definition of Court in Article 1 item 3, where several other defined terms are written with small letters only (mortgages, "hypothèques", charges, maritime liens). The same applies to the definitions in items 2, 5, 6, 7, 8, 9, 10, 15, 16.

In item 7 the following terms are used as alternatives "*Judicial sale of a ship*", "*judicial sale*" and "*sale*". In my view, the term "*sale*" should not be part of this definition. The wording of the instrument would be clearer only one term is used throughout the document. The most correct term would in my view be "*Judicial Sale*". Use of the term "*sale*" when meaning judicial sale could create some confusion even though it is defined to be judicial sale only. It should be noted that if the term "*sale*" is used, it should be used with a capital letter in the



Nordisk Legal Services

relevant articles (in particular article 4) in order to highlight the fact that the term has a special meaning in the instrument.

The definition of “*State of registration*” refers to the register where a ship is “permanently” registered. The wording is in my view somewhat unfortunate due to the fact that the registration of a vessel will rarely be permanent – it can be changed several times during the vessel’s life. The purpose of introducing the additional wording regarding permanency is to exclude bareboat registration. This purpose can be achieved by either explicitly exclude bareboat registration or replace the word “*ship*” with “*the Ship’s ownership*”.

Article 2 – Scope of Application

The area of application is unusually wide. It shall apply to recognition of judicial sale taking place in any state (provided that the state is a UN member). A party to the Instrument may however pursuant to article 9 limit the scope of application by declaring that it will only apply the Instrument to the recognition of a judicial sale made in the territory of a state that is party to the Instrument.

In my view the natural starting point would be the opposite: The Instrument shall only apply to the recognition of judicial sales that has taken place in states that are parties to the Instrument, with a right for the states to opt for a wider application of the Instrument. Ideally, the Instrument should be adjusted accordingly. However, as long as there is a possibility for a state to limit its application of the Instrument pursuant to article 9, the present wording should not be problematic.

Article 3 – Notice of Judicial Sale

In article 3 all defined terms used in items a) to c) should be given capital first letters.

The list of who the court shall give notice of a judicial sale to is in accordance with Norwegian law. One concern, however, is that the owner of the vessel is not required to give details of any unregistered interests, including any maritime liens, over the vessel. If the owner of the vessel is obliged to inform of all lien holders or other with unregistered interests in the vessel, the risk of sales being carried out without the lien holders being informed will decrease and it will be easier for the courts to find and notify all lien holders.

I note that the notice from the court to be provided pursuant to article 3 is not required to contain information about the name of the applicant and his claim unless the court finds it necessary pursuant to item (c). This is contrary to the Norwegian Enforcement Act section 11-16 pursuant to which the notice shall



Nordisk Legal Services

contain information of the applicant and his claim.

Article 4 – Effect of Judicial Sale

As stated above, I recommend that the term “Judicial Sale” is used instead of the term “Sale” throughout the Instrument. This applies particularly to article 4.

It appears that the instrument does not require that the purchase price must be sufficient to cover all mortgages and liens with better priority than the applicant in order for a judicial sale to be carried out. However pursuant to article 4, it is a requirement to conduct the sale in accordance with the state where the sale is accomplished. Presumably the laws of the member states have requirements regarding the purchase price and the position of mortgages and liens with better priority than the applicant.

Section 5 – Issuance of a Certificate of Judicial Sale

I presume that the certificate that shall be issued by the court regarding the judicial sale will specify who the vessel has been sold to. This is however not required by the instrument. Ideally this should be unquestionable and uncontroversial. I therefore suggest inserting the words “to the Purchaser” after the word “sold” in the fifth line.

Article 7 – Recognition of Judicial Sale

In article 7 the term “State Party” is used. This is not a defined term. Even though the meaning of the term is obvious it should be defined in article 1.

Furthermore, in line with our comments to article 2 above, the starting point for the application should be recognition of judicial sales carried out in other member states. Consequently in the first paragraph the word “Party” should be inserted after the word “State” in the third line. Likewise, this application should also apply to arrests governed by article 7 second paragraph and the words “in a State Party” should be inserted after the words “Judicial Sale” in the first line of the second paragraph.

In the fourth paragraph the word “a” before the word “action” should be replaced by “an”.

Article 9 – Restricted Recognition

As previously mentioned I am of the view that the starting point for the application should be opposite of the starting point in the Instrument. If the



Nordisk Legal Services

starting point in article 2 is changed, then article 9 should be amended accordingly; a state party should be given right to choose a “wide application”, where the instrument will be applied to judicial sales in any State.

* * *

Yours sincerely

Nordisk Legal Services

Camilla Bråfelt

NOR/