

Deutscher Verein für Internationales Seerecht

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Beijing Draft International Convention on Recognition of Foreign Judicial Sales of Ships (Done at Beijing on 19 October 2012)

Dear Mr. President,

I refer to your letter of 23 March 2013, addressed to the Presidents of all national Maritime Law Associations. The German Maritime Law Association would like to thank the CMI and the International Working Group for their substantial work to prepare a Draft International Convention on Recognition of Foreign Judicial Sales of Ships which, due to the place where the Convention was drafted, shall be known as the “Beijing Convention”.

The “Beijing Draft”, done at Beijing on 19 October 2012, consists of 9 Articles which deal with the requirements for procedures and recognition of judicial sales of ships. At present, the international legal situation about the recognition of foreign judicial sales of ships is unsatisfactory and largely depends on the existence of either bilateral treaties or multilateral instruments on recognition or enforcement of foreign judicial decisions. There exists no world-wide mechanism for the recognition of foreign judicial sale of ship decisions which leaves room for legal uncertainty.

The Beijing Draft shall ensure that the ownership of the vessel a person has purchased in a judicial-sale-procedure, following which the purchaser obtained title to the vessel, is accepted in other jurisdictions and can be recorded in the relevant ship registers. Greater legal certainty is always appreciated and it is the opinion of the German Maritime Law Association that the Beijing Draft has to be seen in this light. Its main objective is to arrange for an improvement of legal protection of purchases of ships in judicial-sale-proceedings and from a German point of view the Beijing Draft is likely to achieve this.

The German MLA has established an internal working group in order to further discuss and evaluate the Beijing Draft. This working group comprised of maritime lawyers, shipowners, ship finance experts and academics. Please find below the comments of the German MLA regarding the Questionnaire:

Generally, the Beijing Draft is in compliance with the present German legislation. However, in view of adopting practical needs of the industry we nevertheless would like to emphasise four aspects which should be considered:

1. Article 4

Article 4 deals with the effect of a judicial sale. In order to avoid any misconception it is recommended to amend the last sentence of para 1 ending with the words “... shall be transferred to the purchaser in accordance with the law applicable” by the words “in the state in which the judicial sale is accomplished.”

2. Article 5

Article 5 of the Beijing Draft describes the contents of the certificate which shall be issued once a judicial sale has been completed in accordance with the provisions of the Beijing Draft. In order to increase the practical feasibility we recommend that a specimen of such a certificate shall be attached to the Beijing Draft.

In the European community this concept is well established. The Brussels-I-Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters) has adopted this procedure by referring to specimens in its annexes. Annexes V and VI to the Brussels-I-Regulation provide specimen of certificates confirming the enforceability of judgements, court settlements and authentic instruments. Specimen for certificates/declarations having a comparable purpose can be found in Annexes I to III to the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in Annex VII to the Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in Annex IV to the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in Annexes I to IV to the Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations and in Annexes I to IV to the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

A further argument supporting the proposal to attach a specimen is the common practice in the shipping industry to work with specimen and model contracts.

Finally, the certificate of judicial sale appears to be the fundamental important document of the Beijing Draft for providing conclusive evidence that a judicial-sale-procedure has been carried out in compliance with the Beijing Draft and all rights, title and interests existing in the ship prior to its judicial sale are extinguished and a purchaser has become the new owner. A specimen attached to the Beijing Draft would not only clarify the contents to be included in the document, which is described in Article 5 of the Beijing Draft, but in addition would facilitate the

identification for the purchaser, the mortgagees and, most importantly, for the registrars of the ships registry where the vessel was registered prior to the judicial sale.

3. Article 6

Article 6 deals with the organisation and registration of the ship following a judicial sale. The ships register where the ship was registered prior to the judicial sale shall become bound to delete all registered mortgages or registered charges (para 1 of Article 6). Such deletion shall take place upon production by the purchaser of a certificate, provided for in Article 5. The purchaser may, however, become obliged to file an application with the respective ships register in order to start the deletion procedure. The mere filing of such an application in Germany incurs the payment obligation for the fees of the ships register. Since it is the objection of the judicial sale to transfer a clean title to the purchaser without any encumbrances it should be clarified that the purchaser shall not become responsible for deletion fees and charges which, in an ordinary sale and purchase transaction, would be borne by the seller. In order to avoid this situation for the purchaser it should be clarified that the ships register where the ship was registered prior to its judicial sale shall be bound "*ex officio*" to delete all registered mortgages or registered charges from its register and issue a certificate of deregistration or of deletion as the case may be.

In Para 3 of Article 6 it may be prudent to clarify that other languages are acceptable as well, provided the registrar accepts these other languages. In Germany, for example, English documents are acceptable despite the general rule that the official language is German.

Para 4 should clarify what is meant by "certified". It is recommended to replace this word by saying that a duly apostilled or legalised copy of the said certificate is required.

4. Article 8

Article 8 is crucial as it deals with the circumstances in which recognition of a judicial sale may be refused or suspended. In para 3 a general principle is laid down that a recognition of a judicial sale may be refused if the Court in which recognition is sought finds that this would be contrary to the public policy of the state where the Court is located. This public-policy-exception has been discussed in the German working group preparing these comments at length and it is the strong recommendation to narrow-down the public-policy-exception as much as possible in order to avoid Courts in other states to use the public policy as a mode to review the whole judicial sale procedure.

Situations are likely that the state of the country where the ships register is located in which the ship shall be deleted, following a judicial sale in another country, may refuse to deregister the vessel because of its own standards to be complied with for deregistration of vessels which may be either higher or not in compliance with the

provisions of the Beijing Draft. From a German law point of view we are confident that German Courts would not raise the public-policy-exception if the judicial sale is carried out in compliance with the provisions of the Beijing Draft.

The Brussels-I-Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters) in its Article 34 para 1 contains a provision similar to the public-policy-exemption of Article 8 para 3 of the Beijing Draft.

The difference is, however, that under the Brussels-I-Regulation a recognition would need to be **manifestly contrary** to the public policy of a member state in order to rely on the exception. Similar wording can be found in Article 34 para 1 of the (new) Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters of 30 October 2007).

Whether or not the word "manifestly" would be sufficient to cover the concern of a misuse of the public-policy-exception is uncertain. We, however, believe that additional wording is required to assure that the infringement upon the fundamental rights must be substantial in order to permit a refusal of a recognition of a judicial sale. Without such additional wording the aim for harmonizing the international legal situation about the recognition of foreign judicial sale of ships would be seriously weakened.

Hamburg, 23 July 2013

Yours sincerely



Secretary German Maritime Law Association
(Tilo Wallrabenstein)