



Judicial Sale of Ships

The Beijing convention will allow prospective purchasers to bid for distressed assets with increased confidence.

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1. Executive Summary

The Beijing Convention provides a framework for the rights and obligations of stakeholders following judicial sale of ships, whether that be by judicial auction or by way of private treaty. The framework increases protection for prospective purchasers of those ships, usually being sold in the context of enforcement of maritime claim proceedings. The clearly stated aim of the Convention is to realise better value for ships sold in distressed circumstances, on the basis that higher prices benefit debtors and creditors alike. In this update, we take a look at the main provisions of the Beijing Convention and what they mean for stakeholders in judicial sales of vessels.

2. What is the purpose of the Convention?

At its core, the Beijing Convention recognises that it is to the benefit of all stakeholders – debtors and creditors alike, that where high value ships are sold by courts in enforcement proceedings, the potential value of those assets is fully realised. That premise is neatly summarised in the Convention’s preamble:

‘Mindful ... [o]f the high economic value of ships ... and of the function of judicial sales as a means to enforce claims ... Considering that adequate legal protection for purchasers may positively impact the price realised at judicial sale of ships, to the benefit of both shipowners and creditors ...’

3. How did the Convention come about?

On 5 September 2023, representatives of more than thirty states gathered in Beijing for the signing of the ‘United Nations Convention on the International Effects of Judicial Sales of Ships’. Neither the Convention’s full title nor its acronym (**UNCIEJSS**) roll easily off the tongue, and therefore we refer to it here simply as **The Beijing Convention** or simply **The Convention**.

The Beijing Convention has been fifteen years in the making, its origins reportedly from a proposal made at a Comité Maritime International (**CMI**) event in Dubrovnik in 2007. The proposal was followed by the establishment of an International Working Group, in turn, followed by *'Beijing Drafts'* presented by UNCITRAL and discussed and revised at subsequent CMI conferences.

Fifteen states offered up their signatures this Autumn in Beijing, including China, Burkina Faso, Comoros, El Salvador, Grenada, Honduras, Kiribati, Liberia, São Tomé and Príncipe, Saudi Arabia, Senegal, Sierra Leone, Singapore, and Switzerland. Since then, Tanzania has also added its signature. Under Article 21, the Convention enters into force 180 days after the date of the deposit of the third instrument of ratification. The countdown proper hasn't yet started.

At first glance, the list of signatures doesn't appear to be an all-star maritime line-up, however, it does warrant further scrutiny. In terms of gross tonnage: China is now reportedly the world's largest ship-owning country, having displaced Greece's crown; Liberia is reportedly the largest Registry, having overtaken long-standing incumbent, Panama; Singapore is the world's largest transshipment port and bunkering hub. Whilst Switzerland may be unlikely to host a judicial sale(!), it is still a major trading hub with significant interests in shipping. Aside from those who have already signed up, there is also optimism that further nation states are poised to add signatures, including a number of European Union states, following positive murmurings from the European Commissioner.

4. Do we need another Convention?

When a ship is sold by a court, it is usually a distressed asset, often encumbered by mortgage and trade debt with unknown numbers of creditor claimants waiting in the wings. In a common law jurisdiction, a court bill of sale, signed by the admiralty sheriff or marshal on behalf of the court will usually confer clean title on this ship. This means that the ship is 'cleaned' of pre-existing

encumbrances, such as mortgages, charges and liens. If that is right, then why do we need the Beijing Convention?

The answer is that the clean title which the court bill of sale confers on the ship is not always respected; by creditor claimants whom might take action against the ship in a less sophisticated legal jurisdiction; by ship registries which may, on receipt of conflicting accounts as to the state of ownership, refuse to execute deregistration of the ship. Prospective bidders may be concerned about these risks. As such, even with a court bill of sale conferring clean title, prospective purchasers build 'risk' into the price which they are willing to pay for those ships. In other words, the purchaser pays less than the ship is actually worth. This is not just to the detriment of the creditors of the ship, who (assuming there is insufficient value in the ship to meet all of the debts) get cents on the dollar, but also to the shipowner who may remain exposed to residual debt or claims *in personam*.

The Beijing Convention aims to provide a uniform set of rules to regularise the position between state parties to the Convention. The theory is that this will provide increased protection for purchasers of judicially sold ships, who shall then bid for those ships with increased confidence. The Convention's protection comes in the form of a number of tools, including the creation of a new central publicly searchable repository hosted by the Secretary General of the International Maritime Organisation. We look at some of these protections in more detail, below.

5. How does the Convention protect prospective purchasers?

Article 6 of the Beijing Convention sets out the international effects of a judicial sale: '*A judicial sale for which a certificate of judicial sale referred to in article 5 has been issued shall have the effect in every other State party of conferring clean title to the ship on the purchaser*'.

So, there it is in black and white. Every state party shall respect the clean title conferred on a judicially sold ship by another state party. Of course, there are exceptions. This is a Convention after all. One exception is set out at Article 10, in which the Convention considers that a *'judicial sale of a ship shall not have the effect provided in Article 6 in a State party other than the State of judicial sale if a court in the other State party determines that the effect would be manifestly contrary to the public policy of that other State party'*.

Whilst another 'public policy' exception (similar to that employed in the New York Convention) may bring a small shiver to those of us used to seeing such provisions abused, the drafters of the Convention have sought to minimise this risk by raising the threshold point at which the 'public policy' exception can be invoked. In this case, the international effect under Article 6 shall only be displaced where that effect is *'manifestly'* contrary to public policy. The exact nature of *'manifestly'* will undoubtedly be tested if (and when – positive thinking!) the Convention comes into force. In the meantime, it can be said with certainty that the threshold is higher than it would be without addition of the word *'manifestly'*. Indeed, the Explanatory Notes to the Convention confirm that the high threshold is designed to avoid an abusive or overly expansive application of the public policy exception: *'It emphasises that the public policy [exception] is expected to apply only in exceptional cases'*.

6. So, what is the certificate of judicial sale mentioned in Article 6?

The practical framework introduced by the Convention revolves around the issue of a certificate of judicial sale under Article 5. The certificate, of which a model form is included at Annex II to the Convention, is to be issued by the court or other competent authority that conducted the judicial sale. As an aside, it is notable that the Convention contains anti forum-shopping provisions at Article 9, which state that the courts of the state of judicial sale have exclusive

jurisdiction to hear any applications to avoid judicial sale. Article 5 prescribes the statements and factual information that must be included in the certificate of judicial sale.

Importantly, these include statements that the ship was sold in accordance with both the law of the state of judicial sale and that the judicial sale has conferred clean title to the ship on the purchaser.

7. Practically speaking, how does the Convention assist prospective purchasers?

As noted above, the fundamental protection which the Convention offers is to be found at Article 6, which sets out that judicial sale shall have effect in every other state party of conferring clean title to the ship on the purchaser.

However, it is not all ideology, and the Convention provides a framework of practical support for a prospective purchaser. Article 7(1) provides the purchaser with assistance with ship registries. At the request of the purchaser and upon production of the certificate of judicial sale, a ship registry is obliged (a) to delete any mortgage or hypothèque; (b) delete the ship from the register and issue a certificate of deletion; (c) register the ship in the name of the purchaser or (d) take note of any other relevant particulars in the certificate of judicial sale.

The importance of these provisions ought not to be underestimated, as there have been instances of purchasers of vessels at judicial auctions having not been able to secure the deletion of the ship or charges over it from its home registry, often the result of the previous owner petitioning that registry not to effect such changes. These are difficult situations which could, for example, put at risk a charter fixed by the purchaser. The Convention seeks to cut through the interference.

Article 8 of the Convention provides increased protection against prospective arrest of the ship in respect of a claim which pre-dates the judicial sale - in other words, where the clean title conferred by the judicial sale is not respected. Article (1) provides that where an application for arrest of the ship is brought for a claim which arises prior to the judicial sale, upon production of the certificate of judicial sale, the court shall dismiss the application. Article 8(2) of the Convention similarly provides that where the ship is actually arrested for a claim arising prior to judicial sale of the ship, the court shall order release of the ship. In both scenarios, the wording of Article 8 gives the court no discretion, but makes it mandatory, upon production for the certificate of judicial sale, for the application to be dismissed or for the court to order the release of the ship.

One exception to this mandatory requirement is where to dismiss the application or to order the release of the ship would be '*manifestly contrary to the public policy of that state*' - Article 8(4). We have already discussed the '*manifestly contrary*' to public policy wording above and our comments on the terminology which raises the threshold bar apply equally here.

8. So, how do prospective purchasers make sure they get the certificate of judicial sale?

We have seen the usefulness of the certificate of judicial sale as a multi-tool for enforcing the clean title conferred upon the ship, for having ships de-registered from registries, for compelling the removal of mortgages and charges and as a shield against arrest. So, how do prospective purchasers make sure the courts issue one?

Under Article 4(2) of the Convention, '*a certificate of judicial sale under article 5 shall only be issued if a notice of judicial sale is given prior to the judicial sale of the ship*'. So, in order to obtain the certificate of judicial sale, proper notice must be given. There are detailed provisions around the form and content of the notice: Annex I to the Convention sets out the minimum information to be included in

the notice of judicial sale. This includes a statement that the notice is given for the purpose of the Convention. In addition, the notice must contain the name of the state of judicial sale; the name of the court confirming the judicial sale; the details of the ship (name, IMO No., etc), details of the shipowner and details of the judicial sale process, e.g., by auction or private treaty. Notably, the notice requires a declaration as to whether the sale will confer clean title or not.

The notice of judicial sale must be given to a number of bodies including the ship registry, any bareboat registry; any holders of mortgages or registered charges (where registry and instrument are open to public inspection); and the owner and bareboat charterer of the ship themselves. In addition, and consistent with typical procedure for judicial sale, the notice must be published in the press. It must also be transmitted to the repository at the United Nations.

9. So, will the Convention be fit for purpose?

The Convention's aims, as stated, are to *'establish uniform rules that promote the dissemination of information on prospective judicial sales to interested parties and to give international effect to judicial sales of ships sold free and clear of any mortgage, or hypothèque or any charge, including for ship registration purposes'*.

The Convention's aims are far from controversial. They do not seek to change the law or customary practice in relation to the judicial sale of ships (in commonwealth countries, at least). Instead, they operate as a manual of best practice, seeking to give stronger effect to the international effect of judicial sales, as is already the practice in many jurisdictions.

Most commonwealth jurisdictions will give effect to the clean title status of a ship sold judicially (and properly) elsewhere and, by way of example, it is already the practice in most jurisdictions that where an application for judicial sale of a ship is granted, notice of the prospective sale is given by announcement to the press. If not new, the aims of the Convention are noble. In the "Golden Union" [2014]

1 Lloyds Rep. 55, Teare J noted that higher prices could be achieved from vessels judicially sold, since it was possible to confer a title free of liens and encumbrances. We do not doubt that the former Admiralty Judge would approve of the uniform application of rules and the giving of a toolset to achieve them.

It is encouraging to see Liberia, Singapore and Malta, as significant ship registries adding their signatures to the Convention. It can only be hoped that the likes of Panama and the Marshall Islands Registry also lend their support in recognition of a desire to improve and make more transparent, management of the ships that make them up.

The Convention applies to all judicial sales of ships conducted by the court (or other competent authorities) and whether those sales take place post judgment or *pendente lite*. The Convention should be a positive influence for all stakeholders, whether shipowners, bidders or lien holders. Lenders or financiers of ships ought to be beneficiaries of improved communication under Article 4(b) where a sale of a ship in which they have an interest is contemplated. There are no hidden difficulties from a waterfall distribution perspective. Specifically under Article 15(a), *[n]othing in this Convention shall affect [t]he ... priority in the distribution of proceeds of a judicial sale*'. Similarly, maritime lien holders ought to have a further tool in their armoury to check on that status of ships to be sold, via the publicly searchable repository.

In terms of the restrictive scope of the Convention, it is notable that, pursuant to Article 3, the Convention only applies to a judicial sale where the judicial sale is conducted in a state party and where the ship is physically within the territory of the State of judicial sale at the time of that sale.

Finally, one obvious point to note, in terms of endorsement of the Convention to date, is the too few signatures of littoral states, which regularly host judicial sale of ships. It would be encouraging to see the likes of England & Wales, the United

States, Canada, Australia, South Africa, Namibia and the like show their support by becoming signatories.

Tick tock...



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