

International Conventions: A False Sense of Security?

Quite often parties are extremely surprised when the outcome of a particular case is completely contrary to all their expectations. After all, they may have taken much time and trouble to conduct their own research from sources available to them, relied upon the application of international Conventions and they may even have consulted their own lawyer. In this day and age, when there is a host of information available on the internet the risks for parties relying upon their own research could be great. Often the desire to save on legal fees is paramount but, alas, with disastrous results.

There are international Conventions which cover, or are rather intended to cover, most aspects of maritime issues. Regrettably, the implementation and enforcement of such international Conventions varies from country to country, and indeed sometimes illogically, between different courts in the same country! Hence, simply looking up legal publications and databases on ratification of Conventions will frequently not be enough. Specific advice must be sought from an experienced maritime practitioner in the jurisdiction in which one is interested. The following examples may evoke certain memories.

Ship Arrest

Your latest ship acquisition is threatened with being arrested in relation to claims or debts incurred while the ship was in her previous ownership. Should such threats be taken seriously or is the vessel safe due to her (genuine) change of ownership? Furthermore, does it not make any difference that the vessel was purchased through judicial sale?

A substantial number of countries are party to the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952 (otherwise known as the Brussels Arrest Convention). The Convention sets out a list of maritime claims for which a vessel may be arrested, but regrettably does not specifically deal with the situation where the vessel has changed ownership (although an attempt to rectify this has been made in the 1999 Convention, the latter has not yet come into force). Despite certain countries being party to the Arrest Convention, nevertheless their internal legislation grants the right of arrest to claims not listed in the Arrest Convention and also priority rights for certain claims which may be enforced against the vessel even if she has changed ownership. Equally, even though the Convention provides that either the particular vessel in respect of which the claim arose or any other vessel which is wholly in the same ownership may be arrested, nevertheless in a number of Arrest Convention countries vessels that are not true "sister ships" within the meaning of the Convention are arrested. Any objection to such arrest would take months to determine given the legal system in those countries, thereby forcing Owners to resort either to putting up a bank guarantee or to enter into a cash settlement to secure the release of the vessel. By that stage the one-ship owning company that sold the vessel to the innocent buyer may already have been dissolved with no other assets available against which to make a

recovery.

Even if the vessel has been purchased by judicial sale, despite the existence of the International Convention Relating to the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926 and 1993 (otherwise known as the Liens and Mortgages Convention), the legislation and the courts of certain countries provide that if the judicial sale does not comply with their own laws and procedures (including formalities as to publicity) then such foreign judicial sale shall not deprive claimants from enforcing any claims or judgments in their favour against the vessel in her new ownership. Therefore, simply looking up whether a country is a party to the Arrest Convention or to the Liens and Mortgages Convention is not by itself sufficient. (Note that Cyprus is not a party to the Arrest Convention nor to the Liens and Mortgages Convention).

Limitation of Liability

In case of an incident giving rise to substantial damages, will Owners be able to set up a Limitation Fund to prevent the vessel from arrest or for obtaining her release? Will the setting up of a Limitation Fund in one jurisdiction protect the vessel from claims in all other jurisdictions to which she may call?

A primary reason for the existence of a system of limitation of liability is to encourage investment in shipowning in the knowledge that in case of a major incident giving rise to substantial damages, the owners of the vessel will be able to limit their liability to an amount for which they will have liability insurance. Hence the existence of Limitation of Liability Conventions.

However, ascertaining that a particular country is a party to a certain limitation Convention may only be of theoretical value if that country has not established in its internal procedures a method for the setting up of a limitation fund, so that in such case limitation may only be used as a defence and not for the setting up of limitation fund. Furthermore, even if a fund is set up according to a particular Convention in a particular country, this may leave the risk of the vessel being arrested in another country which either is not a party to any limitation Convention or is a party to a different Convention altogether. (Note that Cyprus is not a party to any Limitation of Liability Convention).

Enforcement of Arbitration Awards

Will an arbitration award be enforceable against the losing party, such as an award for demurrage against a charterer, in the country where such party may be registered or otherwise located?

In this context, the pertinent international Convention is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (otherwise known as the New York Convention). One's immediate assumption is that if an arbitration award is obtained from a country which is a party to the New York Convention then it should be quickly, easily and cheaply recognised and enforced in another New York Convention country. Regrettably, in practice, in a number of jurisdictions which are



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parties to the New York Convention such enforcement will take an indefinite period of time. Indeed, there is also a risk that the award may not be enforced at all if, for example, it is contrary to the provisions of the Public Order. For instance, if the award has been issued by a two-member Arbitration Tribunal, whereas the legislation of the country where enforcement is sought provides that any arbitration award must be issued by an odd or a majority number of arbitrators. This situation may arise where the arbitration clause provides for each of the opponent parties to appoint its own arbitrator, with the two appointed arbitrators then appointing an umpire in case they disagree, or appointing a third arbitrator. If the two arbitrators agree on the outcome then there would be no need for an umpire or they would agree with the parties to dispense with the appointment of a third arbitrator. An award thus produced by the two arbitrators may turn out to be unenforceable in such jurisdictions for being against the Public Order, so that the successful party would only have achieved a pyrrhic victory (Note that Cyprus is a party to the New York Convention).

Therefore, the mere fact of a country being a party to a particular international Convention should not be relied upon as producing a conclusive answer or remedy. Shipowners would be well advised to always obtain specific advice of a specialist maritime practitioner for the jurisdiction in which they fear the problem may arise, especially as regards the local courts' implementation and interpretation of international Conventions.

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