

# Study on the Public Policy Implications of Denying International Effects of Judicial Sales of Ships

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## Abstract

The issue of the international effects of judicial sales of ships is an important area of foreign maritime judicial practice, and the specific circumstances in which the international effect of the judicial sale of a ship can be denied is a very crucial topic. The United Nations Convention on the International Effects of Judicial Sales of Ships, adopted by the General Assembly of the United Nations in 2022, provides in Article 10 that public policy is the only cause for denying the international effect of a judicial sale of a ship, but does not specify what this means. This paper examines the basic concepts of public policy in international law, discusses in parallel the particular situations in which public policy is violated in some international conventions, and draws conclusions on the specific implications of public policy in the field of judicial sales of ships. That is to say, when a judicial sale infringes sovereignty or security, or when the procurement of the sale commits by fraud by the purchaser, or when the judicial sale conducts in a manner that violates fundamental principles of due process, States may apply the rule of public policy to negate the international effects of the judicial sales.

## Keywords

Judicial Sales of Ships; International Effects; Public Policy.

## 1. Introduction

On 7 December 2022, the 77th General Assembly of the United Nations formally adopted the United Nations Convention on the International Effects of Judicial Sales of Ships, authorizing the signing ceremony of the convention to be held in Beijing and recommending that the convention be called the Beijing Convention. It is the first international maritime convention to be named after a city in China and the first UN convention in the maritime field to be named after a Chinese city. On 5 September 2023, the convention was officially opened for signature in Beijing. The convention stipulates that it will enter into force 180 days after the date of deposit of the third instrument of ratification, acceptance, approval or accession, which means that ratification by three countries will lead to the entry into force of the convention. At the first signing ceremony, 15 countries and regions, including China, Switzerland and Singapore, became the first signatories to the convention, so the entry into force of the convention can be expected.

Article 10 of the Beijing Convention provides 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. The Beijing Convention provides that the only reason why judicial sales of ships in other countries will not have clean title is that they are manifestly contrary to public policy. The main purpose of this provision is to maximize respect for judicial sales, such as public auctions of ships conducted by courts or other public organizations in other State Parties, by arguing in the shipping community of States that the international effects of judicial sales of ships should not be denied in the vast majority of cases. In order to better apply the

public policy provision in the international judicial sales of ships, it is necessary to clarify the specific connotation of public policy and the specific circumstances under which public policy may be violated, so as to balance the interests of all parties and minimize the uncertainty of the international effects of the convention. The legislative purpose of the Beijing Convention is to harmonize and coordinate the international effects of judicial sales of ships, but due to the short period of time that the convention has been in existence, there are fewer studies on the issue of public policy, which is the only reason for denying the international effects of judicial sales of ships. The author hopes that the research in this paper can explore the specific connotation of public policy under the Beijing Convention that negates the international effects of judicial sales of ships, thus contributing to the realization of a better articulation and harmonization between the convention and the domestic laws of various countries.

## 2. Basic Concepts of Public Policy in International Law

The term public policy originated in the common-law system and is commonly referred to as public order in civil law countries. Public policy is a concept and regime commonly used in private international law in various countries, but there is no uniform understanding and interpretation of the regime and concept in the international community. First of all, from the aspect of academic theory, the Chinese scholar believed that public policy essentially refers mainly to the major interests of the court State, basic policies, basic concepts of morality or basic principles of law [1]. The German scholar considered public policy to be essentially the basis of the economic life of the country and the basic provisions of the law that safeguard and realize such fundamental values [2]. According to the American scholar, public policy is the embodiment of the basic economic, legal, political, moral, religious, and social norms of each nation or international community. Naturally varying according to the character and structure of the State or Group to which they are subordinate, the public policy contains principles and standards so sacrosanct that they should be respected and maintained without exception, whatever the cost [3].

Secondly, in terms of legislative practice, the most often quoted comment of the United States is that of Judge Joseph Smith in Parsons & Whittemore in which he stated that public policy is the most basic notions of morality and justice in the forum State. Germany regulates public policy mainly in two pieces of domestic legislation. Article 6 of the German Civil Code Enforcement Act stipulates that a foreign legal norm may not be applied if its application results in a clear incompatibility with the fundamental principles of German law. In particular, it may not be applied if its application is incompatible with fundamental rights. Article 328 of the German Code of Civil Procedure provides that a foreign court decision shall not be recognized if the result of the recognition of the decision is manifestly incompatible with the fundamental principles of German law, in particular with fundamental rights [4]. China has mainly stipulated the relevant content of public policy in two laws. Article 8 of the Civil Code of the People's Republic of China of 2021 stipulates that civil subjects engaging in civil activities shall not violate the law or go against public order and morals. Article 300 of the Civil Procedure Law of the People's Republic of China of 2024 stipulates that the courts shall review the validity of judgments issued by foreign courts and rule that they shall not recognize the validity of such judgments if they have been obtained by fraudulent means, if they are in violation of the basic principles of the laws of China, or if they are detrimental to the sovereignty, security, or social public interests of the State. Although the above-mentioned laws all provide for public policy, various countries do not give a clear definition of public policy, nor do they define the specific circumstances that constitute a violation of public policy.

Various different legal systems universally recognize public policy as a ground for refusing to recognize or enforce foreign judgments or arbitration, as a way of reflecting respect for a

country's independent sovereignty, helping to balance economic, social and cultural differences between countries, and facilitating the realization of globalization of the enforcement of judgments or arbitration, which is universally accepted and recognized by the international community [5]. From the perspective of international harmonization of laws, as long as each member State retains its own independent legal system that distinguishes it from other States, the diversity of the basic principles of each State is practically unavoidable [6]. It is also for this reason that the system of public policy has been widely adopted in a number of existing international conventions as a "safety valve" for member States in order to maximize the unity of law at the international level while retaining a limited number of differences.

### **3. Specific Content of Public Policy in Relevant International Conventions**

Public policy has different connotations in different countries, and it is difficult to form a uniform standard. With further discussion of public policy in the theoretical community, the concept of "international public policy" has been proposed. Some scholars consider "domestic public policy" to be related to the jus cogens of individual possession of rights, and "international public policy" to be related to the mandatory rules of public politics, economy and morality. With the increase in international commercial activities and the growing exchange of practice and interaction among countries, the concept of public policy as a cause for excluding the recognition and enforcement of international judgments or arbitration needs to be recognized by all countries. And gradually the international community is converging on the development of the connotation of public policy [7].

#### **3.1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958**

International commercial arbitration is one of the most important methods of dispute resolution in the modern international commercial field, and as a quasi-judicial procedure for the resolution of transnational disputes, international commercial arbitration awards are more likely to be recognized and enforced in foreign countries than domestic court judgments. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (hereinafter referred to as the New York Convention), as an important piece of international legislation, is capable of promoting the universal recognition and enforcement of international commercial arbitration outside the country of arbitration. Under the Convention, member States recognize each other's arbitral awards as binding and guarantee the enforcement of arbitral awards made in the other's country in accordance with the procedural provisions of the seat of the award. The New York Convention is universally accepted throughout the world and is the legal basis for the extraterritorial enforcement of international commercial arbitration. Under Article 5 of the New York Convention, the court of the requested State has the right to refuse recognition and enforcement of a foreign arbitral award, without having to comply with an application by the parties, if it considers that the recognition and enforcement of the award would be contrary to the public policy of that country.

The meaning of public policy in the convention is referenced in an international authority, the International Commercial Arbitration Committee of the International Law Association, which issued its Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards at its New Delhi General Assembly in 2002. It summarizes the application of the public policy provisions of the New York Convention and attempts to define what public policy is and what it extends to. In the report, it is argued that the criterion of "international public policy" should be used to qualify the scope of public policy, which should be narrower than "domestic public policy", only a violation of the fundamental public policy of the State would have the effect of refusing to recognize or enforce a foreign arbitral award. The report suggests that "international public policy" should include: (1) fundamental principles of justice and morality,

both substantive and procedural, that the State wishes to protect; (2) rules known as “lois de police” or “public policy rules”, which are designed to maintain the fundamental political, social or economic interests of the State; (3) the international obligations of States towards other States or international organisations.

In order to maximize their private interests, parties to international commercial transactions may use arbitration to circumvent the application of peremptory public law norms to their disadvantage [8]. This may result in the non-enforcement of compelling laws preventing the outward transfer of transaction costs to third parties, undermining compelling laws aimed at harmonizing private and social costs, and may be detrimental to social welfare and contrary to public policy [9]. Therefore, public policy has a significant impact on the recognition and enforcement of international commercial arbitral awards. Most domestic courts have held that the public policy of Article 5 of the New York Convention is judicial review of the application of arbitral awards, and that recognition and enforcement of arbitral awards from other contracting States can only be refused in exceptional cases where the outcome of the award is contrary to the fundamental and mandatory policies expressly set out in the law or judicial documents of that State [10]. In other words, an award cannot be refused recognition and enforcement on the ground that it is contrary to public policy when there has been a substantive error in the award itself.

### **3.2. Convention on Choice of Court Agreements in 2005**

In order to promote international trade and investment by strengthening judicial cooperation, constructing an open foreign-related trial mechanism, upgrading the international legal services market and promoting the global flow of judgments, the Hague Conference on Private International Law organized the drafting of the Convention on Choice of Court Agreements, which was adopted on 30 June 2005 and entered into force on 1 October 2015. The rules on refusal of recognition and enforcement in the convention are one of the most exhaustive international uniform rules on indirect jurisdiction to date, and the grounds for refusal of recognition and enforcement therein are at the center of the rules on indirect jurisdiction. Article 9 of the Convention on Choice of Court Agreements provides for six exceptions to the refusal of recognition and enforcement, of which the public policy exception set out in paragraph 5. States parties may refuse to recognize or enforce a judgment when such recognition or enforcement would be manifestly contrary to the public policy of the requested State, including where the particular proceedings leading to the judgement would not be in conformity with the fundamental principles of procedural fairness of the requested State. The convention reaffirms and emphasizes the public policy issues, which are often set out in recognition and enforcement conventions, and qualifies them with the word “manifestly”.

Public policy in the convention connotes basic concepts and principles of law or justice, with additional emphasis on including procedural public policy. It is clear from the explanatory report of the Convention on Choice of Court Agreements that the purpose of the first part of the provision on public policy in paragraph 5 is to set a high standard for the consequences of a breach, and the purpose of the second part is to focus attention on serious procedural shortcomings in a particular case. Moreover, the second part is not a limitation of the first part, but is intended to point out that the public policy embodied in the Convention on Choice of Court Agreements is not limited to procedural issues, but at the same time, the issues involved must be of fundamental importance to the requested State [11].

The public policy requirement gives the courts of contracting States a wide margin of discretion in the recognition and enforcement of judgments. In some countries, the violation of the fundamental principles of procedural fairness also falls within the scope of public policy, and the “circumstances incompatible with the fundamental principles of procedural fairness of the requested State” provided for in the convention are mainly intended to satisfy the legislative

expectations of some countries. The provisions of Article 9, paragraph 5, of the Convention on Choice of Court Agreements treat procedural fairness as a matter of special public policy, with particular emphasis on serious procedural errors in specific cases, thus avoiding infringement of the general norms of the procedural law of the forum State in which the judgment is recognized [12]. Taken together, there is an overlap in the exceptions provided for in Article 9 of the convention, all of which relate in part or in whole to procedural fairness. For example, where a summons is not served on the defendant and the defendant has no knowledge of the proceedings because of fraud committed by the plaintiff. The reason for the emphasis on procedural fairness is that in some countries the basic principles of procedural fairness (also known as due process of law, natural justice or the right to a fair trial) are enshrined in the constitution, and the recognition of such a foreign judgement may be unconstitutional [11].

### **3.3. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters in 2019**

The recognition and enforcement of civil and commercial judgments of foreign courts is an important area of foreign-related judicial practice in various countries, and the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (hereinafter referred to as the “Hague Judgments Convention”) is one of the most important international legislations in this regard, which establishes the most up-to-date and comprehensive regime and rules in the international community. The Hague Judgments Convention establishes a number of circumstances under which the court of the requested State may refuse to recognize and enforce a judgment of a foreign civil or commercial court, namely, failure of the defendant to obtain proper notice, obtaining a judgment by fraud, violation of public policy, and inconsistency between the judgment of the foreign court and the judgment of the parallel proceeding [4]. Article 7, paragraph 1, subparagraph 3, of the Hague Judgments Convention provides that a court may refuse to recognize and enforce a foreign judgment if such recognition and enforcement would be manifestly incompatible with the public policy of the requested State, including where the particular proceedings in which the judgment was rendered violated the fundamental principles of procedural fairness of the requested State, as well as prejudice the security or sovereignty of that State.

The meaning of public policy in this convention is also clarified in the explanatory report on the Hague Judgments Convention, which states that public policy is always difficult to define but should be understood here in conjunction with the provisions of other articles in the text. The broad connotation of public policy in Article 7(1) of the Hague Judgments Convention overlaps with the meaning of the exceptions in the other paragraphs, so it should be interpreted accordingly. That is, it is only where the recognition and enforcement of a foreign judgment would be a “manifest” contradiction with essential policies of the requested State that it can go beyond the specific scope of the other particular defences and fall within the public policy exception [13]. The specificity of the public policy provisions of the convention means that it is not sufficient for a foreign judgment to be contrary to a mandatory rule of the law of the requested State, but that public policy is limited to mandatory rules reflecting fundamental values, which should be interpreted in this context in the sense of “international public policy”, not “domestic public policy”.

Although the Hague Judgments Convention explains in its text that public policy encompasses two specific situations, namely, violations of procedural fairness and infringement of national security or sovereignty, the specific meaning of public policy in the convention is not very different from that in the Convention on Choice of Court Agreements in 2005. Rather than narrowly limiting the meaning of public policy and reducing the circumstances in which it can be applied, the provision reflects the greater likelihood that issues involving violations of security or sovereignty will be addressed in the context of the Hague Judgments Convention.



## 4. Possible Specific Content of Public Policy in the Field of Judicial Sales of Ships

From the discussion above, it can be concluded that there is a relatively unanimous recommendation in the international legal community regarding the application of public policy by national courts, which favors a narrow interpretation of the public policy exception, interpreting its meaning in the convention as “international public policy”. Similarly, the Beijing Convention, as the most recent and important convention in the field of international commerce on ships, is written with the “structure and logic” of the New York Convention as its model [14], and its interpretation of public policy should be construed restrictively accordingly. In the course of the discussions, it became clear that a distinction should be drawn between issues of judicial sales of ships and substantive issues giving rise to a claim of the judicial sale [15], and in subsequent discussions the words “recognition and enforcement” were changed to “international effects”. This is intended to distinguish the Beijing Convention from the relevant international conventions on the recognition of judgments and awards. However, with regard to the specific meaning of public policy, States have agreed to draw on recent instruments relating to the recognition and enforcement of foreign judgments and awards, such as the Convention on Choice of Court Agreements [15], so that the meaning of “international public policy” should be applied.

Through theoretical and practical research, the author believes that in the case of judicial sales, the specific content of public policy may include infringement of sovereignty or security occasioned by the sale, the procurement of the sale by fraud committed by the purchaser, and conducting the judicial sale in a manner that violates fundamental principles of due process. Public policy requirements relate to the fundamental values of the State, and a simple violation of a mandatory rule will not usually constitute a public policy issue. In the following, the author will explain three specific implications that public policy may have in the Beijing Convention, based on the concept of “international public policy”.

### 4.1. Infringement of Sovereignty or Security by Judicial Sales

The specific connotations of public policy are not entirely consistent due to the different national conditions of different countries. But as far as national sovereignty and security are concerned, the international community has reached a consensus that the inviolability of the State sovereignty is common sense in international law and a rule generally followed by the international community. State sovereignty includes not only territorial sovereignty, but also economic sovereignty and judicial sovereignty [16]. Jean Bodin thinks that the most important dimension of sovereignty lies in legislative power, while judicial power is also an important component of national sovereignty, which is characterized by indivisibility and non-transferability.

In an international judicial sale of a ship, if the judicial sale State infringes on the judicial sovereignty or security of other States, it will inevitably be denied international effects on the grounds of public policy. Typically, the courts of the State of judicial sale organize the auction of the ship in such a way that a judgment or decision will extinguish the ownership rights of the original owner and confer legal ownership rights on the purchaser as the new owner of the ship. The purchaser can apply to the original State of registry to cancel the ship from the register and issue a certificate of cancellation. At the same time, the purchaser can also apply to the new State of registry to register the ship in the purchaser’s name. However, in practice, the debt situation is complicated, and the cancellation of the purchaser’s right to the original ship may affect the interests of others based on the ship, and the unilateral judicial treatment of the judicial sale State may sometimes cause the original shipowner or the relevant debtor to apply for justice, and the other countries concerned, which believe that they have jurisdiction, may

claim that their judicial sovereignty has been infringed upon. Therefore, when a State wrongfully exercises its jurisdiction and makes a judicial sale of a ship, the other State whose judicial sovereignty or security has been violated may deny the effects of the judicial sale of the ship by not granting the ship a clean right.

#### **4.2. The Procurement of the Sale by Fraud Committed by the Purchaser**

Fraud is the conscious misrepresentation of the truth in order to induce others to waive his or her legal rights. Fraud occurs when there is an intent to deceive other person and to cause or attempt to cause harm to that person, whether by word or deed. Fraud is an improper and unlawful means, and judgments or awards obtained in this way should naturally not be protected by law, nor should they be recognized and enforced if they are made by a foreign court. As far as the legal basis for refusing to recognize and enforce a fraudulently obtained judgement or award is concerned, judicial practice in some countries treats such a decision as contrary to public policy and therefore does not recognize and enforce it. While in other common law countries, fraud is considered a legally independent defence, and as long as the judgment or award has been obtained by fraud, it should be refused recognition and enforcement [17].

The Beijing Convention, after many sessions of discussion, does not provide for a judicial sale of a ship fraudulently procured by the purchaser as a legal ground for denial of international effects, on the basis that fraud would trigger public policy. This means that the States parties to the discussion were of the view that public policy in the context of the convention should include intent to defraud [18]. The preamble to the Beijing Convention points out that the States parties believe that international trade on the basis of equality and mutual benefit promotes friendly relations among nations, and that the purpose of the legislation is to provide adequate legal protection for purchasers, thereby facilitating the realization of prices for ships and benefiting the rights holders concerned. If a purchaser, for his own benefit, harms the interests of others in the course of an international judicial sale of a ship by misrepresenting the facts or deceiving others, this is a violation of the fundamental purpose of the convention, and the purchaser should not be protected by the convention in such a case. The purchaser's implementation of fraudulent means undermined the basic principle of good faith and deprived other parties of their legitimate rights. The denial of the international effects of the judicial sales of ships as a specific connotation of public policy can reflect the maintenance of fairness and justice and effectively safeguard the basic human rights of the parties concerned.

#### **4.3. Conducting the Judicial Sale in a Manner that Violates Fundamental Principles of Due Process**

Due process, also known as "procedural justice", is one of the core principles of dispute resolution systems. The principle of due process first appeared in the English common law system in the thirteenth century, and has since developed unprecedentedly in various countries. This principle requires that the court should absolutely follow natural justice when making a decision on any dispute or controversy, taking the legitimacy and reasonableness of the legal process itself as the standard. The implementation of the principle of due process requires, firstly, that the subjective construction of procedural justice should be realized, including the principle of neutrality of judges and the principle of equality of parties. Secondly, the dynamic process of procedural justice should be realized, including the principle of procedural participation and the principle of procedural openness. Judicial activities conducted in a manner that violates the basic principles of due process often result in unnecessary infringement or even malicious infringement of the property rights of the parties involved, which undermines the public's confidence in and respect for the authority of the judiciary and the national legal system.

In light of the legislative purpose of the Beijing Convention, and in order to avoid the easy denial of the international effect of a judicial sale of a ship, it should be considered that only particularly serious non-compliance with the notification requirements set out in the convention may lead to the invocation of the public policy clause.

The notice requirements in the Beijing Convention apply to the judicial sale itself and not, for example, to the proceedings giving rise to the judicial sale or to proceedings relating to the distribution of proceeds. It needs to be made clear that the main purpose of the notification requirements in the convention is to alert creditors to the impending sale and eventual distribution of the proceeds, thus creating a balance between the realization of due process for creditors and the process of judicial sales of ships. The convention does not establish the notification requirement as a stand-alone obligation, but rather as a condition for the issuance of a judicial sale certificate. However, the judicial sale certificate plays a central role in the convention regime, and compliance with the notification requirement is essential to the procedure for the issuance of a judicial sale certificate [19].

## 5. Conclusion

In summary, the Beijing Convention is the latest legislative innovation on international effects in the field of judicial sales of ships, and the prospect of its development deserves the common attention of the international community. Public policy is the only exception in the convention that negates the international effects of the judicial sales of ships, and its meaning has not been officially clarified for the time being. Through a study of the concept of public policy and a cross-reference to relevant international conventions on the recognition and enforcement of judgments and awards, it is concluded that the concept of public policy in the Beijing Convention should be limited to "international public policy". Its implications should include infringement of sovereignty or security occasioned by the sale, the procurement of the sale by fraud committed by the purchaser, and conducting the judicial sale in a manner that violates fundamental principles of due process. States parties may apply the above circumstances to deny the international effects of judicial sales of ships. In addition, in their international practice of judicial sales, States should apply the public policy clause judiciously and avoid lightly refusing to grant international effects to judicial sales of ships from other contracting States. Enabling the purchaser to acquire a clean title to the ship free of any mortgage, and to cancel the old registration and register it in a new State of registry of the purchaser's choice, could thereby enhance the confidence of the international maritime community in the judicial sale system and contribute to the realization and acquisition of the rightful value of the ship.

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