LEGAL ASPECTS OF SHIPPING PURCHASE AND THE CABOTAGE REGIME

Due Diligence Verification
Negotiating Ship Purchase Contracts

At the
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Mfon Ekong Usoro
Outline

Part I
• Shipping Purchase;

Part II
• International Sale of Goods and Shipping Purchase Transactions

Part III
• Shipping Purchase Transactions and the Coastal and Inland Shipping (Cabotage) Act, 2003

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Ships constitute the bedrock of the maritime sector in any economy.

Sale and purchase of ships therefore an indispensable activity of the shipping industry.
Ship Purchase

- Transfer of ownership in a ship from buyer to seller for a price (purchase price).

- Parties -
  - Seller (shipowner)
  - Buyer (shipping company/owner)
  - Bank (financing)

- Securing the loan facility advanced for purchase of the ship – Ship Finance.
Types of ships

- Old build
- New build
Ship Purchase Contd

- Negotiation of Ship Purchase Contract

- Due Diligence Verification / Inspection Stage

- Completion Stage
Ship Purchase Contd

- **Negotiation**
  - usually carried out by brokers appointed by the parties (Buyer & Seller)
  - Main focus is on price and particulars of the ship
  - Negotiation of the terms of the contract
• Memorandum of Agreement “MOA”;
  – Usually contains the terms of the contract
  – Standard Form: SALE FORM 93
  – Allocates rights, obligations and risk between Seller and Buyer
  – Contains clauses relating to:
    Purchase price, deposit, inspections, delivery, spares/bunkers, documents at delivery, encumbrances, taxes, condition on delivery, name/markings, buyer’s and seller’s default, buyers’ representatives on board, arbitration.
  – Binding Agreement.
Ship Purchase

• **Due Diligence Verification (DDV)**

• **Due Diligence on Buyer**
  – [Legal/financial/operational]

• **DDV Checklist on Seller and on ship**
  – Search at ship Registry:
    ✓ confirm ownership of ship,
    ✓ any mortgages/charge.

  – Search at company registry
    ✓ Good standing;
    ✓ any mortgages/debentures/floating charges registered against the seller which relate to the ship;
    ✓ winding up/bankruptcy petition.

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• **DDV Checklist on Seller and ship cont’d**
  - Check MEMART
    - statutory power to sell the ship.
  - Confirm corporate compliance
    - board resolution approving the sale.
  - Search Admiralty Registry
    - any in rem claims have been issued against the ship.
  - Check with the port authority
    - whether ship is under arrest/detention/arrest warrant against the ship at the port where she is to be delivered.
  - Arrange for the pre-delivery survey

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- **Completion Stage/Delivery [Closing Memo]**
  - simultaneous action at closing after final inspection
    - Final inspection
    - Protocol of Delivery and Acceptance
  - Delivery and exchange of documents between buyer and seller e.g. trading certificates and bill of sale;
  - Payment of balance of purchase price;
  - Physical delivery aboard ship.

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- Executed NIMASA forms for registration of vessel;
- Executed NIMASA Forms for Statutory Mortgage;
- Notarized Power of Attorney to register vessel and mortgage;
- Board resolution approving purchase, registration of vessel and mortgage, grant of POA to Bank’s Solicitor;
- Bill of Sale;
- Transcript of Registry or Certificate of Ownership, no encumbrances.
- Class confirmation Certificate
- Certified board resolutions of the seller

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- Commercial invoice for the ship;
- Commercial invoice for bunkers, lubricating oil and other items;
- Safety and International Trading Certificates:
  – ISM, Loading, Tonnage, Radio, Safety Construction Certificate
  – ISPS Code compliance documents;
  – Certificate of Deletion where applicable;
  – or letter of undertaking to deliver a Certificate of Deletion within a specified time;
  – Protocol of Delivery and Acceptance.
- Closing Memorandum

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• Documents for Old Build
  – Memorandum of Agreement;
  – Agreement;
  – Deed of Mortgage;
  – Assignment of all insurances;
  – Assignment of the contracts of employment of the vessel
  – Charterparty
Ship Purchase

• **Newbuild - Ship under Construction**
  – study the shipbuilding contract and determine whether the interest of your client is sufficiently protected. The contract will state which of the standard forms is used.
    ➢ SAJ, Canadian Shipbuilding Form, EU Shipbuilding Contract, Newbuildcon [BIMCO], Norwegian Shipbuilders Association Form.
  – identity of the shipyard is important. Shipyard’s standing, credibility and reputation in shipbuilding.
  – employment projections for the ship after construction also important.

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Documents for Ship under Construction

- Loan Agreement for ship under construction [pre-delivery instalments]
- Shipbuilding contract;
  - Assignment of SBC + Notice of Assignment;
  - Assignment of Refund Guarantee + Notice of Assignment;
- After payment of last tranche and delivery
  - Deed of Mortgage
  - Assignment of all insurances + Notice of Assignment;
  - Assignment of the contracts of employment of the vessel + Notice of Assignment

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Ship Mortgage

- A form of security created by a Deed that confers interest in the ship and discharged upon payment of the loan.
- Security for payment of a debt
- Differs from traditional mortgage
  - No conveyance of property [deed purports to];
  - Security provided instead of transfer of property. A form of statutory charge;
  - Mortgagor remains the legal owner
    ➢ Section 58, MSA 2007;
  - Mortgagor remains in possession.
Ship Mortgage - Types

- Statutory mortgage
- Equitable mortgage
  - It could be created by general words or deposits of title documents. Where all legal formalities of a mortgage is not complied with, court may give effect to intention of parties to create a security. Swiss Bank Corp. -v- Lloyds Bank Ltd (1982) A.C. 584 (C.A)
- Statutory mortgage is superior security
Ship Mortgage - Parties

- Seller (shipowner)
- Buyer (shipping company/owner)
- Bank (financing)
• **Statutory mortgage**
  – Created by “a proper written instrument” generally called a deed. Section 54(1) MSA 2007;
  – Must be registered at CAC and NIMASA.

• Statutory mortgage is superior security
  – Priority;
  – Not affected by mortgagor’s bankruptcy, S.57(2) MSA;
  – Preferred creditor in case of liquidation.
Ship Mortgage - Documents

- **Loan Agreement**
  - Specified ship is the security for the loan;
  - Borrower is registered legal/beneficial owner of ship;
  - Covenant to mortgage ship to the bank;
  - Covenant to submit and execute all required documents for creation of legal mortgage;
  - Warrantee that ship is not encumbered;
  - Additional security;
  - Condition precedent to drawdown;
  - Loan tenure, maturity;
  - Jurisdiction, etc
Ship Mortgage – Documents Contd

• **Deed of Mortgage**
  – Charging clause
  – Assignment of vessel’s insurances;
  – Assignment of contracts of employment;
  – Retention of class;
  – Management of vessels;
  – Event of defaults and powers of the mtgee;
  – Debt service;

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• **Deed of Mortgage cont’d**
  – Indemnity by owners;
  – Mortgagee’s powers;
  – Jurisdiction and governing law.
Ship Mortgage

• **Additional Security for mortgage**
  – Corporate guarantee;
  – Personal guarantee;
  – Floating charge on shipping company’s assets
  – Assignment of earnings;
  – Assignment of contracts for which ship is employed;
  – Assignment of Hull and Machinery insurance;
  – Lien on cargo/freight.

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Ship Mortgage – Registration

• **Registration at CAC**
  – Executed Deed of Mortgage stamped at FIRS;
  – Copy of completed NIMASA Statutory Mortgage Form
    ➢ Stamped at FIRS;
  – Receipt of Stamp Duty fees [nil for ship mortgage];
  – Copy of vessel’s certificate of registration;
  – Resolution of Shipowners’ Board of Directors authorizing the mortgage;
  – Filling/endorsement of Mortgage/Debenture [Form CAC 8];
  – Receipt of payment of CAC filling Fee [1% of loan].
Registration at NIMASA

- Letter of application to register accompanied by the following documents:
  - Deed of Mortgage executed and duly stamped
  - Completed Statutory Mortgage Forms signed and duly stamped;
  - Consent to Mortgage from NIMASA DG;
  - Vessel certificate of registration;
  - Certificate of Registered Debentures [Mortgage] issued by the Corporate Affairs Commission, Abuja;
  - NIMASA official receipt for payment of mortgage fees.

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Ship Mortgage

• Rights/obligation of Parties
  – Mortgagee
  – Mortgagor
  – Seller
  – Shipyard
• **Rights/obligation of bank as mtgee**
  
  – Not treated as owner of ship by reason of mortgage save in so far as it is necessary to realize its security
  
  – Action *in personam* against s/o for breach of personal covenant to pay
  
  – Can intervene in court proceedings affecting its interest
  
  – Have insurable interest
    ➢ assignment of insurance benefit
Ship Mortgage

• **Rights/obligation of bank as mtgee**
  – Contractual and common law rights to take possession
    • Default in payment
    • Impairment of security
      – maritime lien, Unpaid crew wages,
      – insolvency
      – Cancellation on HM insurance
      – Time chartered after loan becomes payable
    – Existing Charterparty
Ship Mortgage

• **Rights/obligation of Bank cont’d**
  - Bound by subsequent charterparty provided it does not impair its security.
  - Power of sale [express/implied/statutory]
    - Exercise right only to realize its security
    - Act bona fide. Duty of care in tort not applicable. Only equitable principle to act in good faith
  - Entitled to arrest and sale
    - Action in rem
  - Possession for sale or trading
    - Actual or constructive
  - Rights to repayment

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Ship Mortgage

- **Rights/obligation of the Mortgagor**
  - S/O remains in possession of ship as legal owner
  - Has right of redemption
  - Obligation to repay
    - Express and implied
  - Obligation to pay interest
  - Right to action for redemption for wrongful action by mortgagee
    - Damages, specific performance, injunction
Ship Mortgage

• Rights/obligation of the Mortgagor
  – Entitled to freight
  – Pays for operational cost of ship
  – Have insurable interest
  – Rights specified in the Deed of Mortgage.
Ship Mortgage

- **General Rule on Priority of Maritime Claims**
  - Registration gives a mortgagee priority over
  - Earlier unregistered mortgages;
  - subsequent registered or unregistered mortgages;
  - Unregistered debentures of earlier creation,
  - Additional facility granted under a prior registered mortgage;
  - Statutory liens [damage done to ship, dispute between co-owners, loss or damage to cargo on aboard ship];
  - *In personam* actions

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Ship Mortgage

• Priority of Maritime Claims cont’d
  – Registered ship mortgage ranks after
  – Maritime liens
    ➢ salvage, damage, crew wages, master’s disbursement, S/O’s freight, S/O’s contribution for general average
  – Possessory lien
    ➢ Admiralty Marshall
    ➢ Repairer’s lien
    ➢ Port dues
International Sale of Goods and Ship Purchase Transactions

Part II

Applicability of International Sales of Goods and Carriage of Goods in Ship Purchase Transactions

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International Sale of Goods and Ship Purchase Transactions

- Relevant Legislation
  - Sales of Goods Act “SGA” 1893 applicable as a statute of general application
  - Sale of Goods Law, 1976 Laws of Bendel State,

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International sale of Goods/Ship Purchase and Ship Mortgage

- Ships have been held to be goods or “chattel” within the meaning of the Act S.62 SGA 1893;
  - Behnke v Bede shipping company Ltd. [1927] 1 KB 649 - “chattel personal”.
  - Even a newbuild (re Blyth Shipbuilding and Dry docks Co. Ltd [1926] 24 Ll. L. Rep 139(CA)).
International sale of Goods/Ship Purchase and Ship Mortgage

• Where it is a sale across borders the principles of international sale kicks in.
  – Express terms;
  – Implied terms;
  – Transfer of property.

• Express terms are evidenced in the standard form contract which have been negotiated and executed by the parties e.g. MOA, SAJ, Loan Agreements
International sale of Goods/Ship Purchase and Ship Mortgage

• Implied Terms (made part of the contract by Statute whether or not they are written in the contract documents).

• General Rule – Court will not import terms into written contract except on special circumstances. **[UBN v Ozigi 3NWLR 1994, 404, S.C.]**
  – Lacunae, ambiguity, business efficacy etc
  – Presumption is that parties intended what was negotiated in written contract and are bound.

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• **Implied Terms**
  - **Section 12** – good title and free of encumbrances;
  - **Sections 13** – sale by description;
  - **Section 14** – quality or fitness, merchantable quality (disclosure, reliance)
    - not applicable in cases of prior inspection
    - Not applicable in ship purchase
  - **Section 15** – by sample
• **Transfer of Property**
  
  - **Section 16** – General rule: property passes only when goods are ascertained.
  
  - **Section 17** - Property passes when it is intended to pass.
  
  - Contract document, conduct, circumstances of the case.
International sale of Goods/Ship Purchase and Ship Mortgage

• **Purchase of old vessel**
  – sale of a specific good;
  – in a deliverable state/ascertained.
  – Property passes upon delivery (simultaneous payment of remaining 90% and physical delivery of vessel and Bill of sale with other docs specified in the MOA).

• **General rule applies.**
International sale of Goods/Ship Purchase and Ship Mortgage

- **Purchase of Newbuild**

  Shipbuilding contract is a contract for the complete construction of a ship or for supplying material thereof and thereafter, transferring all the legal interest to the buyer for a purchase price.

- A contract for sale of future and unascertainable goods, similar to an agreement to sell. Section 18, R5 Sale of Goods Act 1893.

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• Newbuild (unascertainable good, not in a deliverable state).
• Agreed payments by instalments at specified stages of construction, property may pass but where -
• additional action is required to put good in a deliverable state/specified stage, property does not pass.
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• **Laing & sons Ltd v Barclay, Curle & Co Ltd [1908] AC 35, PC.** Property not passed before completion.

• **Re Blyth Shipbuilding & Dry Docks Co. Ltd (1926) 24 LL. L. Rep 139 CA.** Held:
  – that the mere approval of materials by a surveyor on behalf of a buyer during the building of a vessel not sufficient to be appropriated to the vessel that will pass property to the buyer.

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• Parties agree for valuable consideration for the property to pass in stages in the process of development and construction. (above are usually coupled with a counter obligation on the buyer to pay installments on the price).

• **Seath v Moore**(1886)11 App Cas 350 (HL)
  
  – Property can pass if the agreed stage has been reached.[Inspection + payment by installment];
  
  – If materials e.g. rudder have been affixed or made part of the corpus.

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International Sale of Goods/Ship Purchase and Ship Mortgage

- Section 18 – rules for ascertaining intention of parties
  - R1 and R2 on how to ascertaining intention of parties as to when property is intended to pass.
  - Deliverable state, unconditionally appropriated to the contract etc
  - Additional works
  - Delivery to buyer/carrier with reservation of right of disposal
Part III

Shipping Purchase and the Coastal and Inland Shipping (Cabotage) Act 2003
Shipping Purchase and the Coastal and Inland Shipping (Cabotage) Act 2003

- **Section 3 of the Cabotage Act**
  - only Nigerian vessels can engage in domestic coastal carriage of cargo & passengers within Nigerian territorial waters.
Shipping Purchase and the Coastal and Inland Shipping (Cabotage) Act 2003

– Registration of vessel under Buyer’s name;
– Registration of vessel under Nigerian flag;
– Registration governed by the MSA, 2007 and carried out by NIMASA; and
– Conversion of temporary registration to permanent registration.

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Handouts?
Subject to negotiation

Thank you for listening

Mfon Ekong Usoro
B.Sc (Hons) Sociology (Unical);
LL.B (Hons) (Buckingham);
LL.M - Maritime Laws (University College London); B.L
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Mfon Ekong Usoro