

AN AUSTRALIA REPSONSE

STEPHEN THOMPSON
MIDDLETONS MOORE & BEVINS
SYDNEY

April Maritime Agreements ✓ Shelpton Hampton

2000 FCA 507 (Full Ct of Federal Ct)
deals with analysis of History of Arrest
Convention (1952) & 1988 Admiralty Act

INTERNATIONAL CONVENTION ON ARREST OF SHIPS, 1999

AN AUSTRALIAN RESPONSE

In response to a request from the Federal Department of Transport, Stuart Hetherington prepared in January 2000 an initial draft analysis of the 1999 Arrest Convention in comparison to the Admiralty Act 1988.

During March and April, a small working group comprising Stuart, Peter McQueen, Greg Nell, Robert Wilson and myself met on several occasions to continue the project.

It was the intention of that working group to prepare a draft paper on behalf of MLAANZ for submission to the Department as part of the deliberations over whether Australia should incorporate the Convention into domestic law.

It quickly became apparent that there were two quite distinct aspects to the work:

- (a) firstly, the objective and technical comparison of the Convention with those parts of the Act dealing with ship arrest; and
- (b) secondly, where the Convention was more expansive, or restrictive, than the Act, there was a need for a qualitative consideration as to whether one should be preferred over the other in Australia.

In due course, and depending on the outcome of these considerations, it may be necessary to give thought to the question of whether the Convention should be adopted in its entirety, replacing all those parts of the Admiralty Act which touch on ship arrest, or whether a piecemeal approach should be adopted, taking what is seen to be the best of the Convention and augmenting the Admiralty Act with those provisions.

The attached draft memorandum represents the current state of the working group's progress. It is intended as a discussion paper for review by MLAANZ, particularly in respect of the articulation of policy issues on the more contentious aspects. After a suitable period has been allowed for review and comment, it is intended that the draft, incorporating such amendments as the broader membership may suggest, be submitted to Government for consideration.

Stephen Thompson
Middletons Moore & Bevins
Sydney

27 July 2000

*see essay by Edward Goss for
Marilla Calder Briggs, in MLAANZ
Journal & on MLAANZ website*

*believe Australia should
not adopt the convention*

*"If Joseph knew how slow & dangerous were
such the method to ... no confidence in either*

MLAANZ

INTERNATIONAL CONVENTION ON ARREST OF SHIPS 1999

ISSUES FOR AUSTRALIA

Introduction

In Australia, the law of ship arrest is largely to be found in the Admiralty Act 1988.

A comparison of the Admiralty Act with the International Convention on Arrest of Ships 1999 ("Arrest Convention 1999") is a straightforward, if somewhat barren, exercise.

The more important task is the qualitative evaluation of whether or not there are provisions in the Arrest Convention 1999 which Australia should incorporate into domestic law. If there are not then the debate can end there. If there are, then the question becomes whether Australia should repeal those parts of the Admiralty Act 1988 dealing with arrest and give effect to the Arrest Convention 1999 or amend the Admiralty Act 1988 by inserting those provisions in the Arrest Convention 1999 which are seen to be beneficial.

In performing that qualitative evaluation, it is important to consider and acknowledge at the outset the policy parameters within and subject to which the task is to be performed. While a balanced approach is generally the aim, there are instances where it is necessary to make decisions based on the desired outcome or state of affairs.

In commending the Admiralty Bill 1988 to the Australian parliament, the Honourable Lionel Bowen, Deputy Prime Minister and Attorney General, observed:

"Australia is principally a country of shippers rather than shipowners and is dependant on shipping for much of its import and export trade. It is, therefore, in Australia's interests to support a broad Admiralty jurisdiction ... The proposed legislation, therefore, asserts a broad Admiralty jurisdiction but at the same time takes account of international trends and remains within internationally acceptable limits."

Ten years later these sentiments were to be repeated when Federal Parliament considered the Carriage of Goods by Sea Amendment Bill which had the effect of removing the automatic "Hamburg Rule trigger" and introducing a localised version of the Hague-Visby Rules. The Parliamentary speeches surrounding the Bill, which had bi-partisan support, emphasised what were seen to be the key policy issues behind developing an Australian cargo liability regime. As Mr Tony Smith, the Member for Dickson remarked:

"In my submission, these measures are good and are the sorts of measures which will promote those seeking to export goods while, at the same time, providing a little more certainty and equity in an industry where there has been a good deal of uncertainty brought about by legal interpretation, prolonged litigation and frequently injustice at the end of the day where shippers of goods have sustained substantial loss as a result of negligence and/or other actions of the carrier".

It may tentatively be concluded, therefore, that among the primary policy considerations to which regard should be had in evaluating the 1999 Arrest Convention, would be included:

- the promotion of Australia's trading interests, particularly the protection and encouragement of exports;
- certainty and predictability of the law;
- to the extent compatible with the first two objectives, conformity with our major trading partners.

Article 1 "Maritime Claim"

Threshold issue: Causal nexus

Article 1 of the Convention defines "maritime claim" as one "*arising out of*" one or more of the defined situations.

Similar language is used in relation to some of the heads of claim in section 4 of the Admiralty Act 1988 (for example section 4(3)(d), (f)). But in other instances the claim is described as one "*in respect of*" certain topics.

This invites the question whether the words "*arising out of*" are as wide as the existing language. At first blush the language may not seem to be obviously narrower. Although, as an example, in the context of arbitration a claim arising out of an agreement is probably narrower than a claim relating to that agreement or in respect of that agreement.

The following are the heads of claim contained in Article 1 of the Arrest Convention 1999:

(a) Loss or damage caused by the operation of the ship

While these words are not used in *Admiralty Act 1988* this provision is equivalent to sub-section 4(3)(a) of the Act which reads:

"a claim for damage done by a ship (whether by collision or otherwise);"

and might be thought to encompass sub-section 4(3)(c) which reads:

"a claim for loss of life, or for personal injury sustained, in consequence of a defect in a ship or in the apparel or equipment of a ship;"

and sub-section 4(3)(d) which reads:

"a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:

- (a) *the owner or charterer of a ship;*
- (b) *a person in possession or control of a ship; or*
- (c) *a person for whose wrongful acts or omissions the owner, charterer or person in possession or control of the ship is liable;*

being an act or omission in the navigation or management of the ship, including an act or omission in connection with:

- (d) the loading of goods onto, or the unloading goods from, the ship;*
- (e) the embarkation of persons onto, or the disembarkation of persons from, the ship; and*
- (f) the carriage of goods or persons on the ship".*

Discussion

While the language of the Convention is engagingly simple in its reference to "operation of the ship", the more detailed wording of the Admiralty Act 1988, including the long established "damage done by a ship" (which also gives rise to a maritime lien) has much to recommend it. The Australian Law Reform Commission ("ALRC") (at paragraph 165 of its report "Civil Admiralty Jurisdiction") referred to this expression as "a term of art in maritime law whose meaning is well settled by authority".

Conclusion

While the interests of brevity and simplicity would be served by adopting the wording of the Arrest Convention, on balance it is considered that the introduction of new terminology and the potential casting aside of the jurisprudence on the meaning of "damage done by a ship" would not be justified.

(b) Loss of life or personal injury, occurring whether on land or on water, in direct connection with the operation of the ship

The equivalent provisions in the Admiralty Act 1998 are sub-sections 4(c) and (d) quoted above.

Discussion

The Admiralty Act 1988 however includes words of limitation to the effect that the loss of life or personal injury must be "sustained in consequence of a defect in a ship or in the apparel or equipment of a ship".

Those words may be unnecessarily narrow compared with the words "operation of the ship" in the Convention. It is of interest that this provision in the Convention uses the words "in direct connection with" and those words are not found in Article 1(a). Thus it would seem that there is some limit on the circumstances in which claims for loss of life or personal injury may arise by reason of the operation of the ship whereas there is no such limitation in relation to loss or damage caused by the operation of the ship. It might be sought to be argued that claims for loss of life or personal injury could also be brought within Article 1(a) and that there is no need in such circumstances for the "direct connection" to arise. It is also noted that the ALRC, in paragraph 166, referred to the desirability of personal injury claims arising from the "operation" of ships being included in the Admiralty jurisdiction and considered the advantages and disadvantages of a simple or more detailed definition. It opted for the more detailed wording.

Conclusion

Cases could be made for use of the Convention wording or retention of the Admiralty Act wording and there is little to choose between the two. While a case could be made for the simplicity of the words in the Convention, that simplicity might not accommodate claims which could otherwise be brought within the Admiralty Act 1988. The fact that the ALRC supported the more detailed definition weighs in favour of the retention of the Admiralty Act wording.

(c) Salvage operations or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which itself or its cargo threatened damage to the environment

The equivalent provision in the Admiralty Act 1988 is contained in sub-section 4(3)(g) which reads:

"a claim relating to salvage (including life salvage and salvage or cargo and wreck found on land)."

Discussion

The specific reference to "salvage agreement" in the Convention does not add anything to the Act. Most salvage claims are made as a result of an agreement (such as Lloyd's Open Form) having been entered into and it has not so far as we are aware, been suggested that that precludes an arrest under the Admiralty Act 1988. Similarly it is difficult to see why any claim which is made under the Salvage Convention would not be a claim relating to salvage and thus within the Admiralty Act 1988 although there is no particular reference to a claim for special compensation relating to threatened damage to the environment.

Conclusion

It is not thought that the Convention wording adds anything to the scope of the jurisdiction contained within the Admiralty Act 1988 and the specific reference to life salvage and salvage or cargo and wreck found on land is a useful provision under the Admiralty Act 1988.

(d) Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimise, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d)

Claims of such nature do not find an obvious equivalent under the Admiralty Act 1988. A claimant would need to bring such a claim either within sub-section 4(3)(a) ("a claim for damage done by a ship"), sub-section 4(3)(b) ("a claim in respect of the liability of the owner of a ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act

pure economic loss claim?

1981 ..."), the salvage provision in sub-section 4(3)(g) or sub-section 4(3)(d) ("a claim for loss of life or personal injury").

Discussion

The aspects of this Article of most interest are those relating to a "threat of damage" and "loss likely to be incurred"

A claim relating to a "threat of damage", made by someone who has not provided salvage services, would not be recoverable under sub-section 4(3)(a) which requires "damage".

Presumably a claim by a Government for clean up expenses arising from the "threat of damage" would be recoverable under sub-section 4(3)(b) ("a claim in respect of the liability of the owner of a ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act 1981 or under a law of a State or Territory that makes provision as mention in sub-section 7(1) of that Act).

Claimants, other than Governments, would therefore have to bring themselves within sub-section 4(3)(d). It would seem that they would have an entitlement to arrest under that sub-section in most cases since the act giving rise to the threat of damage is likely to have arisen from an "act or omission in the navigation or management of the ship", but whether or not they would actually have a good cause of action in contract or tort would be debatable. Presumably it would be a claim for pure economic loss and give rise to the difficulties that such claims carry with them. The same difficulties would arise, of course, if Article 1(d) of the Arrest Convention 1999 was part of Australian Law.

The value of these parts of the Article may be illusory if such circumstances would support arrest but not a substantive claim, particularly in the context of section 6 of the Admiralty Act 1988 which makes clear that the provisions of the Act are not intended to create new causes of action. Australian arrest for security in respect of foreign substantive proceedings would be a possible rationale.

Further, we are unclear as to who it is expected would be able to arrest the vessel in relation to loss which is incurred or likely to be incurred by a third party. Presumably it is such third parties who should have the rights to arrest but that is not made clear by the wording in the Convention.

Conclusion

Whilst this provision, if incorporated into Australian law, may provide a modest expansion of the existing scope of the Admiralty Act 1988 it is not thought likely that there would be many circumstances in which it could be of practical value.

In view of the number of difficulties and issues created by this provision it is not considered that if incorporated into Australian law, it would provide benefits.

(e) Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned,

including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew

There is no equivalent provision under the Admiralty Act 1988. A claimant would have to seek to bring itself within sub-sections 4(3)(a), (d) or (g).

Discussion

The inclusion (or non-inclusion) of jurisdiction in relation to wrecks was considered specifically by the ALRC :

- in paragraph [157] - that the salvage head did not cover wreck other than salvage claims in relation to a wreck ; and
- in paragraph [178] - where the ALRC thought it best to leave the whole matter of jurisdiction in relation to wrecks to be dealt with in the Navigation Act (which provisions it also recommended be reviewed but did not do so because it was outside of its terms of reference).

We are not aware of any practical difficulties that the absence of Admiralty jurisdiction has given rise to in such a situation in Australia. Harbour masters are given wide powers to order the owners of a vessel to remove wrecks. Where such owners are entered with Protection and Indemnity Associations the expenses are covered by the Clubs concerned and we are not aware of examples of situations in which harbour masters have been left without a remedy in the past.

In practical terms Article 1(e) would only be of benefit to a harbour master in circumstances in which the owner of a vessel concerned has a sister ship which can be arrested. Similarly we are not aware of situations which a Government instrumentality, or indeed any other third party, has been left to meet the costs of maintaining the crew of a vessel which has sunk and then needed a remedy to recover such costs against the ship owner. Once again this would only be of any value in circumstances in which the ship owner concerned has other ships within the jurisdiction which can be arrested.

Conclusion

Any consideration of the adoption of this paragraph of the Convention ought entail a re-examination of the ALRC's views and decision not to include a specific head in this regard before any recommendation is made as to its inclusion.

The provision could be of benefit if introduced into Australian law, but it would only be in a rare case that it could have application.

(f) Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise

This provision has a direct equivalent in sub-section 4(3)(f) of the Admiralty Act 1988:

"A claim arising out of an agreement that refers to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charter party or otherwise."

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(g) Any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise

This provision is contained within sub-section 4(3)(f) of the Admiralty Act 1988.

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(h) Loss of or damage to or in connection with goods (including luggage) carried on board the ship

The equivalent provision to this in the Admiralty Act 1988 is sub-section 4(3)(e). The only difference is the words "including luggage". Pursuant to sub-section 3 (3) of the Admiralty Act 1988 a reference to goods, in relation to a ship, includes a reference to the baggage and other possessions of a person who is on the ship, being baggage and possessions that are being carried or able to be carried on the ship. Claims in respect of damage to luggage would be maintainable under the Admiralty Act 1988, arguably, under both sub-sections 4(3)(f) and (e).

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(i) General average

The equivalent provision in the Admiralty Act is sub-section 4(3)(h) ("a claim in respect of general average").

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(j) Towage

The equivalent provision in the Admiralty Act 1988 is sub-section 4(3)(j) ("a claim in respect of towage of a ship").

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(k) Pilotage

The equivalent provision in the Admiralty Act 1988 is sub-section 4(3)(k) ("a claim in respect of pilotage of a ship").

Conclusion

The Convention and the Act are substantially equivalent in respect of this subject matter.

(l) Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance

The equivalent provision in the Admiralty Act 1988 is sub-section 4(3)(m):

"a claim in respect of goods, materials or services including stevedoring and lighterage services supplied or to be supplied to a ship for its operation or maintenance."

Discussion

The question is whether the addition of words in the Convention "provisions, bunkers, equipment (including containers)" and also the additional words "management, preservation" add to the Admiralty Act provision.

There has been a good deal of litigation around the issue as to whether or not services relating to containers (usually provided by the ship's agent) can give a right to proceed against a particular ship in the Admiralty jurisdiction. The insertion of the words "including containers" would assist somewhat in clarifying this issue at least in so far as the owner of the containers is concerned but would require an agent to establish that a particular container and a charge in relation to such a container related to the particular ship which is sought to be arrested (see The River Rima, Skulptor Vuchetich and Skulptor Konenkov and the comments below under (r)). Thus those words by themselves would not resolve this issue.

It is not thought that the words "provisions, bunkers, equipment" go beyond what is already established by common law as "necessaries" and which give rise to a right of arrest.

Similarly it is not thought that the words "management, preservation" add to what is covered by the words "operation or maintenance" in the Admiralty Act 1988.

Conclusion

The provision in the Convention adds very little to the equivalent Admiralty Act provision.

(m) Construction, reconstruction, repair, converting or equipping of the ship

The equivalent provisions in the Admiralty Act 1988 are sub-section 4(3)(n):

"a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched"

and sub-section 4(3)(o):

("a claim in respect of the alteration, repair or equipping of a ship").

Discussion

The only questions which arise are whether the words "reconstruction" and "converting" add anything to the jurisdiction contained in sub-section 4(3)(n) and (o) of the Admiralty Act 1988. It is suggested that they do not.

Conclusion

Overall it is not considered that this provision adds anything to the Admiralty Act 1988.

(n) Port, canal, dock, harbour and other waterway dues and charges

The equivalent provision in the Admiralty Act 1988 is sub-section 4(3)(p):

("a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of a similar kind, in relation to a ship").

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

(o) Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf

The equivalent provision is sub-section 4(3)(t) of the Admiralty Act 1988 which reads:

"a claim by a master, or a member of the crew, of a ship for:

- (i) wages; or
- (ii) an amount that a person, as employer, is under an obligation to pay a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including the operation of the law of a foreign country."

Discussion

One question which arises is whether the words of inclusion "costs of repatriation and social insurance contributions" add to the ambit of the jurisdiction under the Admiralty Act 1988. It is not thought that they do although a potential problem in relation to both the Convention and the Act is that they refer to "sums due to the master" and "an obligation to

pay a person as employee" whereas in some cases, such as "social insurance contributions", "superannuation", "union dues", the payments are in fact made to a third party on behalf of the crew member. It may be that the inclusion of the words "social insurance contributions" makes clear that "sums due to the master" etc include sums which are payable to third parties and such an interpretation maybe easier to reach under the Convention than under the Act.

This seems to have been what the ALRC intended, recognising (as it did) that wages included payments such as of social benefit contributions on behalf of crew to third parties (see ALRC paragraph 162 including the passage from *Thomas* there cited). The passage from the ALRC report (including the quote from *Thomas*) was cited with apparent approval (or at least without dissent) by the Full Federal Court in the Ionian Mariner 149 ALR 200 @ p. 216.

One potential problem with the wording of the Convention is the inclusion of the words "in respect of their employment on the ship". It is to be hoped that those words would not preclude a crew member who is on leave from arresting a ship in respect of unpaid wages. The same issue could arise under the Act.

The language of the Convention may also exclude for instance redundancy payments or severance payments based on a period of service with the employer generally and which are not themselves payments in respect of their employment on the ship (see The Tacoma City [1991] 1 Lloyd's Rep. 330). However, arguably claims for payments of this nature would fall within section 4(3)(t) as general maritime claims (provided that the shipowner or relevant person as the employer of the crew is obliged to make those payments under the law governing the contract of employment) and notwithstanding that they do not relate to the vessel against which suit is brought (although they would still not fall within the wages lien and attract the higher priority of a lien).

Conclusion

The language of the Convention appears no wider, and may in fact be narrower, than existing Australian law on this issue.

As an aside, another question that may merit consideration in this regard is whether section 4(3)(t) should be amended in light of the Full Court's decision in the Ionian Mariner 149 ALR 200 in the context of monies due under collective wage agreements to which the crew are not themselves parties (the parties being the shipowner and their crew's union).

(p) Disbursements incurred on behalf of the ship or its owners

The equivalent provision is contained in sub-section 4(3)(r) of the Admiralty Act 1988:

"a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship".

Under the Admiralty Act 1988 it is only identified persons who can make such claims whereas under the Convention the jurisdiction arises at large to anyone who incurs such disbursements.

It is difficult to see who apart from those nominated persons is likely to incur such disbursements and therefore why there would be any need to amend the Admiralty Act 1988 provision. A problem which may arise under the wording in the Convention is the use of the words "it's owners" and whether that includes demise charterers or, indeed, beneficial owners. It would be preferable if those words were deleted from the Convention. It is thought that the words in the Act "on account of" might be preferable to the words in the Convention "on behalf of".

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

(g) Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer

The equivalent provision in the Admiralty Act 1988 is sub-section 4(3)(s):

"a claim for an insurance premium, or for a mutual insurance call, in relation to a ship".

Discussion

It is unclear what the words "payable by or on behalf of the shipowner or demise charterer" add, if anything, to the jurisdiction which is contained in the Admiralty Act 1988. It is suggested that they do not in view of the definition of relevant person and the other provisions contained in the Act.

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

(r) Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer

There is no equivalent provision in the Admiralty Act 1988 and in fact the Courts have found in Australia that such payments are not within the Admiralty jurisdiction. (See Sheppard J in Morlines Agency Ltd v Skulptor Vuchetich, followed by Tamberlin J in Patricks v Skulptor Konenkov (1997) 150 ALR 651).

The Convention departs from the structure of Australian Admiralty jurisdiction in that the latter disallows arrest for agency fees on the basis of the distinction between services to a ship and services to the general business of the ship owner.

Conclusion

This provision is considered to be a useful addition to Australia's Admiralty jurisdiction although it is not thought that the words "by or on behalf of the ship owner or demise

charterer" are necessary in view of the provisions in the Admiralty Act relating to "relevant person" and creating the right of arrest in respect of vessels owned or demise chartered.

(s) Any dispute as to ownership or possession of the ship

The equivalent provision in the Admiralty Act 1988 is contained in sub-sections 4(2)(a)(i) and (ii) which reads:

"(a) a claim relating to:

(i) possession of a ship;

(ii) title to or ownership of a ship or a share in ship."

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

(t) Any dispute between co-owners of the ship as to the employment or earnings of the ship

The equivalent provision is contained in *sub-section 4(2)(b)* of the *Admiralty Act 1988* which reads:

"a claim between co-owners of a ship relating to the possession, ownership, operation or earnings of the ship".

Discussion

The major difference relates to the use of the word "employment" in the Convention as compared with "operation" in the Admiralty Act 1988. It is not thought that the difference is significant.

Conclusions

The Convention and the Act are substantially similar in respect of this subject matter.

(u) A mortgage or a "hypothèque" or a charge of the same nature on the ship

The equivalent provision in the Admiralty Act 1988 is contained in sub-sections 4(2)(a)(iii) and (iv) which reads:-

"a claim relating to:

(iii) a mortgage of a ship or of a share in a ship; or

(iv) a mortgage of a ship's freight."

Discussion

The distinction between the two relates to the inclusion of the word "hypothèque" and the additional words "charge of the same nature on the ship". It is not thought that the

distinction is significant, particularly as the definition of "mortgage" in Section 3(1) of the Admiralty Act 1988 includes "hypothecation". Some commentators have queried whether the Convention should not have referred to registered mortgages, but as the Admiralty Act itself makes no reference to whether or not a mortgage is required to have been registered there is no difference between the Convention wording and the Act.

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

(v) Any dispute arising out of a contract for the sale of the ship

There is no directly equivalent provision in the Admiralty Act 1988.

This, however, does not mean that all claims under a contract for sale of a ship may not be pursued in rem - for instance if the claim could otherwise be characterised as one for possession of the ship (for instance in completion of performance of the contract for sale) or for title (for instance in completion of performance of the obligation to transfer title under a contract for sale). For example see The Bineta [1967] 1 WLR 121 and Antares Shipping -v- the ship "Capricorn" (1979) 111 DLR (3d) 289 referred to in the Shin Kobe Maru 1981 CLR 404@ p. 422).

In the case of Paul Allison and APAI Pty Ltd v "Greshanne" (1996) 125 FLR 342 it was held by the Supreme Court of Tasmania that a claim for the price to be paid on the sale of a ship was not within the Admiralty jurisdiction. It is of interest however that in the case of Caravelle Investments Limited v Martaban Limited (LMLN 530) Finklestein J held in the Federal Court that the plaintiff's claim for the return of "holding deposit" it had paid depended upon the plaintiff establishing that it did not purchase the "Cape Don". To defeat the plaintiff's claim the defendant had to show that the contract of sale was concluded and thus the claim did come within the Admiralty jurisdiction.

Conclusion

In view of the differing judicial reasons referred to above it is considered that such a provision would be worthy of inclusion in Australia's Admiralty jurisdiction.

Other provisions

The remaining provisions of Article 1 contain definitions of "arrest" (paragraph 2); "person" (paragraph 3); "claimant" (paragraph 4) and "Court" (paragraph 5) which do not have equivalent provisions in the Admiralty Act 1988.

Conclusion

It is not considered that those provisions would add anything to the Australian statute.

Article 2 "Powers of arrest"

Discussion

It is of note that neither Article 2 nor Article 3 refer to arrest of "other property" which is referred to in the Admiralty Act. It is not thought that paragraphs 1, 2 or 4 of Article 2 would add anything to the Admiralty Act 1988.

Paragraph 3 of Article 2 provides as follows:

"A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State."

The equivalent provision is contained in Section 29 of the Admiralty Act 1988 which provides that the Court may stay proceedings in circumstances in which the claim concerned should be determined by arbitration or by a Court of a foreign country.

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

Article 3 "Exercise of right of arrest"

This provides as follows:

1. Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
 - (a) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
 - (b) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
 - (c) the claim is based upon a mortgage or a "hyptheque" or a charge of the same nature on the ship; or
 - (d) the claim relates to the ownership or possession of the ship; or
 - (e) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under the law of the State where the arrest is applied for.
2. Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:
 - (a) owner of the ship in respect of which the maritime claim arose; or
 - (b) demise charterer, time charterer or voyage charterer of that ship.

This provision does not apply to claims in respect of ownership or possession of a ship.

3. *Notwithstanding the provisions of paragraphs 1 and 2 of this article, the arrest of a ship which is not owned by the person liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.*

The equivalent provisions in the Admiralty Act 1988 are contained in Sections 15, 16, 17 and 18 which deal with the topics of the right to proceed in rem on maritime liens (Section 15) the right to proceed in rem on proprietary maritime claims (Section 16) the right to proceed in rem on owners' liabilities (Section 17) and the right to proceed in rem on demise charterers' liabilities (Section 18).

Discussion: Article 3.1(a)

The Convention permits arrest when the person who owned the ship at time when the maritime claim arose "is liable for the claim and is owner of the ship when the arrest is effected".

There are two fundamental points of departure from the Admiralty Act:

- the Convention requires that the owner at the time of the claim "is liable for the claim" while the Act refers, in the definition of "relevant person" to "a person who would be liable on the claim";
- the second time period under the Convention is the time at which the arrest is effected, while the corresponding time under the Act is when proceedings are commenced.

The recent decision of the Australian High Court in the Iran Amanat [1999] 73 ALJR 559 has held that in an application challenging the jurisdiction of the Court it is not appropriate for the Court to treat the words "would be liable" as meaning "is liable". In such an application it was held that the Court is not concerned to assess the strength of the claim but only its nature. Thus the wording in the Convention ("is liable") may be construed to require a Court to consider the strength or merits of a claim even at an interlocutory level - as the Court would under the Act where a Defendant moves to strike out a Writ on the ground that it is frivolous or vexatious or discloses no reasonable cause of action. (The application in the Iran Amanat was not of that kind).

The Convention creates a significant change in requiring the vessel to have been owned or demise chartered at the time when the arrest is effected and not, as under the Act, when the proceeding is commenced. Under the Act there is a possibility that an arrest in Australia might not take place for many months after a proceeding has been commenced. This may cause difficulty for the ship owner or bareboat charter who acquires the vessel (or enters into a bareboat charter) between the time when the proceedings have been commenced and the time of the arrest of the vessel.

It does not appear that the ALRC gave detailed consideration to this aspect. In paragraph 136 where the Commission concluded its review of the options available to it in enlarging the circumstances in which vessels might be arrested and concluded that "a statutory right

of action in rem with respect to any claim, other than the claim directly involving the possession of or a proprietary interest in the ship, should only be able to be brought where, when the action is commenced, the owner or a demise charterer of the ship is a relevant person in respect of the claim."

It is also of note that in paragraph 137 the ALRC suggested that if its recommendation in the previous paragraph was not accepted and the legislature decided to extend the right of arrest further so that vessels which were time chartered, for example, could be arrested then it would be "desirable to impose a relatively short time limit (such as 12 months) for service of process after the commencement of proceedings, to avoid unnecessarily affecting third parties where the time charterer as relevant person has ceased to be operator of the ship.". It may be that the existence of Rule 20 which requires initiating process to be served within 12 months provides some protection against an innocent third party purchaser of the vessel when there has been a delay between the filing of the Writ and its service.

Conclusion

Ship owners and others with interests in vessels who might feel the High Court decision in the Iran Amanat makes it too easy for an arresting party would no doubt support the change which would be made by the introduction of the Convention both insofar as the words "is liable for the claim" and the change to the time at which the necessary relationship with the vessel is required are concerned. Both provide benefits to ship owners. As has been pointed out above the Iran Amanat decision might not in practice provide too much by way of hardship for ship owners who can seek to strike out Writs in circumstances in which they do not believe there is a reasonable cause of action against them. They then face the same difficulties that any other defendants do in meeting at an interlocutory stage, and therefore without the benefit of discovery or other interlocutory processes, a high standard of proof.

It is not thought that the changes contained in the Convention are so obviously meritorious to Australian interests as to warrant these provisions being brought into Australian law. They do however contain significant changes to the present position in Australia and must be taken into consideration in any decision made as to whether Australia should give effect to the Convention or amend the Act.

Discussion: Article 3.1(c) and (d)

These provisions, dealing with mortgages and ownership, have their equivalent in Section 16 of the Admiralty Act 1988 which draws a distinction between proprietary maritime claims and general maritime claims. The effect of the Convention and under the Act is the same and there is no necessity for any relevant nexus between the person who would be liable on the claim in personam and the ship to be arrested.

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

Discussion: Article 3.1(e)

This provision, dealing with liens, has its equivalent in Section 15 of the Admiralty Act 1988. The difference is that no attempt has been made in the Convention to define or limit what is constituted by a maritime lien. Under Section 15 there is a definition, which is not exclusive, and which embraces salvage, damage done by a ship, wages of the master or a member of the crew and master's disbursements. The other distinction from the Convention is that it seeks to link the lien with a claim against an owner, demise charterer, manager or operator of the ship. It is hard to see how such a lien could arise otherwise than by the existence of an underlying claim against one of those organisations and therefore it is difficult to see why the concept of the maritime lien which runs with the vessel needs to be delimited in any way.

Conclusion

The ALRC gave consideration to the question whether it should define the subjects of maritime lien. It was thought, largely for educational purposes for those unfamiliar with the jurisdiction that it would be helpful to list those matters which are regarded in Australia as maritime liens but made it clear that it was not precluding the Courts adding to the list (Section 15(2) says that "*a maritime lien includes a reference to*"). (See paragraph 122 ALRC report).

Discussion: Article 3.2

This provision deals with sister ship arrest has its equivalent in Section 19 of the Admiralty Act 1998.

Once again the Convention identifies "the person who is liable for the maritime claim" rather than the Act's "relevant person" and also refers to the time when the "arrest is effected" and not when the "proceeding is commenced" as under the Act. The Convention also goes on to say that this right does not arise in respect of ownership or possession disputes. The same applies under the Admiralty Act 1988 as Section 19 is only applicable to general maritime claims and not to proprietary maritime claims.

Conclusion

The same comments as have been made above in relation to Article 3 paragraph 1(a) are applicable.

Discussion: Article 3.3

This provision restricts the situations in which an arrest can be effected where a vessel is not owned by the person liable for the claim (ie. where the claim arises under a maritime lien and the vessel has been sold by the relevant person or the vessel is demise chartered by the relevant person), in the circumstances in which the law of the State permits the judicial sale of that ship.

This is a difficult provision to understand since it seems to be aimed at potentially restricting the right of arrest in both sister ship and bareboat charter situations. The

position might be particularly applicable in bareboat charter situations because it is difficult to see under what power execution could be levied in Australia against a vessel where it is bareboat chartered and not owned by the person who owes a debt. In the absence of a provision in the Convention entitling the sale of such a vessel it would seem to be possible that this provision would cut down the right to arrest in respect of bareboat charterer's liabilities.

Conclusion

In view of the comments made above for the potentiality of paragraph 3 of Article 3 to cut down the right of arrest in respect of bareboat chartered vessels we would not recommend incorporation of this provision into Australian law.

Article 4 "Release from arrest"

This provides:

1. *A ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, paragraphs 1(s) and (t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.*
2. *In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof, not exceeding the value of the arrested ship.*
3. *Any request for the ship to be released upon security being provided shall not be construed as acknowledgement of liability nor as a waiver of any defence or any right to limit liability.*
4. *If a ship has been arrested in a non-party State and is not released although security in respect of that ship has been provided in a State Party in respect of the same claim, that security shall be ordered to be released on application to the Court in the State Party.*
5. *If in a non-party State the ship is released upon satisfactory security in respect of that ship being provided, any security provided in a State Party in respect of the same claim shall be ordered to be released to the extent that the total amount of security provided in the two States exceeds:*
 - (a) *The claim for which the ship has been arrested, or*
 - (b) *The value of the ship,**whichever is the lower. Such release shall, however, not be ordered unless the security provided in the non-party State will actually be available to the claimant and will be freely transferable.*
6. *Where, pursuant to paragraph 1 of this article, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.*

Discussion: Article 4.1

There is no direct equivalent provision to Article 4 paragraph 1 in the Admiralty Act. It is the Rules which make provision for release from arrest (Rule 51 and Rule 52) and bail bonds (Rules 54 to 59) and there is no particular provision which enables a vessel to continue to be traded or operated where the underlying claim relates to ownership or possession or is a dispute between co-owners of the ship as is contained in paragraph 1 of Article 4. Mr Justice Sheppard did deliver a judgment in which he declined to permit a vessel to trade whilst under arrest (not an ownership dispute), although he subsequently heard further argument and permitted a voyage to be made.

Conclusion

This is a procedural provision which could usefully be included in the Australian legislation.

Discussion: Article 4.2

There is no directly equivalent provision to Article 4 paragraph 2 which provides that "the Court shall determine" the nature and amount of security where the parties are unable to agree. The nearest equivalent is contained in Rule 52(1) and in (3) which enables a party to a proceeding to apply to the Court for the release of a ship and the Court "may order the release from arrest of the ship or property on such terms that are just." Tamberlin J declined to become involved in the case of the Carina c/w MSC Samia when the parties were unable to agree the form of a letter of undertaking. He took the view that an owner wishing to secure the release from arrest of the ship should either put up cash or a bail bond.

Conclusion

While Australian Courts have shown a reluctance to intervene in matter of security, it is submitted that a provision for the Court to resolve deadlocked disputes would be beneficial.

Discussion: Article 4.3

There is no equivalent provision to Article 4 paragraph 3 in the Admiralty Act 1988. It is thought by some to be a deficiency of the present Australian legislation that no allowance has been made for appearances under protest or conditionally when making interlocutory applications after the arrest of a ship. The inclusion of such a provision as Article 4 paragraph 3 of the Convention may obviate the need for such provisions at least in circumstances in which an application is made for release of a vessel from arrest upon security being provided.

Conclusion

It is submitted that the substance of this provision would be a beneficial addition to Australian Admiralty law.

Discussion: Article 4.4

There is no equivalent provision to Article 4 paragraph 4 dealing with arrest of a vessel in a non-party State, where security has already been provided in a State party. The nearest equivalent provision is contained in Section 20 of the Admiralty Act which deals with the topic of "service on and arrest of only one ship." This precludes more than one arrest taking place in either the same proceedings or other proceedings on the same claim unless the original arrest or the first mentioned proceedings have been discontinued, dismissed or struck out. It would not seem to be dealing with arrests taking place in two separate jurisdictions.

Conclusion

This might be a useful provision to be incorporated into the Australian legislation. If Australia is not going to give effect to the Convention it would however have to be re-worded.

Discussion: Article 4.5

The same comments apply in relation to Article 4 paragraph 5 which also deals with the topic of arrest in a non-party State, in circumstances in which security has been provided in the non-party State. The requirement, in effect, that the Court be satisfied that the security provided in the non-party State will actually be available to the Claimant and will be freely transferable might create difficulties. It might require the Court, for example, to express views as to the integrity and reliability of the judicial or banking systems of other countries.

Conclusion

A provision of this type, while it may cause some judicial discomfort, would be a beneficial addition to Australia law.

Discussion: Article 4.6

There is no equivalent provision to Article 4 paragraph 6 enabling a party to re-apply to the Court to have security reduced, modified or cancelled after it has been provided. It might be thought that such a provision is a useful provision to have, particularly given Tamberlin J's views concerning security.

Conclusion

Once again this provision could be of benefit in Australia.

Conclusion concerning Article 4

Apart from the comments which have been made in relation to part of the wording in Article 4 paragraph 5, all the provisions contained within Article 4 could, it is thought, usefully be incorporated into Australian law. If this were to be done without adoption of the

Convention, these provisions could be added to the Admiralty Rules without the necessity to amend the Act.

Article 5 "Right of rearrest and multiple arrest"

This provides:

1. *Where in any State a ship has already been arrested and released or security in respect of that ship has already been provided to secure a maritime claim, the ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:*
 - (a) *the nature or amount of the security in respect of that ship already provided in respect of the same claim is inadequate, on condition that the aggregate amount of security may not exceed the value of the ship; or*
 - (b) *the person who has already provided the security is not, or is unlikely to be, able to fulfil some or all of that person's obligations; or*
 - (c) *the ship arrested or the security previously provided was released either:*
 - (i) *upon the application or with the consent of the claimant acting on reasonable grounds, or*
 - (ii) *because the claimant could not by taking reasonable steps prevent the release.*
2. *Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:*
 - (a) *the nature or amount of the security already provided in respect of the same claim is inadequate; or*
 - (b) *the provisions of paragraph 1(b) or (c) of this article are applicable.*
3. *"Release" for the purpose of this article shall not include any unlawful release or escape from arrest.*

Discussion

The equivalent provision is contained in Section 21 of the Admiralty Act 1988. It permits rearrest where default has been made in the performance of a guarantee or undertaking or "for some other sufficient reason".

It is suggested that the Court would find that the examples given in paragraph 1 of Article 5 would be "other sufficient reason".

Article 5 paragraph 2 has a similarity to Section 20 of the Admiralty Act 1988. It deals with the subject of "service on and arrest of only one ship" but does permit service on another ship where service on the first mentioned ship has been set aside or the proceeding, so far as it relates to that ship, has been discontinued, dismissed or struck out or unless service on the first mentioned ship was invalid and it has been released from arrest or was

unlawfully removed from the custody of the Marshal. Thus rearrest is not available in Australia in circumstances in which the security provided proves to be inadequate or the person who has provided the security is unlikely to be able to fulfil their obligations or the ship was released from arrest for one of the two reasons given in Article 5 paragraph 1(c) of the Convention.

Conclusion

It is considered that the wider discretion given to the Court under the Admiralty Act 1988 is preferable than the list of circumstances itemised in paragraph 1 of Article 5. It is not thought therefore that these provisions add anything to the Admiralty Act 1988.

Article 6 "Protection of owners and demise charterers of arrested ships"

This provides:

1. *The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:-*
 - (a) *the arrest having been wrongful or unjustified; or*
 - (b) *excessive security having been demanded and provided.*
2. *The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:-*
 - (a) *the arrest having been wrongful or unjustified, or*
 - (b) *excessive security having been demanded and provided.*
3. *The liability, if any, of the claimant in accordance with paragraph 2 of this article shall be determined by application of the law of the State where the arrest was effected.*
4. *If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision.*
5. *Where pursuant to paragraph 1 of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.*

Discussion

There is no equivalent provision to Article 6 paragraph 1 in the Admiralty Act 1988. This provision gives the Court the power to require a plaintiff to provide security, as a condition to permitting the arrest of a ship, in respect of any loss which might be incurred by the ship owner in consequence of the arrest having been wrongful or unjustified or excessive security having been demanded and provided. It is not clear when such a power is likely in practice to be exercised. For example we query whether the rules would have to include a provision requiring a plaintiff or its solicitor to provide such security at the time when the Writ is filed. It is not known how the Registry would determine the amount of such security or in what form it would require it to be provided. These may be matters which would need to be dealt with by the Rules.

This provision clearly goes further than merely requiring the plaintiff to provide an undertaking as to damages (which is typically required to be given when a plaintiff applies for an interlocutory injunction). It might cause considerable difficulties to both insured and uninsured plaintiffs. Where an uninsured plaintiff brings a cargo claim it may be that the cargo about which the claim is made is that plaintiff's sole or principal asset and its business may founder without it. It might be thought that it would have considerable difficulties providing additional security in respect of its claim in some circumstances. Even where a claim is brought by an insurer pursuant to rights of subrogation there may be some difficulty obtaining security in the absence of some well developed practice such as the provision of the P&I Club Letters of Undertaking. The other difficulty which we have with the wording of this provision is the open ended words: "including but not restricted to such loss or damage". The same words appear in paragraph 2.

Article 6 paragraph 2 is equivalent to Section 34 of the Admiralty Act 1988 which deals with the subject of "damages for unjustified arrest". That provision refers to a party who "unreasonably and without good cause" demands excessive security or obtains the arrest of the vessel. The words "wrongful or unjustified" in the Convention are similar to "unreasonably and without good cause" in the Act. The substance of the test is in any event left to the State Courts: Article 6 paragraph 3.

Article 6 paragraph 4 gives a discretion to the Court in which a claim for wrongful arrest is being made to stay such a claim until the determination of the principal action, in circumstances where it is to be determined in another jurisdiction. This is clearly a useful provision, although it might be thought that the Court would either of its own volition, or at the request of one of the parties, delay making any determination under Section 34 of the Admiralty Act 1988 until the substantive claim had been determined in another jurisdiction.

Article 6 paragraph 5 is clearly also a useful provision enabling an arresting party to apply to the Court to have whatever security it has been required to put up reduced, modified or cancelled. There is no directly equivalent provision in the Act.

Conclusion

There is a respectable case to be put for plaintiffs being required to put up security or for a more liberal test for wrongful arrest in this jurisdiction. Unfortunately there have been no

decisions in Australia under Section 34 as to what constitutes an arrest which has been "unreasonable and without good cause".

The position is of greatest concern where the plaintiff is outside the jurisdiction. In such circumstances the defendant can obtain security in respect of costs but has no protection in relation to any damages which it might ultimately obtain against the Plaintiff. At paragraph 245 of its report the ALRC compared arrest and Mareva injunction remedies and specifically referred to the undertaking which a plaintiff is required to give when applying for an injunction. Without exposing its reasoning, the ACRC did not recommend security for arrest.

This provision is perhaps the most extreme and contentious in the Convention since it might seriously impact on the ability of some plaintiffs to proceed with an arrest. The consensus of opinion in the committee is that any undertaking as to damages to be given should only be required from the plaintiff and not from the solicitor filing the initiating process. Quite apart from the question of the provision of security it is considered that paragraph 5 of Article 6 has much to recommend it and could usefully be incorporated in Australian law.

Article 7 "Jurisdiction on the merits of the case"

This provides:

1. *The Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.*
2. *Notwithstanding the provisions of paragraph 1 of this article, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.*
3. *In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship:*
 - (a) *does not have jurisdiction to determine the case upon its merits; or*
 - (b) *has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article,**such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.*
4. *If proceedings are not brought within the period of time ordered in accordance with paragraph 3 of this article then the ship arrested or the security provided shall, upon request, be ordered to be released.*
5. *If proceedings are brought within the period of time ordered in accordance with paragraph 3 of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, any final decision resulting therefrom shall be recognised and given effect with respect of the arrested ship or to the security provided in order to obtain its release, on condition that:*

- (a) *the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence; and*
 - (b) *such recognition is not against public policy (order public)*
6. *Nothing contained in the provisions of paragraph 5 of this article shall restrict any further effect given to a foreign judgment or arbitral award under the law of the State where the arrest of the ship was effected or security provided to obtain its release.*

Discussion

There is no directly equivalent provision to Article 7 in the Admiralty Act but it is not thought that it adds anything to what would apply in any event. For example paragraph 3 which permits the Court which is not going to determine the substantive issue to make orders requiring the substantive proceedings to be brought before a competent Court or arbitral tribunal within a specified period of time has an equivalent provision in sub-section 29(3) of the Admiralty Act 1988 where the Court is specifically empowered to stay the proceedings in Australia *"on such conditions as are just, including a condition ... with respect to the institution or prosecution of the arbitration or proceeding in the Court of the foreign country."*

Article 7 paragraph 4 gives a power to the Court which it might be thought would be exercised in any event if a condition imposed pursuant to Section 29 was not complied with.

It might be thought that Article 7 paragraph 5 is a useful provision insofar as it makes clear that where a decision is made in a foreign tribunal it is to be recognised in the country in which the vessel has been arrested and/or security provided (and there is no express provision in the Admiralty Act 1988 which makes that clear) and also as it contains some protection for the owner of the arrested vessel so that it is given notice of the proceedings in the foreign jurisdiction.

Article 7 paragraph 6 also makes it clear that whatever further effect can be given to a foreign judgment or arbitral award in the State in which the arrest has taken place should be permitted. This has perhaps been made even more obvious under the Admiralty Act 1988 in sub-section 4(2) (c) which includes as a proprietary maritime claim *"a claim for the satisfaction or enforcement of a judgment given by a Court (including a Court of a foreign country) against a ship or other property in a proceeding in rem in the nature of a proceeding in Admiralty"* and Section 4(3) (u) *"a claim for the enforcement of, or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration (Foreign Awards and Agreements) Act 1974) made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs."*

Conclusion

As has been noted above Article 7 paragraph 5 might well be a useful provision to be incorporated, but the remaining provisions add little to the Act.

Article 8 "Application"

This provides:

1. *This Convention shall apply to any ship within the jurisdiction of any State Party, whether or not that ship is flying the flag of a State Party.*
2. *This Convention shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.*
3. *This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.*
4. *This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.*
5. *Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.*
6. *Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person whose habitual residence or principal place of business is in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.*

Discussion

There are no equivalent provisions to paragraphs 1 and 2 of Article 8 in the Admiralty Act 1988. A similar provision to paragraph 1 is Section 5 of the Admiralty Act 1988 which says that the Act applies to all ships irrespective of the places of residence or domicile of their owners and all maritime claims where ever arising. Sub-section 8(2) of the Act also makes it clear that an action in rem cannot be commenced against a government ship or government property (reflecting the Foreign States Immunity Act 1985).

Paragraph 3 of Article 8 does not have a direct equivalent in the Admiralty Act 1988. Section 36 of the Admiralty Act 1988 recognises that there are powers of detention given to government authorities but that section makes it clear that they do not prevent the arrest of a ship and the power of detention is suspended whilst the ship is under arrest. Most significantly sub-section 36(5) gives a priority to a claimant having such rights of detention in respect of other claimants other than a marshal for his expenses. Such a provision would seem to find support in Article 8 paragraph 4 but there would need to be a specific provision inserted in any legislation giving effect to the Arrest Convention 1999 (or some other legislation) having the same effect.

The provisions of paragraph 5 of Article 8, which maintain the effect of any International Limitation Convention is equivalent to Section 25 of the Admiralty Act 1988 which also incorporates the procedures to be followed in making an application seeking limitation.

Paragraph 6 of Article 8 does not have any equivalent provision in the Admiralty Act 1988. It is hard to see what other rights of arrest would be available and therefore what further protection this paragraph provides to would be claimants.

Conclusion

It is not thought that these provisions add anything to the Admiralty Act 1988.

Article 9 “Non-creation of maritime liens”

This provides:

Nothing in this Convention shall be construed as creating a maritime lien.

Discussion

There is an equivalent provision in the Admiralty Act 1988 in sub-section 6(a) which provides that “*the provisions of this Act (other than Section 34) do not have effect to create ... a new maritime lien or other charge.*”

As has been said earlier Section 15 of the Act goes further than the Arrest Convention by identifying what are regarded as maritime liens in this jurisdiction but that is not an exhaustive definition.

Conclusion

The Convention and the Act are substantially similar in respect of this subject matter.

Article 10 “Reservations”

This provides:

1. Any State may, at the time of signature, ratification, acceptance, approval, or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to any or all of the following:
 - (a) ships which are not seagoing;
 - (b) ships not flying the flag of a State Party;
 - (c) claims under article 1, paragraph 1(s).
2. A State may, when it is also a State Party to a specified treaty on navigation on inland waterways, declare when signing, ratifying, accepting, approving or acceding to this Convention, that rules on jurisdiction, recognition and execution of Court decisions provided for in such treaties shall prevail over the rules contained in Article 7 of this Convention.

Discussion

Section 5(3) of the Admiralty Act 1988 provides that it does not apply to a cause of action that arises in respect of "inland waterways vessels", defined as meaning vessels used or intended to be used wholly on "inland waters", which are themselves defined as meaning "waters within Australia other than waters of the sea" and "sea" is defined as including "all waters within the ebb and flow of the tide".

Conclusion

These provisions do not add to the Admiralty Act 1988.

Provisions in the Admiralty Act 1988 not covered by Arrest Convention 1999

Section 3 – many of the definitions.

Section 4 – the distinction between proprietary and general maritime claims.

Section 4(2)(a)(iv) – mortgage of a ship's freight.

- 4(2)(c) a claim for the satisfaction or enforcement of a judgment.
- 4(2)(d) a claim for interest
- 4(3)(a) a claim for damage done by a ship
- 4(3)(b) a claim in respect of the liability of the owner of a ship arising under Part II or IV of the Protection of the Sea (Civil Liability) Act 1981.
- 4(3)(c) a claim for loss of life or personal injury as a consequence of a defect in the ship
- 4(3)(q) a claim in respect of a levy in relation to a ship including a ship levy imposed by the Protection of the Sea (Shipping Levy Act) 1981, being a levy in relation to which a power to detain a ship is conferred by a law enforced in Australia or in a part of Australia.
- 4(3)(u) a claim for the enforcement of, or a claim arising out of, an arbitral award (including a foreign award within the meaning of the Arbitration (Foreign Awards and Agreements) Act 1974 made in respect of a proprietary maritime claim or a claim referred to in one of the preceding paragraphs.
- 4(3)(w) a claim for interest in respect of a claim referred to in one of the preceding paragraphs.

Section 5(3) in relation to inland waterways vessels and inland waters.

Section 6(b) which provides that the Act does not create a cause of action that would not have existed if the Act had not been passed.

Section 7 – extending the Act to each external territory.

Section 8(1) - binding the crown.

Section 8(3) – permitting an action commenced in rem against a Government ship to continue in personam.

Section 9 – conferring jurisdiction on the Federal Court and the Courts of the Territories and the States for actions in personam on maritime claims or on a claim for damage done to a ship. This latter head of jurisdiction is not found in the Convention at all.

Section 10 – the conferring of Federal jurisdiction on the Federal Court, Supreme Courts of the Territories and States in rem.

Section 11 – Giving power to the Governor General to proclaim that other Courts have jurisdiction for in rem claims.

Section 12 – extending the jurisdiction that a Court has to matters that are associated with a matter in which the jurisdiction of the Court is invoked.

Section 13 – which confirms that the jurisdiction being conferred in the Court is that conferred by paragraph 76(ii) and (iii) of the Constitution.

Section 14 – this confirms that only proceedings identified in the Act can be pursued as actions in rem.

Section 15 – identifying maritime liens.

Section 16 – identifying the circumstances in which proprietary maritime claims may be commenced.

Section 17 – the right to proceed on owners liabilities in rem.

Section 18 – the right to proceed on demised charterer's liabilities in rem.

Section 19 – the right to proceed in rem against surrogate ships.

Section 20 – the detailed provisions dealing with service on and arrest of only one ship.

Section 21 – the rights and restrictions on rearrest.

Section 22 – confirming that proceedings can only be served within the jurisdiction and the limits of the Territorial sea of Australia or in respect of State or Territory Courts within those Court's jurisdiction and referring to "innocent passage".

Section 23 – confirming that the Service and Execution of Process Act does not apply.

Section 24 – providing that proceedings may be commenced against the proceeds of sale of a ship or other property which are being paid into Court.

Section 25 – identifying the procedure to be followed in relation to claims for limitation under a Limitation Convention.

Section 26 – the provision linking Section 4(3)(b) to the procedure required to be followed for claims under the CLC Convention.

Section 27 – dealing with the transfer and remittal of proceedings from one Court to another.

Section 28 – dealing with the remittal of proceedings.

Section 29 – the specific provisions dealing with security in relation to stayed or dismissed proceedings.

Section 30 – the procedure in relation to a ship or property in circumstances in which proceedings are transferred or remitted.

Section 31 – explaining the effect of a judgment in rem where a person has entered an appearance stating that such a person, if they are a relevant person, has a liability which is not limited to the value of the ship or property and where a person has entered an appearance but is not a relevant person that person is not liable.

Section 32 – dealing with the powers of the Federal Court in relation to Section 59 of the Shipping Registration Act 1981 where a proprietary maritime claims are concerned.

Section 33 – identifying the orders that a Court may make in relation to claims between co-owners such as the settlement of accounts or that the ship or a share in the ship be sold.

Section 34 – specific provisions dealing with unjustified arrest.

Section 35 – dealing with priorities where surrogate ship arrest is concerned.

Section 36 – specific provisions dealing with powers of detention.

Section 37 – specific provisions dealing with limitation as to time (as opposed to limitation of liability).

Section 38 – confirming that trials will take place without juries.

Section 39 – dealing with jurisdictional limits of the various Courts before whom cases might come.

Section 40 – providing that the Courts are to act in aid of and be auxiliary to each other.

Section 41 – the provision providing the Governor General with power to make rules for the practice and procedure to be followed in Courts exercising a jurisdiction under the Act.

Section 42 – setting up the Admiralty Rules Committee.

Section 43 – giving the Governor General power to make regulations.

Section 44-46 – dealing with repeals and amendments of imperial legislation.

Section 47 – transitional provisions.

Section 49-57 – make amendments to the Navigation Act 1912.

Section 58 and 59 – making amendments to the Shipping and Registration Act 1981.

First discussion paper draft prepared by:

**Stuart Hetherington
Peter McQueen
Gregory Nell
Stephen Thompson
Robert Wilson**