# THE *BEIJING CONVENTION ON THE JUDICIAL SALE OF SHIPS*

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## 1. Introduction

The *Beijing Convention on the Judicial Sale of Ships* ('*Convention*') was recently signed by 15 States in a signing ceremony on 5 September 2023.[1] Since then, several other States have signed the *Convention*, such that, at the time of writing, 31 States, as well as the European Union,[2] have signed the *Convention*.[3] Several States known globally for their presence as ports, including Belgium, China, and Singapore, have signed the *Convention*, and other States with significant shipping registries, such as Cyprus, Liberia, and Malta, have also signed the *Convention*. Broadly speaking, the *Convention* provides a regime for giving consistent international effect to the judicial sale of ships, but retains the ability of state domestic law to prescribe the procedure for judicial sales and the circumstances in which a judicial sale confers clean title to a vessel.[4]

The *Convention* is the culmination of a process that began in 2007 when Professor Henry Hai Li, in a paper presented to the Executive Council of Comité Maritime International ('CMI'), drew attention to issues arising from the inconsistent recognition of clean title to a vessel after a judicial sale.[5] Since raising those issues, deliberations and successive drafts of an international instrument harmonising the rules regarding the judicial sale of ships was undertaken by the International Working Group of CMI and subsequently by Working Group VI of the United Nations Commission on International Trade Law ('UNCITRAL') across six UNCITRAL sessions.[6] A draft of the *Convention* was adopted by UNCITRAL at its 55th session,[7] which was also subsequently adopted by the United Nations General Assembly at its 77th session.[8] As this history suggests, the *Convention* has had the drafting input of a broad collection of stakeholders in the maritime industry, including national maritime law associations, members of CMI, and States themselves.[9]

Australia was not a signatory to the *Convention* nor has Australia acceded to the *Convention*. However, it is not the purpose of this paper to express any concluded view on whether Australia should accede to the *Convention*. (I note, however, that the position of the Maritime Law Association of Australia and New Zealand appears to be one of encouraging Australia to accede to the *Convention*.)[10] The intention of this paper is rather to explain the impetus behind the *Convention*, namely the issues that arose from inconsistent rules regarding the judicial sale of vessels, explain how the *Convention* attempts to deal with such issues, and explain how the *Convention* compares to Australian domestic law regarding the judicial sale of vessels.

Part II of this paper seeks to briefly explain, by way of background, the principles regarding the judicial sale of ships. Part III illustrates a few cases that have involved issues where there has been inconsistent recognition of clean title to a vessel once sold by a judicial order. Part IV looks at the substantive provisions of the *Convention* itself, and how the *Convention* may remedy the issues arising in Part III. Part V then compares the *Convention* to Australia's domestic

* Associate to a Justice of the Supreme Court of Queensland. I thank the referees for their generous and insightful comments.

[1] 'The Convention on the International Effects of Judicial Sales of Ships Open for Signature', *Comité Maritime International* (Web Page) <https://comitemaritime.org/the–convention-on-the-international-effects-of-judicial-sales-of-ships-open-for-signature/>.

[2] The *Convention* permits a 'regional economic integration organisation' to accede to the *Convention*: see *United Nations Convention on the International Effects of Judicial Sale of Ships*, opened for signature 7 June 2023 (not yet in force) art 18 ('*Convention*').

[3] For a complete list of the States that have signed the Convention: see 'Status: United Nations Convention on the International Effects of Judicial Sales of Ships (New York, 2022) (the "Beijing Convention on the Judicial Sale of Ships")', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/judicialsaleofships/status>.

[4] Explanatory Note, United Nations Convention on the International Effects of Judicial Sale of Ships [3] ('Convention Explanatory Note').

[5] See Henry Hai Li, 'A Brief Discussion on Judicial Sale of Ships' [2009] *Comite Maritime International Yearbook* 342.

[6] See generally *Proposal of the Comité Maritime International (CMI) for Possible Future Work on Cross-Border Issues Related to the Judicial Sale of Ships*, UN Doc A/CN.9/923 (13 April 2017) (Note by the Secretariat).

[7] See *Draft Convention on the International Effects of Judicial Sale of Ships*, UN Doc A/CN.9/1108 (4 March 2022) (Note by the Secretariat).

[8] See *United Nations Convention on the International Effects of Judicial Sale of* Ships, GA Res 77/100, UN Doc A/RES/77/100 (19 December 2022, adopted 7 December 2022).

[9] See *Report of Working Group VI (Judicial Sale of Ships) on the Work of its Thirty-Fifth session*, UN Doc A/CN.9/973 (24 May 2019) 3 [14].

[10] See, eg, David Goodwin, Submission to Attorney General's Department of the Commonwealth of Australia (2 March 2020); Naraya Lamart, 'Australian Report' [2024] (December) *Semaphore: Newsletter of the Maritime Law Association of Australia and New Zealand* 2.

law regarding the judicial sale of vessels. Finally, Part VI looks at an issue regarding the notice provisions contained within the *Convention*.

## 2. Principles Regarding the Judicial Sale of Ships under the General Admiralty Law

Writing in 1860, Coote described the in rem jurisdiction of the English Admiralty Court as 'that which is most resorted to, and which constitutes the peculiarity of the Court of Admiralty, and gives to it an advantage over other Courts having concurrent jurisdiction'.[11] One consequence of the in rem jurisdiction of Admiralty Courts is that the Court may, upon judgment or earlier *pendente lite*, order the sale of the vessel to satisfy the claim or claims brought in rem.[12] Such sales provide 'the means by which, failing the provision of alternative security, claims *in rem* are enforced'.[13] Once the vessel is sold by court order, the proceeds are paid into court,[14] and, subject to any other parties with a recognised in rem claim against the vessel bringing their claims against those proceeds,[15] the proceeds are paid out according to a recognised and 'well settled' order of claims.[16] Once the vessel is sold by a judicial order, what title does the purchaser of a vessel have?

Under the general admiralty law,[17] a purchaser of a vessel from a judicially ordered sale is conferred a clean title upon the purchaser, free of all maritime liens, charges or other encumbrances arising before its sale.[18] The purchaser is conferred a clean title to the vessel. This is a recognised advantage to having a vessel sold by an admiralty court. In contrast, a private sale arranged by a creditor or mortgagee of the vessel does not extinguish any other lien or encumbrance over the vessel other than the creditor's own lien or encumbrance.[19] Similarly, sale of a vessel pursuant to the execution of a writ of *fieri facias* (often abbreviated *fi fa*) does not confer clean title to the purchaser of the vessel.[20] Nor does a privately arranged sale extinguish any maritime liens against the vessel which survive against the vessel despite a change of ownership, even if the purchaser may not know of the existence of the maritime lien.[21]

The general admiralty law has, under considerations of comity, recognised that an order of a foreign court to sell a vessel confers a clean title on the purchaser of that vessel (that is, a title free from any previous maritime liens, charges, or other encumbrances), at least where the vessel was within the lawful control or territory of the State of the foreign court and the foreign court has jurisdiction and acts within that jurisdiction in ordering the sale of the vessel.[22] Conversely, the general admiralty law relies on the comity of courts in *other jurisdictions* to recognise the clean title conferred on a purchaser after an admiralty court has ordered the sale of a vessel.[23] The rationale for such comity is that once a vessel has been sold via judicial sale, and clean title has been conferred on the purchaser of the vessel, a party with a maritime lien, encumbrance, or other charge against the vessel arising before the judicial sale cannot claim that interest against the vessel after it has been sold by judicial order. Hewson J explained this rationale in *The Acrux* in the following terms:

[11] Henry Charles Coote, *The New Practice of the High Court of Admiralty of England* (Butterworths, 1st ed, 1860) 10.
[12] See, eg, *Admiralty Rules 1988* (Cth) r 69; *Civil Procedure Rules* (UK) r 61.10.
[13] *Qatar National Bank v Owners of the Yacht Force India [No 2]* [2020] 2 Lloyd's Rep 348, [10] (Teare J).
[14] *Admiralty Rules 1988* (Cth) r 71.
[15] *Admiralty Act 1988* (Cth) s 24.
[16] *Patrick Stevedores No 2 Pty Ltd v Proceeds of Sale from the Vessel MV Skulptor Konenkov* (1997) 75 FCR 47, 50–1 (Sheppard J).
[17] 'The general admiralty law is not a supra-national binding law; … it is maritime law (separate in source, and sometimes different in context, from common law) which is accepted and administered by the forum as its law and thus governing': *The Chou Shan* (2014) 224 FCR 384, 405 [93] (Allsop CJ, Besanko and Pagone JJ).
[18] *The Tremont* (1841) 1 Wm Rob 163, 164; 166 ER 534 (Dr Lushington); *The Acrux* [1962] 1 Lloyd's Rep 405, 409 (Hewson J); *The Cerro Colorado* [1993] 1 Lloyd's Rep 58, 60–1 (Sheen J).
[19] Lief Bleyen, *Judicial Sale of Ships: A Comparative Study* (Springer, 2016) 2. See also *The Turtle Bay* [2013] SGHC 165, [10]–[11] (Ang Saw Ean J).
[20] See *The James W Elwell* [1921] P 351.
[21] See, eg, *The Sam Hawk* (2016) 246 FCR 337, 352–3 [49] (Allsop CJ and Edelman J).
[22] *Louis Castrique v William Imrie* (1869) LR 4 HL 414, 429 (Blackburn J, Lord Chelmsford agreeing at 448); *The Acrux* (n 18).
[23] See, eg, *The Tremont* (n 18); *The Cerro Colorado* (n 18) 61. See also Paul Myburgh, '"Satisfactory for its Own Purposes:" Private Direct Arrangements and Judicial Vessel Sales' (Working Paper No 17/03, Centre for Maritime Law, National University of Singapore, March 2017) 14–15.

> It would be intolerable, inequitable and an affront to the Court if any party who invoked the process of this Court and received its aid and, by implication, assented to the sale to an innocent purchaser, should thereafter proceed or was able to proceed elsewhere against the ship under her new and innocent ownership.[24]

Reliance on comity and the domestic admiralty law of other jurisdictions to recognise clean title to a vessel after a judicial sale has led to issues regarding inconsistent recognition of clean title to a vessel once sold by judicial order.[25] Further, where a vessel is subject to registered mortgages against the vessel, the practical ability of a court to confer clean title to the purchaser is dependent on the cooperation of the registry in which the ship is registered to deregister the vessel and any registered mortgages or encumbrances against the vessel upon the vessel's sale.[26] It is this mischief that the *Convention* seeks to resolve by providing a regime harmonising the international effect of judicial sales. Before analysing the provisions of the *Convention* itself, it is useful to outline some issues that have arisen regarding the inconsistent recognition of clean title to a vessel after a judicial sale without an international regime.

## 3. Case Illustrations

The following six judgments, of which four are reported decisions of the Lloyds Law Reports, illustrate some issues that are involved when clean title to a vessel is not recognised in courts of foreign states after a judicial sale of a vessel. It should be noted that there are other cases, not addressed in this article, that have also been raised by Professor Henry Hai Li and former President of CMI, Stuart Hetherington, in deliberations leading up to the drafting of the *Convention*.[27] But, as was recognised at UNCITRAL's 35th session, the number of cases, or case examples generally, are not entirely indicative of the economic impact and legal uncertainty that may occur in the absence of non-uniform recognition of clean title.[28] Nevertheless, an understanding of the complexities raised in the following cases can help understand the purpose of the *Convention* and the issues it seeks to address.

### 3.1. *The Acrux* [1962] 1 Lloyd's Rep 405

The Italian registered *Acrux* was sold pursuant to a judicial order of the English Admiralty Court. This occurred after the claimant (and others) intervened in proceedings to prevent the vessel's release from arrest, as the claimant had two Italian registered mortgages over the vessel. The claimant sought the sum of the two mortgages against the proceeds of the judicial sale.

The Admiralty Judge, Justice Hewson, was then informed by the Admiralty Marshal that the purchaser of the vessel from the judicial sale was facing 'great difficulty' in deregistering the vessel from the Italian registry. The Marshal was also informed that Italian law did not recognise that a vessel sold in in rem proceedings conferred clean title. Accordingly, the purchaser could not reregister the vessel in a country of his choice.

Whilst there was no contention about the validity of the claimant's mortgages against the vessel, the circumstances were such that, before distribution of the proceeds of sale to the claimant, Justice Hewson:

> [F]elt constrained to ask these claimants for an undertaking from them that they would not proceed elsewhere against this ship in respect of any unsatisfied balance of their claim, nor institute proceedings *in rem*, or equivalent proceedings, against the *Acrux* anywhere in respect of their claim.[29]

As quoted earlier, Justice Hewson pointed out that it would be an affront to the Court if a creditor of the vessel could engage the in rem jurisdiction of the Admiralty Court to sell the vessel and enforce their claim, then be able to re-enforce that same claim against the new owner of the vessel.[30]

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[24] *The Acrux* (n 18) 409.
[25] See below Part III.
[26] Myburgh (n 23) 14.
[27] See Li (n 5) 348–51; Stuart Hetherington, 'The Malta Colloquium on Recognition of Judicial Sale of Ships' (Speech, Malta Colloquium on Recognition of Judicial Sale of Ships, 27 February 2018) 3–6.
[28] See *Report of Working Group VI (Judicial Sale of Ships) on the Work of its Thirty-Fifth Session* (n 9) 3 [16].
[29] *The Acrux* (n 18) 409–10.
[30] See above n 24.

Justice Hewson also noted that the failure to recognise clean title to a vessel in other jurisdictions, after it was conferred by a judicial sale of an Admiralty Court in England, would have grave impacts not merely to the parties immediately before the Court, but to the 'maritime interests of the world':

> Were such a clean title as given by the Court be challenged or disturbed, the innocent purchaser would be gravely prejudiced. Not only that, but as a general proposition the maritime interests of the world would suffer. Were it to become established, contrary to general maritime law, that a proper sale of a ship by a competent Court did not give a clean title, those whose business it is to make advances of money in their various ways to enable ships to pursue their lawful occasions would be prejudiced in all cases where it became necessary to sell the ship under proper processes of any competent Court. It would be prejudiced for this reason, that no innocent purchaser would be prepared to pay the full market price for the ship, and the resultant fund, if the ship were sold, would be minimized and not represent her true value.[31]

In the later case of *The Cerro Colorado*, discussed below, Sheen J agreed with these two propositions.[32]

### 3.2. *The Emre II* [1989] 2 Lloyd's Rep 182

The claimant issued a writ in rem against the Turkish registered *Emre II* for amounts due by the owners of the vessel and secured by a registered mortgage on the vessel. The claimant also sought an order to sell the vessel *pendente lite*. The defendants applied to stay the proceedings on the basis that the parties contractually agreed to the exclusive jurisdiction of Turkey or alternatively on grounds of *forum non conveniens*.

The Admiralty Judge, Justice Sheen, was relevantly informed by the defendants that if the ship was sold by order of the English Admiralty Court, then the relevant Turkish authorities may not delete the name of the ship from the register in Istanbul. Justice Sheen noted the following consequences of such conduct:

> [T]he effect is to diminish the value of the ship. When the ship is advertised for sale it will have to be made clear to any potential purchaser that there may be some difficulty in having the name of the ship deleted from the Turkish register. That would be unfortunate for the parties in this litigation and would adversely affect all other Turkish shipowners.[33]

Justice Sheen ordered that the vessel would be sold *pendente lite* after 21 days if, within that period, the defendant's solicitor did not provide a personal undertaking to pay the vessel's costs of arrest on demand.[34] In the event the vessel was to be sold, Justice Sheen added:

> [T]he solicitors for the defendants should obtain clear instructions from the relevant authority in Turkey as to whether that authority will recognize and act upon a sale by order of this Court. Those instructions should be communicated to the Marshal so that he may advertise the ship appropriately.[35]

Justice Sheen therefore recognised that Turkish law may not 'recognize and act upon' a sale by the English Admiralty Court as conferring clean title to the vessel and that the Admiralty Marshal should 'advertise the ship appropriately' to reflect this.

### 3.3. *The Cerro Colorado* [1993] 1 Lloyd's Rep 58

The claimant bank lent money to the defendant. This loan was secured by a mortgage on the defendant's vessel the *Cerro Colorado*. Judgment was given for the claimant, and the Admiralty Court made an order that the *Cerro Colorado* be appraised and sold by the Admiralty Marshal in execution of judgment.

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[31] *The Acrux* (n 18) 409.
[32] *The Cerro Colorado* (n 18) 61.
[33] *The Emre II* [1989] 2 Lloyd's Rep 182, 185.
[34] Ibid 184–5.
[35] Ibid 185.

Prior to that order, the Admiralty Marshal was advised by the Spanish Embassy that a purchaser of the vessel may find themselves subject to substantial claims by the crew for wages and arrears for severance pay. The master and crew of the vessel had also requested the entry of a caveat against the release of the vessel but had not yet issued a writ in rem against the vessel for these claims. The Admiralty Marshal sought further directions about the effect of a Court ordered sale of the vessel.

Justice Sheen relevantly said:

> I can only express the hope that the Spanish Court will, as a matter of comity, recognise the decrees made by this Court … From time to time almost every ship-owner wants to borrow money from his bank and to give as security a mortgage on a ship. The value of that security would be drastically reduced if, when it came to be sold by the Court there was any doubt as to whether the purchaser from the Court would get a title free of encumbrances and debts.[36]

Another significant matter was that the sale of the ship was advertised in *Lloyd's List*. That advertisement and a subsequent news article described the ship as being subject to a judgment of a Spanish Court that awarded its crew an amount of 700 million pesetas (roughly £3.5 million) which (according to the advertisement) the vessel will remain subject to notwithstanding the judicial sale of the ship.

Justice Sheen expressed 'no doubt' that, under English law, the advertisement could be treated as a contempt of Court, as it 'tend[ed] to interfere with the administration of justice'.[37] Justice Sheen also added:

> It is in the interest of all parties that the sale of *Cerro Colorado* by the Admiralty Marshal should achieve the full market price. The publications to which I have referred have already caused some concern to be felt by some prospective purchasers who had seen the advertisement. These proceedings remain active until the ship is sold. No action will be taken in respect of either the advertisement or the article, but any repetition would be regarded as serious contempt.[38]

A misunderstanding as to whether clean title would be conferred in Spain therefore had the effect that those advertising the vessel's sale could have been in contempt of court for interfering with the Admiralty Marshal in the sale of the vessel.

### 3.4. *The Phoenix* [2014] 1 Lloyd's Rep 449

This was an appeal to the Eastern Caribbean Supreme Court. It involved a vessel registered in St Vincent and the Grenadines. The vessel was secured by a mortgage to BCEN-Euro Bank ('Bank') that was registered in the St Vincent and the Grenadines Ship Registry. The vessel underwent a series of judicial sales, first in the Democratic People's Republic of North Korea, then, for a separate action arising after the first sale, in the People's Republic of China.

The ultimate owner of the vessel had difficulties deregistering the vessel from the Saint Vincent and the Grenadines Ship Registry. The owner sought proceedings in the High Court of Saint Vincent and the Grenadines for an order to compel the Registrar to deregister the vessel and an order that it was the lawful owner of the vessel free from any encumbrances. The Bank subsequently intervened in the proceedings to seek to maintain their registered mortgage over the vessel. The first instance judge, Thom J, granted both orders sought by the owner. The bank appealed to the Eastern Caribbean Supreme Court, which upheld the first instance decision.

Justice of Appeal Davidson Kelvin Baptiste, with whom Don Mitchell and Clare Henry JJA agreed, held that both judicial sales conducted in North Korea[39] and China[40] were validly recognised under the general admiralty law and that the Court must recognise the sales as conferring clean title.

[36] *The Cerro Colorado* (n 18) 61.
[37] Ibid.
[38] Ibid 61–2.
[39] *The Phoenix* [2014] 1 Lloyd's Rep 449, 458–9 [34]–[37].
[40] Ibid 459–60 [38]–[39].

### 3.5. *SPV Sam Dragon Inc v GE Transportation Finance (Ireland) Ltd* [2012] IEHC 240

The *Pretty Flourish* was registered in the Korean Shipping Registry. The owner of the vessel entered into a loan with the defendant financier which was also registered as a mortgage over the vessel in the Korean Ship Registry. The vessel was arrested in the Port of Ghent by various creditors of the owner and was sold by judicial sale to the claimant. At the time of the sale, the previous owner of the vessel was subject to an insolvency process known in South Korea as 'rehabilitation'. As such, the defendant mortgagee received legal advice to not deregister their mortgage over the vessel until it received the proceeds from the judicial sale. This caused delay and expense to the claimant, as a subsequent purchaser of the vessel in deregistering the ship from the Korean Ship Registry and having the ship registered in the Hong Kong Shipping Registry. The claimant sought these expenses against the defendant financier.

Justice McGovern of the High Court of Ireland dismissed the claim. Justice McGovern held that defendant's purported failure to delete the mortgage from the Korean Shipping Register was governed by Korean law,[41] which did not, upon the evidence provided to the court, require a mortgagee to *voluntarily* remove a mortgage from the Registry where there has been a judicial sale of a ship in another jurisdiction.[42]

### 3.6. *The Bright Star*

The current President of CMI, Ann Fenech, in her speech at the signing ceremony of the *Convention*, referred to the Maltese Court of Appeal decision of *The Bright Star*.[43] That case involved the sale of The *Bright Star* ordered by the Supreme Court of Jamaica. After the sale by judicial order, a creditor of the previous owner who had a mortgage over the vessel sought the arrest of the vessel once it entered Maltese waters. The mortgagee claimed, both at first instance and on appeal, that its mortgage over the vessel was not extinguished by the sale ordered by the Jamaican Court.

The mortgagee's claim failed both at first instance and on appeal, on the basis that Maltese law did indeed recognise clean title to the vessel after the sale by the Jamaican Court. Nevertheless, Ann Fenech, who appears to have acted as counsel in that case, referred to the considerable expense involved in the proceedings and that the proceedings collectively took four years to resolve.[44] Ann Fenech referred to the expenses as including the fact that, at the time of the vessel's initial arrest, the vessel was on charter and needed to be put on off-hire, the delay in delivering the cargo, and that the owner had to put up considerable security to have the vessel released from arrest.[45]

### 3.7. Observations from These Cases

At least two observations can be made from these six cases.

First, four cases involved the purchaser of the vessel from the judicial sale having some difficulty deregistering the vessel from its previous ship registry and reregistering the vessel in a new registry. The ability of a new owner of a vessel to reregister the vessel in a separate registry is vital for at least two reasons. First, many State shipping registries require a shipowner to register the vessel in their registry if the shipowner (or a requisite composition of shipowners) is a national, resident, or domiciled in the State of that registry.[46] For example, section 12 of the *Shipping Registration Act 1981* (Cth) ('SRA') provides a general rule (subject to exceptions) that all Australian-owned vessels (as defined in s 8(1)) *must* be registered in the relevant Australian registry under that Act. Secondly, there are several consequences, arising under public and private law, that are circumscribed by the State in which the vessel is registered.[47] At public international law, for example, each State may punish vessels that sail under its flag without being authorised to do so.[48] As a matter of private international law (under Australian choice of law rules), it is generally understood that the law of the flag governs torts committed on the high seas that relate to a ship's 'internal

[41] *SPV Sam Dragon Inc v GE Transportation Finance (Ireland) Ltd* [2012] IEHC 240, [33].
[42] Ibid [41].
[43] *The Bright Star* (App Čiv 846/18/2, 12 January 2023).
[44] See Ann Fenech, 'Key Note Speech in Beijing' (Speech, Beijing, 5 September 2023) https://comitemaritime.org/the-convention-on-the-international-effects-of-judicial-sales-of-ships-open-for-signature/.
[45] Ibid.
[46] See Richard Coles and Edward Watt (eds) *Ship Registration: Law and Practice* (Informa, 2nd ed, 2009) 4–5 [1.12].
[47] See ibid 7–8 [1.21], 9 [1.24].
[48] Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law* (Oxford University Press, 9th ed, 2008) 727.

economy'.[49] The risk that a new purchaser cannot deregister the vessel therefore lowers the price that a purchaser of the vessel is willing to pay from a judicial sale.[50] In turn, this reduces the proceeds of sale from which creditors can claim, and, in turn again, reduces the amount that financiers and creditors are willing to loan to an owner of the ship.[51]

The second observation is that concerns were raised about the *non-recognition* of clean title in jurisdictions outside the jurisdiction of judicial sale once it was sold by judicial order. This taints comity between courts, imposes legal uncertainty on the purchaser of the vessel from the judicial sale, and, as Hewson J pointed out above in *The Acrux*, negatively affects the interests of the vessel's creditors and parties engaging in maritime trade more broadly.[52]

Professor Henry Hai Li also raised two other 'issues calling for special attention' in deliberations leading up to the *Convention*.[53]

The first was that there must be sufficient *notice* of the judicial sale. In Part VI of this article, I question whether notice provisions are necessary to include in this *Convention*, given that the *Convention* purposefully does *not* govern the procedure of a judicial sale of a ship. In Professor Li's view, the following notice was necessary before the sale of a vessel by judicial order:

> [N]otice of the time, venue and all other necessary particulars of the sale should be sent in advance to all related parties [of the vessel], such as the registered owner of the ship, the registered demise charterer, the holders of [a] mortgage or hypothec on the ship, the known holders of maritime and other liens on the ship, the ship's register, etc., so as to ensure that steps may be taken by each of them to protect their respective rights and interests in connection with the ship to be sold by way of judicial sale.[54]

Three points arise from this notice requirement. First, this notice appears rather prescriptive, as it requires *specific notice* of the sale to the parties listed in the passage. It may be difficult to find out who those parties are. If notice is sent, it may also be difficult to know whether it has been received. Secondly, it appears unclear who must give this notice. Is it the party that applied for the judicial sale of the vessel? Or is it the court or some officer of the Court such as the Admiralty Marshal? Thirdly, it appears unclear what the *consequences* are for the judicial sale if these notice requirements are not followed. Would the judicial sale be voidable, or void ab initio, on the basis that such notice requirements were not established? Or is it of no consequence to the effect of the judicial sale? It suffices to say here the form of notice described by Professor Li was adopted in the *Convention*. This is discussed in further detail below.

The final concern raised by Professor Li was that the court of judicial sale should have *exclusive jurisdiction* regarding any challenge to the *validity* of the judicial sale.[55] This respects the comity of courts and prevents any re-examination of the merits of a foreign court ordering the sale of a vessel. Under the general admiralty law of many jurisdictions, an admiralty court would *recognise* an order of a foreign court to sell a vessel as conferring clean title on the purchaser of that vessel where the vessel was within the lawful control or territory of the State of the foreign court and the foreign court has jurisdiction and acts within that jurisdiction in ordering the sale of the vessel.[56] But if that principle does not apply in some jurisdictions, then such a provision appears appropriate.

## 4. Beijing Convention on the Judicial Sale of Ships

This Part seeks to briefly set out, and explain, the provisions of the *Convention*. This Part is purely explanatory. A comparison of the *Convention* to Australian domestic law is provided in Part V.

[49] See, eg, *Blunden v Commonwealth* (2003) 218 CLR 330, 340 [23] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 566–7 [25] (Hayne and Bell JJ).
[50] See *Report of the United Nations Commission on International Trade* Law, UN Doc A/72/17 (3–21 July 2017) 94 [458].
[51] See *Report of Working Group VI (Judicial Sale of Ships) on the Work of its Thirty-Fifth Session* (n 9) 2–3 [12]–[13].
[52] See above n 31. See also ibid 2 [12].
[53] Li (n 5).
[54] Ibid 352–3.
[55] Ibid 354.
[56] *Louis Castrique v William Imrie* (n 22) 429; *The Acrux* (n 18) 409.

## 4.1. Scope and Definitions (Articles 1–3)

### 4.1.1. Purpose and Scope

The purpose of the *Convention*, as stated in Article 1, is to 'govern[] the international effects of a judicial sale of a ship that confers clean title on the purchaser.' As the *Convention* only governs the international *effects* of the judicial sale, the *Convention* does not prescribe rules regarding the *conduct* or *procedure* of the judicial sale, save as it does 'indirectly' through certain notice requirements of the sale in Article 4.[57] Nor does the *Convention* circumscribe the circumstances in which clean title may be conferred, which is a matter of domestic law.[58]

The procedure of the judicial sale of the vessel itself is, pursuant to Article 4(1), 'conducted in accordance with the law of the State of judicial sale'. The State in which the judicial sale occurs must also 'provide procedures for challenging the judicial sale prior to its completion and determine the time of the sale for the purposes of [the] Convention'.[59] The *Convention* also does not affect the procedure nor the priority in the distribution of the sale proceeds of the ship, nor does it affect any in personam claim brought by those with a proprietary right in the ship.[60]

### 4.1.2. Clean Title

Article 1 delimits the *Convention*'s application to judicial sales that 'confers clean title'. 'Clean title' is defined in Article 2(c) as 'title free and clear of any mortgage or *hypothèque* and of any charge'. 'Mortgage or *hypothèque*' and 'charge' are subsequently defined under Article 2(d) and (e) in the following terms:

> (d) 'Mortgage or *hypothèque*' means any mortgage or *hypothèque* that is effected on a ship and registered in the State in whose register of ships or equivalent register the ship is registered;
> (e) 'Charge' means any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise, and includes a maritime lien, lien, encumbrance, right of use or right of retention but does not include a mortgage or *hypothèque.*

Again, the *Convention* does not circumscribe the circumstances in which clean title is conferred, but provides a regime for judicial sales that do confer clean title.[61]

### 4.1.3. Ship

The *Convention* only applies to a 'ship or other vessel registered in a register that is open to public inspection that may be the subject of an arrest or other similar measure capable of leading to a judicial sale under the law of the State of judicial sale.'[62]

While this definition is intended to include both seagoing vessels and inland vessels, the requirement that the vessel is registered in a register that is open to public inspection may exclude some inland navigation vessels and certain other vessels which are exempt from registration.[63] Article 3(2) also provides that the *Convention* does not apply to 'warships' or 'naval auxiliaries', or 'other vessels owned or operated by a State and used, immediately prior to the time of judicial sale, only on government non-commercial service'.

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[57] Convention Explanatory Note (n 4) [24].
[58] Ibid [3].
[59] *Convention* (n 2) art 4(1).
[60] Ibid arts 15(1)(a)–(b).
[61] Convention Explanatory Note (n 4) [3].
[62] *Convention* (n 2) arts 2(b), 3(1).
[63] For example, for ships that are required to be registered in Australia, vessels that are less than 24 metres in tonnage length, 'Government ships', 'fishing vessels' and 'pleasure craft' need not be registered: *Shipping Registration Act 1981* (Cth) s 13 ('*SRA*'). But even if the *Convention* does not apply to these vessels, the general maritime law would recognise clean title to the purchaser of such a vessel by judicial sale, which is not displaced by the *Convention*: see above Part II.

### 4.1.4. Judicial Sale

Article 3(1) further delimits the application of the *Convention* to judicial sales that are conducted in a State party to the *Convention* and where the ship is 'physically within the territory of the State of judicial sale at the time of that sale'. The *Convention* therefore applies even if the ship subject to the judicial sale is registered in a jurisdiction different to the State of the judicial sale.[64]

'Judicial sale' is defined under Article 2(a) as 'any sale of a ship':

(i) Which is ordered, approved or confirmed by a court or other public authority either by way of public auction or by private treaty carried out under the supervision and with the approval of a court; and
(ii) For which the proceeds of sale are made available to the creditors.

The *Convention* therefore does not displace the ability under the general admiralty law for a judicial sale of a vessel to occur by public auction (whether through an open or closed bid tender process) or (exceptionally)[65] by private treaty to a selected buyer without any competitive bidding process or wide marketing of the ship to potential buyers. The reference to an 'other public authority' permits the practice, recognised in some jurisdictions but not Australia, of a quasi-judicial body undertaking the sale of a vessel.[66]

## 4.2. Notice of Judicial Sale (Article 4)

The *Convention* requires, under Articles 4(2) and 5(1), minimum notice requirements to be undertaken for a certificate of judicial sale to be issued. The certificate itself, and its effect, is also a creature of the *Convention* and is discussed below. It is important to note here, however, that the recognition of clean title is *contingent* upon the issuance of the certificate under Article 6. Accordingly, clean title to the vessel under the *Convention* is, in turn, contingent upon the notice requirements being followed.

Article 4 prescribes requirements as to (a) the *parties* to be notified of the judicial sale, (b) the *content* of such notice, and (c) the *public advertisement* of the judicial sale.

### 4.2.1. Parties Notified

Article 4(3) provides that a notice of the judicial sale must be provided to:

(a) The registry of ships or equivalent registry with which the ship is registered;
(b) All holders of any mortgage or *hypothèque* and of any registered charge, provided that the register in which it is registered, and any instrument required to be registered under the law of the State of registration, are open to public inspection, and that extracts from the register and copies of such instruments are obtainable from the registry;
(c) All holders of any maritime lien, provided that they have notified the court or other public authority conducting the judicial sale of the claim secured by the maritime lien in accordance with the regulations and procedures of the State of judicial sale;
(d) The owner of the ship for the time being; and
(e) If the ship is granted bareboat charter registration:
    (i) The person registered as the bareboat charterer of the ship in the bareboat charter register; and

[64] Convention Explanatory Note (n 4) [47].
[65] As Feutrill J explained in *The Island Escape [No 2]* [2023] FCA 101, [32] (citations omitted), the exceptional nature of such sales is because: First, the [Admiralty] Marshal is duty-bound to act impartially and obtain the best possible price for the ship for the benefit of all persons who have an interest in the ship. … Second, in the absence of wide marketing of the ship to all potential buyers, there is a risk that sale by private treaty to a 'selected' buyer would not result in a competitive process whereby the highest price that buyer is willing to pay for the ship is obtained. … Third, and linked to the first, sale by private treaty is open to abuse and may lack transparency and accountability as to the mechanism by which the Marshal agreed to the sale price.
[66] See Convention Explanatory Note (n 4) [34].

(ii) The bareboat charter registry.

Article 4(7) also provides that:

> In determining the identity or address of any person to whom the notice of judicial sale is given, it is sufficient to rely on:
>
> (a) Information set forth in the register of ships or equivalent register in which the ship is registered or in the bareboat charter register;
> (b) Information set forth in the register in which the mortgage or *hypothèque* or the registered charge is registered, if different to the register of ships or equivalent register; and
> (c) Information notified under paragraph 3, subparagraph (c) [that is, the information notified to the court or other public authority of the claim secured by those with a maritime lien].

Save for these requirements and the content requirements explained below, Article 4(4) provides for the notice of judicial sale to be given in accordance with the law of the State of judicial sale. Domestic law would thus govern the notice period, the method of notification, the form of the notice, and the persons responsible for giving the notice.[67]

Provision of this notice has the additional effect of alerting the ship registry (and bareboat charter registry), and a shipping registry in which a mortgage is registered, to the possible future deregistration of the ship or mortgage under Article 7.[68]

### 4.2.2. Content of the Notice

Article 4(4) requires that the notice of the judicial sale be in accordance with the State of judicial sale, but also that the notice must contain certain minimum information that is provided in Annex I to the *Convention*. The minimum information required under Annex I is as follows:

1. A statement that the notice of judicial sale is given for the purposes of the *United Nations Convention on the International Effects of Judicial Sales of Ships*;
2. The name of the State of judicial sale;
3. The court or other public authority ordering, approving or confirming the judicial sale;
4. The reference number or other identifier for the judicial sale procedure;
5. The name of ship;
6. The registry in which the ship is registered in;
7. International Maritime Organization ('IMO') number;
8. (If the IMO number not available) other information capable of identifying the ship;
9. Name of the owner;
10. Address of residence or principal place of business of the owner;
11. (If judicial sale by public auction) anticipated date, time and place of public auction;
12. (If judicial sale by private treaty) any relevant details, including time period, for the judicial sale as ordered by the court or other public authority;
13. Statement either confirming that the judicial sale will confer clean title to the ship, or, if it is not known whether the judicial sale will confer clean title, a statement of the circumstances under which the judicial sale would not confer clean title; and
14. Other information required by the law of the State of judicial sale, in particular any information deemed necessary to protect the interests of the person receiving the notice.

These minimum content requirements are intended to provide those parties with an interest in the vessel's sale with the information required to assert their rights in the ship or its distributions from sale.[69] As indicated in item number 14, State law may prescribe further information requirements in the notice.

[67] Ibid [124].
[68] See Ibid [105].
[69] Ibid [118].

### 4.2.3. Public Advertising

Under Article 4(5), the notice of judicial sale must also be:

(a) Published by announcement in the press or other publication available in the State of judicial sale; and
(b) Transmitted to the repository referred to in article 11 for publication, namely the Secretary-General of the IMO, or another institution named by UNCITRAL.

Apart from these requirements, the law of the State of the judicial sale may prescribe how the notice is to be published.[70] In Article 4(5)(a), notification by 'press' entails 'placing an advertisement in a newspaper containing the notice of judicial sale' and 'other publication available' may include advertisement in an online journal or a newsletter that is 'available' in the State of the judicial sale.[71]

Under Article 11(2), the repository must, upon receipt of either a notice of judicial sale, a certificate of judicial sale, or a decision of a court to avoid or suspend a judicial sale, 'make [that document] available to the public in a timely manner, in the form and in the language in which it is received'. The purpose of this mechanism is to 'enhance the operation of the Convention regime by providing public access' to certain documents regarding the judicial sale of ships.[72]

## 4.3. Certificate of Judicial Sale

### 4.3.1. Issuance

Under Article 5(1), after completion of a judicial sale that confers clean title in accordance with the requirements of the law of the State of judicial sale *and* the requirements of the *Convention*, the court or other public authority that conducts the judicial sale must issue a certificate of judicial sale to the purchaser. Under Article 5(2), the certificate must be 'substantially' in accordance with a form contained in Annex II of the *Convention*, and must also contain:

(a) A statement that the ship was sold in accordance with the requirements of the law of the State of judicial sale and the requirements of the *Convention*;
(b) A statement that the judicial sale has conferred clean title to the ship on the purchaser;
(c) The name of the State of judicial sale;
(d) The name, address and the contact details of the authority issuing the certificate;
(e) The name of the court or other public authority that conducted the judicial sale and the date of the sale;
(f) The name of the ship and registry of ships or equivalent registry with which the ship is registered;
(g) The IMO number of the ship or, if not available, other information capable of identifying the ship;
(h) The name and address of residence or principal place of business of the owner of the ship immediately prior to the judicial sale;
(i) The name and address of residence or principal place of business of the purchaser;
(j) The place and date of issuance of the certificate; and
(k) The signature or stamp of the authority issuing the certificate or other confirmation of authenticity of the certificate.

The State in which the judicial sale occurred must also require the certificate to be transmitted promptly to the repository.[73] The *Convention* also allows the certificate to be electronic, provided:

(a) The information contained therein is accessible so as to be usable for subsequent reference;
(b) A reliable method is used to identify the authority issuing the certificate; and

[70] Ibid [130].
[71] Ibid [132].
[72] Ibid [215].
[73] *Convention* (n 2) art 5(3).

(c) A reliable method is used to detect any alteration to the record after the time it was generated, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display.[74]

### 4.3.2. Effect of Certificate

Once a certificate of judicial sale is conferred, the *Convention* provides the following three consequences from its issuance.

#### *Conferral of clean title*

Under Article 6, a judicial sale for which a certificate of judicial sale has been issued is effective in every other State Party of conferring clean title to the ship on the purchaser.

#### *Deregistration*

In accordance with the regulations and procedures of the State Party, under Article 7(1) the registry of a State Party in which the ship is registered must, when a purchaser of the ship from a judicial sale (or a subsequent purchaser) produces the certificate:

(a) Delete from the register any mortgage or *hypothèque* and any registered charge attached to the ship that had been registered before completion of the judicial sale;
(b) Delete the ship from the register and issue a certificate of deletion for the purpose of new registration;
(c) Register the ship in the name of the purchaser or subsequent purchaser, provided further that the ship and the person in whose name the ship is to be registered meet the requirements of the law of the State of registration; and
(d) Update the register with any other relevant particulars in the certificate of judicial sale.

Similarly, if the ship is registered in a bareboat charter registry in a State party to the *Convention*, then the registry must delete the ship from the bareboat charter registry upon production of the certificate by the purchaser or the subsequent purchaser.[75]

However, either of these powers does not apply if a court in the State of the registry (which may be separate from the State in which the vessel was sold) determines under Article 10 that the effect of the judicial sale would be 'manifestly contrary to the public policy of the State'.[76] This process, not recognised under the general law, is discussed in further detail below.

#### *No Arrest*

If an application is brought before a court to arrest a ship for a claim arising before the judicial sale of the ship, a court in a State party must, upon production of the certificate of judicial sale, dismiss the application.[77] Similarly, if the ship is arrested for a claim arising before the judicial sale of the ship, the court must release the ship upon production of the certificate.[78]

[74] Ibid art 5(6).
[75] Ibid art 7(2).
[76] Ibid art 7(5).
[77] Ibid art 8(1).
[78] Ibid art 8(2).

## 4.4. Exclusive Jurisdiction

Under Article 9(1), the courts of the State of judicial sale have exclusive jurisdiction to hear a claim or application to avoid or challenge the judicial sale of a ship conducted in that State; the courts of all other States that are party to the *Convention* must decline jurisdiction for such a claim.[79]

This provision is only concerned with preventing the challenge of a judicial sale in a State different to that in which the sale occurred (which is a party to the *Convention*); it does not prescribe the grounds upon which a judicial sale may be avoided or prevented, which is a matter for the law of the State of judicial sale.[80]

## 4.5. Challenge Based on Public Policy

Article 10 of the *Convention* provides:

> A judicial sale of a ship shall not have the effect provided in article 6 [ie the conferral of clean title] in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.

This provision therefore allows the prevention of clean title, based on public policy, in the state in which the clean title is being challenged. It is discussed in further detail below.

## 4.6. Repository

Under Article 11(1), the 'repository' is the Secretary-General of the International Maritime Organization or an institution otherwise named by the United Nations Commission on International Trade Law. Under Article 11(2), upon the repository's receipt of a notice of judicial sale (required under Article 4(5)(b)), a certificate of judicial sale (required under Article 5(3)), or a decision of a court that avoids or suspends the effects of a judicial sale for which a certificate of judicial sale has been issued (required under Article 9(3)), the repository must 'make [the relevant document] available to the public in a timely manner, in the form and in the language in which it is received'.

Under Article 11(3), the repository may also receive a notice of a judicial sale and make it available to the public from a State that has ratified, accepted, approved, or acceded to the *Convention* and for which the *Convention* has not yet entered into force.

# 5. Comparing the Convention to Australian Domestic Law

This Part seeks to compare the differences between the *Convention* ans Australian domestic law, whether that be under the general admiralty law or statute. There appear to be five differences between the *Convention* and the position under Australian domestic law. The first is the requirement to give notice of the judicial sale under the *Convention* to certain prescribed parties and the additional consequence that failure to fulfil the notice requirements required under the *Convention* will result in clean title not being conferred to the vessel. The second difference is the establishment of certificates of judicial sale and their consequences. The third difference is the requirement that courts of a State Party decline jurisdiction regarding any challenge to the validity of a judicial sale that occurred in another State Party. The fourth is the ability to challenge the conferral of clean title based on public policy. The fifth is the establishment of the Repository. These are discussed in turn.

## 5.1. Notice Requirements

While the *Convention* leaves the conduct and procedure of the judicial sale to domestic law, it does prescribe notice requirements of the sale under Article 4.[81] We saw above that this includes the requirement to give notice of the sale of the vessel to certain parties, minimum content requirements of such notice, and public announcement of the notice

[79] Ibid art 9(2).
[80] Convention Explanatory Note (n 4) [204], [206].
[81] Ibid [24].

of sale. One consequence, under Article 4(2), of failing to adhere to the notice requirements is that a certificate of judicial sale cannot be conferred, and, in turn, clean title cannot be conferred by the sale under Article 6.

It suffices to say here that there is no general requirement under the general admiralty law to give notice to specific parties before a vessel is to be sold by judicial order. In Australia, once an order for the sale of a vessel has been made, it is the Admiralty Marshal that undertakes the sale of the vessel.[82] The Marshal may be subject to direction by the Federal Court of Australia under the *Admiralty Rules* and is ultimately an officer of that Court.[83] The Marshal is also obligated, under the general admiralty law, to act impartially in the sale of the vessel and to obtain the highest possible price for the ship.[84] While exceptional circumstances may allow the 'direct sale' of a vessel to a particular purchaser without advertisement or appraisement of the vessel, the proper advertisement of the vessel (along with appraisement of the vessel and invitations to bid) is generally necessary to discharge the Marshal's obligation to obtain the highest possible price.[85] Moreover, courts have recognised that a judicial sale of a vessel is 'not merely [a] matter[] between two parties', but rather 'intimately affects the interests of other potential claimants in admiralty, many of whom might not even know that the ship has been arrested or sold by the Admiralty Court'.[86] Reasonable advertisement of the vessel prior to its sale by judicial order, in accordance with the requirement under the general admiralty law for the Marshal to achieve the highest price of the vessel, therefore 'not only publicise[s] the sale to a wider audience interested in bidding for the vessel to obtain the best possible bid price, but [the advertisements] also serve to notify the sale to all others interested in the vessel so that they can come forward and establish their maritime claims'.[87]

The *Convention* differs from the position under the general admiralty law in two respects. First, there is the requirement to give notice to specific parties under Article 4(3). Secondly, there is the additional consequence that issuance of a certificate of judicial sale (and subsequently clean title to the purchaser) is, under Article 4(2), *contingent* upon following the notice requirements in the *Convention*. Some reasons why these notice requirements under Article 4 may be too prescriptive are considered in Part VI.

## 5.2. Certificates of Judicial Sale

The issuance of certificates of judicial sale by the court or other state authority undertaking the judicial sale is also novel. We saw how, under Article 6, issuance of the certificate has the effect of conferring clean title to the vessel. The remaining two effects of the certificate is that presentation of the certificate by the new owner facilitates deregistration of the vessel and any registered mortgages in a shipping registry of a State Party to the *Convention* (Article 7) and dismisses any application to arrest the vessel based on a claim that that arose prior to the judicial sale of the vessel (Article 8).

As for deregistration under Article 7, if Australia were to accede to the *Convention*, this provision would only apply to ships registered in the *Australian Shipping Registry* (since those are the only ships in which the Registrar would be subject to deregistration obligations). In general terms, the SRA only permits 'Australian-owned' or Australian 'operated' ships (as defined in s 8 of the SRA) to be registered in the two Australian ship registers, namely the General Register and the International Register.[88] Where the ship loses this ownership or operational character it ceases to be entitled to be registered. In such circumstances, the registered owner is obliged to inform the Registry of this loss of entitlement to be registered, and the registration is 'deemed to be closed'.[89] Section 58 of the SRA also provides a process where the Registry itself can seek to update or amend the register if it has reason to believe that the register is incorrect; this process includes a power for the Registry to deregister the vessel upon direction by the Australian Maritime Safety Authority if it is appropriate to do so.

These two means to deregister a vessel, however, are undertaken either by the previous registered owner of the vessel or the Registry itself, not by a *new* owner of the vessel directly. Article 7 would thus allow for a simplified and express process that allows a new owner of the vessel from a judicial sale to deregister the vessel, should they seek, or be

[82] Admiralty Rules 1988 (Cth) r 70(1).
[83] *Federal Court of Australia Act 1976* (Cth) ss 18N(1)(e), 18ZH(1)(a). See also *The Island Escape [No 2]* (n 65) [29].
[84] *The Union Gold* [2014] 1 Lloyd's Rep 53, 54 [2] (Teare J); *The Island Escape [No 2]* (n 65) [32].
[85] See *The Turtle Bay* (n 19) [20]; *The Union Gold* (n 84) 56 [20]; *The Island Escape [No 2]* (n 65) [32].
[86] *The Margo L* [1998] 1 HKC 217, 218 (Waung J). See also *The Turtle Bay* (n 19) [20].
[87] *The Turtle Bay* (n 19) [20].
[88] *SRA* (n 63) ss 3 (definition of 'ship entitled to be registered'), 12(1), 14, 15B.
[89] Ibid ss 66(1)(a)(iv), (3)(b).

required, to register the vessel elsewhere, or should they wish to reregister the vessel in an Australian Shipping Registry in their own name. Were Australia to accede to the *Convention*, then the SRA would require amendment to reflect this ability of the new owner to deregister the vessel upon presentation of the certificate to the Registry.

Under Article 8, the dismissal of an application to arrest the vessel upon production of the certificate provides a means to prevent the issue of a warrant to arrest the vessel. Under the *Admiralty Rules*, an application for a vessel's arrest may be brought by a party if they are a party to proceedings that have brought in rem against that ship.[90] The *Admiralty Rules* presently provide the Registrar with a power to issue arrest warrants and also proscribe the Registrar from issuing an arrest warrant in certain circumstances.[91] If Australia were to accede to the *Convention*, the *Admiralty Rules* would require amendment such that the presentation of a certificate is another ground upon which the Registrar must refuse the issuance of an arrest warrant.

## 5.3. Decline of Jurisdiction Regarding a Challenge to a Judicial Sale Occurring in Another State Party

It will be recalled that Article 9 requires a court to decline jurisdiction for any claim or application to avoid a judicial sale of a ship conducted in another State party that confers clean title. The *Admiralty Act 1988* (Cth) does not confer jurisdiction on the Federal Court of Australia to bring an application to avoid or challenge a judicial sale of a vessel in a foreign court itself. Nevertheless, a claim could be brought in rem on the basis that a proprietary claim or maritime lien was not extinguished by a foreign court's judicial sale of the vessel, and, on that basis, challenge the validity of the foreign court's judicial sale (either because the foreign court did not have, or exceeded, its jurisdiction, or because the vessel was not in the territory of the foreign State). In such circumstances, if the foreign court was a party to the *Convention*, and the sale conferred clean title under the *Convention*, the Federal Court would not have jurisdiction to hear such a claim.

## 5.4. Challenge on the Basis of Public Policy

It will be recalled that Article 10 of the *Convention* provides a process to challenge the *clean title* conferred to a vessel on grounds of public policy. This does not challenge the *sale* of the vessel itself, but challenges the conferral of clean title in the State in which the challenge was brought. Article 10 provides:

> A judicial sale of a ship shall not have the effect provided in article 6 [ie the conferral of clean title] in a State Party other than the State of judicial sale if a court in the other State Party determines that the effect would be manifestly contrary to the public policy of that other State Party.

Several points can be made about Article 10 from these terms. First, this provision is in similar terms to 'public policy' exceptions contained in other prominent international treaties.[92] Secondly, the requirement that the sale be *manifestly contrary* to public policy 'set[s] a high threshold' and 'requires a compelling reason as to why giving effect to the foreign judicial sale is contrary to an identified matter of public policy'.[93] Thirdly, the relevant public policy is the public policy of the *State in which the challenge occurs* (not the State in which the sale of the vessel occurred), which may differ slightly from State to State. Fourthly, the effect of a successful challenge under Article 10 would only prevent the enforcement of clean title in the State in which the enforcement of clean title was challenged and not in the other States party to the *Convention* (unless challenges were also brought in those States).

Notwithstanding this high threshold in 'manifestly contrary' to public policy, and the rather limited operation of this challenge, the general maritime law does not permit a general public policy exception to setting aside the effect of a judicial sale. A judicial sale would not be recognised as conferring clean title to a purchaser only if the vessel was not within the lawful control or territory of the State of the foreign court when it was sold or the foreign court had no

[90] *Admiralty Rules 1988* (Cth) r 39(1).
[91] See also ibid r 40(3).
[92] See, eg, *United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art 5(2)(b); *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, opened for signature 2 July 2019, (entered into force 1 September 2023) art 7(1)(c).
[93] Convention Explanatory Note (n 4) [212].

jurisdiction, or acted outside that jurisdiction, in ordering the sale of the vessel.[94] These exceptions relate to the foreign court not having appropriate jurisdiction, whether over the vessel or the claim brought and do not relate to a general 'public policy' exception. If Australia were to accede to the *Convention*, Article 10 would allow challenges to the enforcement of clean title in Australia if the sale occurred in another State party to the *Convention* and that sale was manifestly contrary to the public policy of Australia.

### 5.5. Repository

It will be recalled that, under Article 11(1), the 'repository' is the Secretary-General of the International Maritime Organization or an institution otherwise named by the United Nations Commission on International Trade Law. The repository must, upon receipt of the relevant document, 'make available to the public' the notice of judicial sale, a certificate of judicial sale, or a decision of a court that avoids or suspends the effects of a judicial sale.

The role of the Repository is 'purely informational' and does not give legal effect to any instruments by publication.[95] One consequence of the Repository may be the better distribution and access to information regarding the judicial sale of vessels in different jurisdictions. This is particularly relevant if, as it has been pointed out, a party with a claim against a vessel does not know whether or not a vessel it has an interest in is being sold pursuant to a judicial order.[96]

## 6. One Concern Regarding Notice Under Article 4

There is a concern that following the notice requirements imposed by Article 4 of the *Convention* may delay the judicial sale of the vessel. In this Part, I discuss why this may be so, and the consequences if it is indeed the case. I will then discuss how, in accordance with Article 4(4) of the *Convention*, prescribing simple and clear notice requirements under Australian domestic law may, to some extent, alleviate these concerns.

### 6.1. Overly Prescriptive Notice Requirements

While admiralty jurisdiction is not limited to in rem proceedings, it is the ability to enforce recognised claims[97] in rem that is an advantage of, and indeed characteristic to, admiralty jurisdiction.[98] The notice requirements in Article 4, by requiring notice to be given to the various parties prescribed in Article 4(3), would increase the cost in effecting a judicial sale, since no notice was required to any *particular party* under the general admiralty law before a valid judicial sale of a vessel. Under Article 4(4) of the *Convention*, domestic law would prescribe *who* gives the notice under Article 4. In principle, this may be the party that has successfully sought an order for judicial sale of the vessel or the Admiralty Marshal (who is an officer of the Court)[99] themselves.

The fees of the Admiralty Marshal (including fees for effecting and maintaining arrest, as well as costs of the vessel's sale) and the costs borne by a particular applicant in the arrest of the vessel receive the first and second claim to the proceeds of the sale of the vessel respectively, ahead of any other party.[100] Thus the increased costs in providing notice of the sale to specific parties may reduce the remaining proceeds available to the parties with a claim in rem against the vessel arrested.

Further, satisfying the notice requirements under Article 4 may increase the *time* it takes for a vessel to be sold. While notice of the sale of the vessel under Article 4 could be given in the period of time between the judicial order to sell the vessel and the actual sale of the vessel (such as to allow the vessel to be advertised, appraised, and to allow for tenders of the vessel),[101] compliance with the requirement in Article 4(3) to give notice to *specific* parties would take time in terms of finding out who those parties may be and in giving notice to those parties. This is particularly so since

[94] *Louis Castrique v William Imrie* (n 22) 429; *The Acrux* (n 18) 409.
[95] Convention Explanatory Note (n 4) [217].
[96] See above n 86.
[97] See *Admiralty Act 1988* (Cth) ss 15–19.
[98] See Gregory Nell SC, 'The Arrest of Ships – Some Legal Issues' (2009) 23(1) *Australian and New Zealand Maritime Law Journal* 39, 39. See also Coote n 11.
[99] See n 83.
[100] *Patrick Stevedores No 2 Pty Ltd v Proceeds of Sale from the Vessel MV Skulptor Konenkov* (n 16) 50–1.
[101] See generally Federal Court of Australia, *Admiralty Marshals' Manual,* 2018, ch 6.

notice of the sale to any *specific* party was not a requirement under the general law.[102] A consequence of this is that the vessel is arrested for a longer period, as a vessel is under the arrest and custody of the Admiralty Marshal until it is sold by court order.[103] The extended time in which the vessel is under custody increases the Admiralty Marshal's fees of arrest and reduces the proceeds available to those with an admiralty claim against the vessel after its judicial sale.

The notice requirements seem overly prescriptive for two reasons. First, it requires notice to up to six *classes* of parties, some of which may contain numerous parties (such as, for example, a party with a registered mortgage or charge over the vessel). Information of some of these parties may be known by the time of applying for the judicial sale of a vessel, which is generally preceded by the vessel's arrest and the institution of in rem proceedings.[104] Ascertaining information of these parties is somewhat alleviated by Article 7(7), which allows reliance upon the records of a shipping registry, the registry of a registered mortgage or charge, or information provided to the court by a holder of a maritime lien for the identity and address of the person in which notice is required to be given to. Nevertheless, providing notice to each of these parties takes time. The amount of time it takes to provide notice under Article 4 also depends on how Australian domestic law prescribes the *means* by which notice is given. Personal service, for example, of each of the parties required to be given notice would require much greater time and expense than if notice is satisfied if it is sent via email to the relevant party.

The second reason why the notice requirements appears too prescriptive is that a failure to properly follow the notice requirements under Articles 4(3)–(7) means that a certificate of judicial sale, and subsequently the conferral of clean title, cannot be issued: Article 4(2). The *Convention* also requires, under Article 4(1), for domestic law to 'provide procedures for challenging the judicial sale prior to its completion'. Thus, a failure to follow the notice requirements under the *Convention* may preclude the conferral of clean title to a purchaser of the vessel even if the failure to follow those notice requirements has not caused any prejudice to the party who was not notified of the sale; failure to follow the notice provisions *alone* suffices for clean title to not be conferred to the purchaser. A result of these two provisions may be a greater willingness for disgruntled creditors with a claim against the vessel to challenge the validity of a judicial sale on the basis that adequate notice has not been given to them. Conversely, it may result in a delay in the sale of the vessel until the notice requirements are strictly observed and there is proof that this has been done. Again, this will increase the time the vessel is in the custody of the Admiralty Marshal and therefore decrease the proceeds that can be paid out against those with a claim against the vessel.

What justifications are provided for insertion of the notice provisions in the *Convention*? The Explanatory Note to the *Convention* states that notification of a judicial sale of a vessel is an aspect 'that is particularly important in safeguarding the interests of creditors [with an interest in the vessel], who might not otherwise be party to the proceedings giving rise to the judicial sale'.[105] But that is a questionable proposition. Whilst creditors may not have possession of the vessel, and may thus find it more difficult to know whether the vessel they have a security interest in is subject to a judicial order for her sale, creditors have an economic self-interest in the satisfaction of their debt by pursuing and enforcing their interest over the vessel. If that debt is not pursued in a timely manner, it may be defeated by other claims against the vessel. Would a creditor, much less a prudent one, lend money to a debtor without the necessary means of, or desire to, pursuing and enforcing their claim against the vessel?

The Explanatory Note then states that 'the primary purpose of the notice requirements in the *Convention* is to alert creditors to the impending sale and eventual distribution of proceeds'.[106] But imposing substantive notice requirements for a judicial sale of a vessel seems contrary to the stated purpose of the *Convention*, which is to 'govern the international *effects* of a judicial sale of a ship that confers clean title on the purchaser' whilst leaving the *procedure* of judicial sales of vessels to domestic law.[107] The *Convention* was carefully drafted to allow domestic law to govern (among other matters) the procedures for the sale; it is not clear why notice of the vessel's sale was singled out as requiring stipulation within the *Convention*, when this seems to be a matter of procedure in the sale of the vessel.

[102] See above Part II.
[103] *Admiralty Rules 1988* (Cth) rr 44, 47(1).
[104] Ibid r 69(1).
[105] Convention Explanatory Note (n 4) [94].
[106] Ibid [95].
[107] *Convention* (n 2) arts 1, 4(1).

Finally, the Explanatory Note states that the notice requirements in Article 4 are 'designed to strike a fair balance between due process towards creditors and the expediency required in judicial sale proceedings'.[108] However, it is unclear whether there is such a 'fair balance' for the two reasons above in explaining why the notice requirements seem overly prescriptive.

## 6.2. Prescribing Notice Under Australian Domestic Law

Any delay arising out of giving specific notice under the *Convention* may be alleviated to some extent by prescribing clear and simple notice requirements under Australian domestic law. It will be recalled that while the *Convention* requires notice of the judicial sale to various parties under Article 4(3), the notice is to be given in accordance with the law of the State of judicial sale under Article 4(4). Domestic law would govern the notice period, how notification is to occur, the form of the notice, and the persons responsible for giving the notice.[109] The Explanatory Note to the *Convention* provides various examples of how notice may be given,[110] including by personal service, notice by post, email or other electronic communication addressed to the person with confirmation of receipt, or, if these methods fail, by a public announcement. Interestingly, the Explanatory Note appears to suggest that notice by public announcement, if other means of notice have been attempted and failed, is sufficient to discharge the requirement to give notice under Article 4(3), even though a public announcement of a judicial sale does not strictly given notice 'to' a particular party.[111]

Even if clear and simple methods of notification of parties is provided under Australian domestic law, there appears to be both delay and expense involved in undertaking the notification process under Article 4 of the *Convention*. To that extent, a concern regarding the notice provisions in the *Convention* remains.

## 7. Conclusion

The *Convention* has much to commend as an instrument that has been endorsed by both UNCITRAL and the United Nations General Assembly and which has had the drafting input of a range of stakeholders within the maritime industry. This article has analysed the principles behind the judicial sale of vessels under the general maritime law and how the general law has relied upon the comity of other jurisdictions to recognise clean title to a vessel when sold by a judicial sale. This article has illustrated some issues that have arisen in cases when reliance has been placed upon other jurisdictions to recognise clean title to a vessel under considerations of comity, which forms the impetus behind the *Convention*. This article then analysed the substantive provisions of the *Convention* and compared this with Australian domestic law regarding the judicial sale of vessels. Finally, it was discussed how the requirement to give specific notice of the judicial sale to specific parties in Article 4(3) of the *Convention* may unnecessarily delay the sale of the vessel and how this may, to some extent, be alleviated by domestic law providing for clear and simple means of notifying such parties.

Lord Diplock said in a different context:

> Outside the special field of 'prize' in times of hostilities there is no 'maritime law of the world,' as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights or liabilities enforceable in English courts. Because of the nature of its subject matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a 'maritime law of the world' and not from the internal municipal law of a particular sovereign state.[112]

[108] Convention Explanatory Note (n 4) [95].
[109] Ibid [123].
[110] Ibid [124].
[111] 'A judicial sale should not be regarded as failing to comply with the notice requirements under the Convention merely because the notice of judicial sale was not given "to" the person concerned': ibid.
[112] *Re Owners of MV Toju Maru* [1972] AC 242, 290–1.

Lord Diplock thus recognised that there was no 'maritime law of the world' but only those series of maritime laws enforced by different courts around the world. Adopting the *Convention* would appear to undertake the opposite of what Lord Diplock described. It would supplant the inconsistencies and follies of different jurisdictional regimes with international consistency so far as it relates to harmonising the international effects of the judicial sale of vessels. But it would, equally, supplant domestic law to the extent the *Convention* requires. The explanation of the *Convention* in this article, and how it compares to Australian domestic law, may hopefully assist in understanding whether Australia should adopt the *Convention*.