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REPORT ON THE COMITÉ MARITIME INTERNATIONAL WORKING PROJECT ON RECOGNITION OF FOREIGN JUDICIAL SHIP SALES

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1 Introduction

The Comité Maritime International (CMI) began working on the issue of recognition of foreign judicial ship sales in 2007.[1] This project eventually resulted in the draft International Convention on Foreign Judicial Sales of Ships and Their Recognition (the draft Convention), which was approved at the CMI Assembly in Hamburg in June 2014.[2]

The CMI subsequently submitted the draft Convention to the Legal Committee of the International Maritime Organisation (IMO) in 2015 for its sponsorship and addition to its work programme.[3] This proposal, co-sponsored by China, South Korea and the CMI, was considered by the Legal Committee in more depth in 2016, but the Committee decided 'not to pursue the proposal at this time', questioning whether there was a 'compelling need' for such an instrument. The Legal Committee suggested that the sponsors of the project approach other UN bodies (such as UNCITRAL or UNCTAD) so see whether they might be interested in taking it up.[4]

A subsequent approach to the Hague Conference on Private International Law in February 2017 was also unsuccessful.[5] CMI then made a similar proposal to the United Nations Commission on International Trade (UNCITRAL) in July 2017. In response, UNCITRAL suggested that CMI organize an international colloquium to 'develop and advance the proposal', to gather 'additional information in respect of the breadth of the problem' of non-recognition of foreign judicial vessel sales, and to report back to UNCITRAL for its reconsideration of the issue.[6] This colloquium will

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1 See Henry Hai Li 'A Brief Discussion on Judicial Sale of Ships' (paper presented at the CMI Athens Conference 2008, at http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html.

2 For the text of the draft Convention (also referred to as the Beijing draft) and its previous iterations, as well as documents relating to the project, see http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html. The text is also reproduced in Lief Bleyen, *Judicial Sales of Ships* (Springer 2016) 179-185.

3 See http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-102nd-session.aspx.

4 See http://www.imo.org/en/MediaCentre/MeetingSummaries/Legal/Pages/LEG-103rd-session.aspx; Patrick Griggs, 'IMO Legal Committee – 103rd Session' (2016) 22 JIML 237, 240.

5 See https://www.hcch.net/en/governance/council-on-general-affairs/archive/2017-council.

6 See *Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)* A/72/17 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/pdf/V1705889.pdf [456]-[465].

be held in Malta at the end of February 2018.[7] In light of these developments, the Attorney-General's Chambers and the Maritime and Port Authority of Singapore have invited comments from maritime stakeholders, including the Centre for Maritime Law, on the issue of recognition of foreign judicial ship sales and the CMI draft Convention.

2 The Current Legal Position in Singapore

The issue of recognition and enforcement of foreign admiralty judgments in rem at Singapore law is still largely governed by the common law.[8] In practice, the conflicts issues that are likely to arise from disputes over foreign judicial ship sales are properly characterized as relating to *recognition of the legal effect* of a foreign judgment in rem, rather than the *direct enforcement* of the foreign judgment in rem itself.[9] This is because a judicial sale purchaser bringing an action for wrongful interference with its vessel, resisting arrest of its vessel, or seeking a declaratory judgment as to its ownership of the vessel, is relying on the clean title purportedly derived from the foreign judgment in rem and judicial sale, rather than on the foreign court's judgment in rem itself. The question is therefore whether the local court will recognize the effectiveness of the foreign judgment and sale '*qua* an assignment rather than *qua* a judgment'.[10] Similarly, an application by a judicial sale purchaser for orders to deregister mortgages or amend the local ship

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The CMI proposal A/CN.9/923 is at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/36/pdf/V1702336.pdf.

7 See colloquium documents at http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html and http://www.comitemaritime.org/Uploads/Publications/Yearbooks/Newsletter%20CMI%20No.1--2018.pdf.

8 The Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 5(2)(b) simply restates the common law principle (discussed below text at n 12 et seq) that the foreign court will have jurisdiction 'in the case of a judgment given in an action of which the subject-matter was immovable property or in an action in rem of which the subject-matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court'. The Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) does not cover foreign judgments in rem. See Adeline Chong, 'Country Report: Singapore' in Adeline Chong (ed), *Recognition and Enforcement of Foreign Judgments in Asia* (Asian Business Law Institute 2017) 175.

9 See also Paul Myburgh, '"Satisfactory for its Own Purposes": Private Direct Arrangements and Judicial Vessel Sales' (2016) 22 JIML 355.

10 Dicey, Morris and Collins, *The Conflict of Laws* (15th ed with 3rd Supplement, Sweet & Maxwell Ltd 2016) paras 14-005, 14-110. For recognition of foreign judgments in rem under the Brussels Regulation regime within the European Union, see Bleyen (n 1) 20-25.

registry in accordance with a foreign judicial sale[11] may be seen as a recognition of the incidents of the title conferred by the judicial sale, rather than a direct enforcement of a foreign judgment in rem.[12]

The relevant common law rule in Singapore is authoritatively stated by the Singapore Court of Appeal in *The Republic of the Philippines v Maler Foundation*:[13]

> The rule relating to the recognition of the legal effect of a foreign in rem judgment in the forum court is set out in Rule 47 of Dicey, Morris & Collins vol 1 ([53] supra) (at para 14R-108):
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> > RULE 47—(1) A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject-matter of the proceedings wherein that judgment was given was immovable or movable property which was at the time of the proceedings situate in that country.
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> It is therefore essential to the recognition of a foreign judgment in rem that the res was situated in that foreign country at the time of the judgment. The Judge considered the authorities of *Louis Castrique v William Imrie* (1870) LR 4 HL 414 and *Minna Craig Steamship Company v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55 in some detail (at [48]–[53] of the Judgment), and it suffices for us to note that that the key principle that may be distilled from these authorities is embodied in Dicey, Morris & Collins vol 1's Rule 47 …

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[11] See eg *The Phoenix* [2014] 1 Lloyd's Rep 449 (application to amend the St Vincent and Grenadines ship register following judicial sales in North Korea and China).

[12] That said, subject to the usual complications caused by issue estoppel, a foreign judgment in rem may be enforced directly by an unsatisfied judgment creditor: see *The City of Mecca* (1879) 5 PD 28; *The Despina GK* [1983] QB 214; *Pacific Star v Bank of America National Trust and Savings Association* [1965] WAR 159.

[13] [2014] 1 SLR 1389; [2013] SGCA 66 at [66].

In *Castrique v Imrie*,[14] the locus classicus of the common law rule referred to in *The Republic of the Philippines v Maler Foundation*, the House of Lords had to decide whether to recognize the consequences of a French court's judicial sale of a British-registered ship, the *Ann Martin*. In his advice to the House, Blackburn J stated that the nature and effect of the French proceedings and judgment was to be characterized according to French law.[15] On the crucial question as to whether the French court's judgment was in personam, and therefore binding only on the parties before the court; or in rem, and therefore conferring a clean title good against all third parties, Blackburn J adopted the analysis in *Story on the Conflict of Laws* to the effect that:[16]

> [T]he principle that the judgment is conclusive 'is applied to all proceedings *in rem* as to moveable property within the jurisdiction of the Court pronouncing the judgment. Whatever it settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they be causes of prize or bottomry, or salvage or forfeiture, of which such Courts have a rightful jurisdiction founded in the actual or constructive possession of the subject matter.'
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> We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the last few words quoted from *Story*. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under the authority of which the Court sits; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition

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14 *Castrique v Imrie* (1869-70) LR 4 HL 414.

15 *Castrique v Imrie* (1869-70) LR 4 HL 414, 427. It would seem that French law was favoured here as the lex situs rather than the lex executionis: Blackburn J (429) saw the issue of recognition of the title conferred by a foreign judgment in rem as a subset of the broader principle laid down in *Cammell v Sewell* (1860) 5 H & N 728, 157 ER 1371 that the lex situs governs the validity of dispositions of movable property.

16 *Castrique v Imrie* (1869-70) LR 4 HL 414, 428-429.

> of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against the world.

Applying these two criteria to the facts, Blackburn J held that the ship was in French territorial waters at the time of its sale, and that the French court had exercised an in rem jurisdiction that was 'analogous to that of our own Admiralty courts'.[17] The French court's judgment in rem and subsequent judicial sale was therefore to be recognized as conclusive by the English courts, even though it was based on an erroneous interpretation of English law.[18] The only ground on which Blackburn J seemed willing to entertain reopening the merits of a foreign judgment in rem was fraud. Even then, he seemed doubtful as to whether the rights of a bona fide purchaser in a judicial sale would necessarily be affected by a judgment in rem or judicial sale procured by fraud.[19]

The *Castrique v Imrie* approach, which has been applied in a number of subsequent cases,[20] seems to allow very little scope for an admiralty court to refuse to recognize the validity of the clean title conferred by a foreign judicial ship sale, provided that the two basic requirements set out by Blackburn J are satisfied. Unless the foreign court has manifestly exceeded the bounds of its own admiralty jurisdiction, or the ship was outside the territory of the foreign court when it was sold, recognition by the local court of the foreign judicial sale and the clean title conferred by it should automatically follow.

Dicey, Morris and Collins suggest that it is, nonetheless, conceivable that recognition of the title arising from a foreign judgment in rem may be refused on the ground that it offends public

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17 *Castrique v Imrie* (1869-70) LR 4 HL 414, 430.

18 *Castrique v Imrie* (1869-70) LR 4 HL 414, 432-433. See *The Fairway* [2009] 2 Lloyd's Rep 191 [94] referring to *Castrique v Imrie*: '[T]he adjudication is regarded by this court as conclusive against all the world, irrespective that application of either the law of the place of registry or English law might produce a different result.'

19 *Castrique v Imrie* (1869-70) LR 4 HL 414, 433.

20 See eg *Minna Craig Steamship Co v Chartered Mercantile Bank of India London and China* [1897] 1 QB 55; *The Acrux* [1962] 1 Lloyd's Rep 405, 408-409; *The Cerro Colorado* [1993] 1 Lloyd's Rep 58, 61; *The Phoenix* [2014] 1 Lloyd's Rep 449 [35]-[37].

policy.[21] The most obvious candidates for a public policy argument would seem to be a breach of the rules of natural justice in the judgment or sale process, or an objectionable interference in the legal interests or rights of parties in the process. The problem with a public policy argument based on a breach of the rules of natural justice is that Common Law jurisdictions regard service of a writ in rem on the ship as sufficient notice to found in rem admiralty jurisdiction, and allow for default judgments in rem if the shipowner chooses not to appear. It is therefore very difficult to mount plausible natural justice arguments based on lack of notice in the admiralty context.[22] An unreasonable refusal by the court to allow an interested party to intervene in admiralty proceedings, or clear evidence of court corruption, collusion or bias, might provide a sounder basis for arguments against recognition of foreign judicial ship sales on public policy grounds.

There are to my knowledge no reported judgments regarding the non-recognition of Singapore admiralty judgments in rem or subsequent judicial sales abroad, or of any issues relating to non-recognition of foreign judicial vessel sales being raised for determination by Singapore courts.

3 The Arguments in Favour of a Convention

CMI's arguments in favour of the adoption of its draft Convention are summarized in the President of CMI's letter to the Hague Conference on Private International Law of February 2017 as follows:[23]

> Many legal systems recognize the Judicial sale of ships in another jurisdiction and that where a ship is sold by way of a Judicial sale, all claims that lie against that ship (in particular any maritime liens or mortgages) are extinguished and the purchaser acquires a clean title to the ship that is free of such claims.

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21 Dicey, Morris and Collins (n 70) para 14-111.

22 See eg *The Phoenix* [2014] 1 Lloyd's Rep 449 [28]-[32], where the court rejected arguments of a breach of natural justice or fraud in a North Korean judicial sale, finding that the mortgagee had chosen not to participate in the sale process.

23 Available at https://www.hcch.net/en/governance/council-on-general-affairs/archive/2017-council and http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/0,2750,15032,00.html. See also the CMI proposal to UNICTRAL A/CN.9/923 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/36/pdf/V1702336.pdf.

> However, each legal system has developed its own approach to the administration and conduct of such sales, and, from time to time, problems have been experienced in deleting the ship from its erstwhile register, in registering the ship in a new registry, and in the purchaser having to defend old claims that arose against or in respect of the ship prior to its Judicial sale.
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> Indeed, some jurisdictions flatly refuse to recognize any Judicial sale unless that sale was made through its own courts. There are numerous cases where such non-recognition has led to considerable prejudice to the purchaser of a ship on a Judicial sale. Attached to the material produced to the IMO was a summary of a number of legal cases reported from around the world.
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> …
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> [Judicial] sales whether pre or post judgment, will only be supported, and proper values for ships fetched, if the prospective purchasers can be confident of receiving the vessel with a clean title, free of any encumbrances and capable of being deleted from its old registry and registered in a new register of the purchaser's choice. Thereafter the purchaser must also be able to trade the ship without it being subject to arrest in respect of any claim arising prior to its Judicial sale.

Similar arguments were put forward to UNCITRAL later in 2017:[24]

> 457. The proponents explained the nature of judicial sales addressed in the proposal, and issues that were preventing the transfer of vessels with clean title. Recalling that over 95 per cent of world trade took place using transport by sea and that, in current times of financial difficulty, there were increasing failures by ship owners, unable to obtain additional financing, to pay debts as they fell due. In addition, the scale and worldwide nature of the concerns were highlighted.

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[24] *Report of the United Nations Commission on International Trade Law, Fiftieth Session (3-21 July 2017)* A/72/17 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/058/89/pdf/V1705889.pdf.

458. It was explained that a variety of debts would arise as a result of the operation of a ship, and that non-payment thereof would give rise to maritime claims that enabled creditors to arrest a vessel for non-payment, with an eventual order for judicial sale of the vessel. The outcome of such a sale should be to transfer clean title to the purchaser of the vessel, but in some jurisdictions, courts did not recognize and enforce that outcome when the order for the judicial sale emanated from another jurisdiction. The consequences of that failure included difficulties for the purchaser in re-registering such vessels and trading freely with them, as well as the exposure of such purchasers to claims against prior owners for undisclosed liabilities. The risks of a failure to obtain clean title depressed the price fetched by vessels through judicial sale by as much as half their value and led to a cascading set of problems in a number of sectors, including reluctance by financial institutions to lend, lower repayments to creditors and an inability for ship owners to obtain funding. Those problems resulted in serious loss in economic value and a reduction in the state and maintenance of the world fleet.

459. The proponents also explained that a short, self-contained instrument along the lines of the New York Convention could provide a solution to those issues. In essence, it would ensure that prior claimants would look to ship sale proceeds and previous ship owners to settle their claims, and clean title to vessels would be transferred and recognized across borders.

460. It was observed, in considering the proposal, that the concerns were highly relevant to UNCITRAL and to world trade. The pernicious consequences of the current situation included the hindering of the flow of cargo, the destruction of value and assets and unnecessary legal action, which compromised the industry and world trade because vessels unable to trade clogged ports. For all those reasons, and those set out in document A/CN.9/923, UNCITRAL was requested to take up the proposal.

4 Evaluation

There is scant empirical evidence of a widespread international problem regarding non-recognition or enforcement of the clean title arising from foreign judgments in rem and judicial ship sales, or of a consequent crisis of confidence in the international shipping industry. Courts in a handful of jurisdictions clearly do seem to regard any foreign judicial sales of their registered ships as illegal, an affront to sovereignty, or contrary to public policy,[25] but these are outliers. Further, given the large numbers of judicial sales of ships conducted annually worldwide, these problem cases would seem to represent a minuscule proportion of total judicial vessel sales worldwide.[26] This may be one reason why the various international bodies approached to sponsor the draft Convention to date have been unconvinced of the compelling need for such an instrument. Even if the problem is rather more widespread than the reported cases suggest, the risks posed by non-recognition of foreign judicial ship sales to Singapore ship purchasers or financers would appear to be very low, and to be confined to ships flagged in a handful of jurisdictions (which are presumably already known to the market to be risky). Rather, foreign judicial sales and the clean title that they confer would seem to be almost universally respected and recognized by courts on the basis of domestic conflict of laws principles broadly similar to those set out in *Castrique v Imrie* and applied in Singapore.

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25 See eg Bleyen (n 1) 154-157; *Goldfish Shipping SA v HSH Nordbank AG* 2010 377 Fed App 150, 2010 AMC 1210 (3rd Circ) (Turkey refusing to recognise US judicial sale); *Bridge Oil Ltd v Fund constituting the proceeds of the sale of the MV Mega S (formerly the MV Aksu)* [2003] ZAWCHC 24 (Turkey refusing to recognise Danish judicial sale); *Deputy Marshal, Federal Court v The Galaxias* [1989] 1 FC 375, 20 FTR 141, 1989 AMC 348 (Greece attempting to place conditions on recognition of Canadian judicial sale); *Vrac Mar Inc v Demetries Karamanlis* [1972] FC 430 (Panama refusing to recognise the effects of a Canadian judicial sale). See also Henry Hai Li 'A Brief Discussion on Judicial Sale of Ships' (paper presented at the CMI Athens Conference 2008, at http://www.comitemaritime.org/Recognition-of-Foreign-Judicial-Sales-of-Ships/ 0,2750,15032,00.html, which identifies four problem cases.

26 While there are no readily available international statistics on the annual number of judicial ship sales conducted worldwide, the CMI proposal to UNICTRAL (A/CN.9/923 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V17/023/36/pdf/V1702336.pdf) notes that 'the data from four significant maritime jurisdictions in Asia (Republic of Korea, China, Singapore and Japan) show that, during the period 2010-2014, more than 480 ships were sold by way of Judicial sale per year in those countries'. The conclusion drawn by CMI from these figures is that 'the number of ship sales that would benefit from the certainty provided by the draft international instrument would run to many hundreds of ships a year'. It could equally be concluded that these figures demonstrate just how rarely problems arise from the application of current domestic conflict of laws rules to issues of recognition of foreign judicial ship sales.

The CMI colloquium in Malta will hopefully provide further clarification as to whether issues of non-recognition are indeed more widespread than the handful of reported problem cases would suggest, and furnish sound economic evidence of the claim made to UNCITRAL that the 'risks of a failure to obtain clean title depressed the price fetched by vessels through judicial sale by as much as half their value'. Even if it is established that this is the case, however, it does not necessarily follow that the draft Convention will provide an effective solution to the problem. Those few jurisdictions which have categorically refused to recognize the legal effects of foreign judicial vessel sales (notably Greece, Panama and Turkey) are unlikely to adopt any Convention that will require the automatic recognition of foreign judicial sales of vessels flying their flags.

The vast majority of jurisdictions which currently do recognize foreign admiralty judgments in rem and foreign judicial vessel sales, including Singapore, would experience little change to the current legal position if they adopted the draft Convention.[27] In its bid to make foreign judicial vessel sales and the clean title flowing from them virtually unassailable, however, the draft Convention might conceivably have a chilling effect on bona fide and meritorious challenges to foreign admiralty in rem judgments and judicial sales. Currently, Singapore admiralty courts may hear objections from any aggrieved party (whether a maritime lienholder or any other maritime creditor) challenging an illegal or corrupt foreign judicial ship sale, or a collusive foreign judicial ship sale involving a mala fide purchaser. The challenge threshold would presumably be set very high by the Singapore court, both to preserve the integrity of the international judicial ship sale system, and to afford appropriate comity to the judgment of the foreign admiralty court. However, in such extreme cases it would seem appropriate for the Singapore court to be able to hear the challenge. If it were found to be baseless, damages for wrongful arrest would provide the bona fide purchaser with redress.

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[27] This is because art 4.1 of the draft Convention effectively restates the existing *Castrique v Imrie* principle by providing that a foreign judicial sale will be recognised where the following two preconditions are met:

> '(a) the Ship being physically within the jurisdiction of the State of Judicial Sale, at the time of the Judicial Sale; and
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> (b) the Judicial Sale having been conducted in accordance with the law of the State of Judicial Sale and the provisions of this Convention …'.

Articles 7.2 and 7.4 of the draft Convention would, however, expressly limit foreign judicial ship sale challenges to those brought by an Interested Person, which is defined as the shipowner and/or mortgagee at the time of the foreign judicial sale. It seems problematic that other interested parties (including those traditionally thought deserving of particular protection or encouragement by admiralty courts, such as salvors, seafarers or collision victims) have no standing under the draft Convention to challenge a foreign judicial sale that may have been deliberately designed to thwart their legitimate claims against the vessel.

Article 7.3 of the draft Convention also requires all challenges to be referred back to the foreign court which conducted the original judicial sale, and purports to deprive all other courts of jurisdiction in respect of this issue. While this provision was probably seen as a necessary measure to counteract the intransigence of those few jurisdictions who refuse to recognize any foreign judicial sales, it could potentially limit the powers of the Singapore courts to protect local lienholders or other maritime creditors where the basis for the challenge is that the foreign court conducting the judicial vessel sale was itself corrupt or collusive.[28]

Further, the draft Convention only deals with recognition and enforcement of the legal effects of foreign admiralty in rem judgments. It does not deal with the issue of in personam admiralty judgments, which will continue to be dealt with under domestic conflicts rules. It may therefore be queried whether the adoption of a stand-alone instrument for recognition of admiralty in rem judgments is desirable, or whether it will cause unnecessary complications.[29]

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[28] Art 8.3 of the draft Convention does provide that the local forum may refuse to recognize a foreign judicial sale where it finds that recognition of the foreign judicial sale would be 'manifestly contrary to the public policy' of the forum State. However, the draft text does not it clear whether, or when, this would override art 7, or how these two provisions should be read together.

[29] Singapore's recognition and enforcement of foreign judgments regime already consists of four complex interacting 'layers': the common law rules, the Reciprocal Enforcement of Foreign Judgments Act, the Reciprocal Enforcement of Commonwealth Judgments Act, and, most recently, the Choice of Court Agreements Act.

For the above reasons, it is suggested that adoption of the draft Convention by Singapore is unlikely to result in significant benefits. Although uniform international regulation of the issue of cross-border recognition of judicial ship sales may be desirable in principle, this is dependent on the draft Convention receiving universal international support, which currently seems unlikely.