

Colloquium on Judicial Sale of ships
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“clean title”

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References

- Definition: art. 1(b)

(b) “Clean title” [to a ship means that any title to or rights and interests in the ship existing prior to its judicial sale have been extinguished and that any charge or mortgage have ceased to attach to the Ship] [means title free and clear of any mortgage or charge];⁴

- Scope of application: 3.1(b)

Article 3. Scope of application

1. This Convention applies only to a judicial sale of a ship if:

- (a) The ship was physically within the jurisdiction of the State of judicial sale at the time of the sale; and
- (b) Under the law of that State, the judicial sale confers clean title to the ship on the purchaser.¹²

- Certificate: art. 5.1

Article 5. Certificate of judicial sale

1. When a ship is sold by way of judicial sale that is conducted in accordance with the law of the State of judicial sale and the notice requirements in article 4,¹⁹ the public authority designated by the State of judicial sale²⁰ shall, at the request of the purchaser, and in accordance with its regulations and procedures, issue a certificate of judicial sale to the purchaser recording that:

- (c) The purchaser acquired clean title to the ship.²¹

- International effects: 6.1

Article 6. International effects of a judicial sale²⁸

1. A judicial sale to which this Convention applies that is conducted in one State Party shall have the effect in every other State Party of conferring clean title to the ship on the purchaser²⁹[, provided that:

Clean title: dual function in the Convention

1. **As condition for the application of the Instrument** (in the **State of the JS**):
 1. The Convention applies only to a JS of a ship **if**, **under the law of the State of the JS, that sale confers clean title** to the ship on the purchaser.
2. **As effect** [in the **State(s) of the Effect of the JS**]:
 1. Under the fulfillment of certain requirements (physically, law SJS, notice requirements),
 2. That JS shall have the effect in other State Party of **conferring clean title** to the ship on the purchaser (**materialization**):
 1. deletion/cancelation “registered charges/mortgages” and deregistration/re-registration (Action shall be carried out by **Registrar**)
 2. release the ship in case of arrest for previous “registered/unregistered” charges (Action shall be carried out by **Court**)

Definition

"TITLE TO OR RIGHTS AND INTERESTS"

- Scope of the terms:
 - Interpretation problems
- Consequence: **extinction**

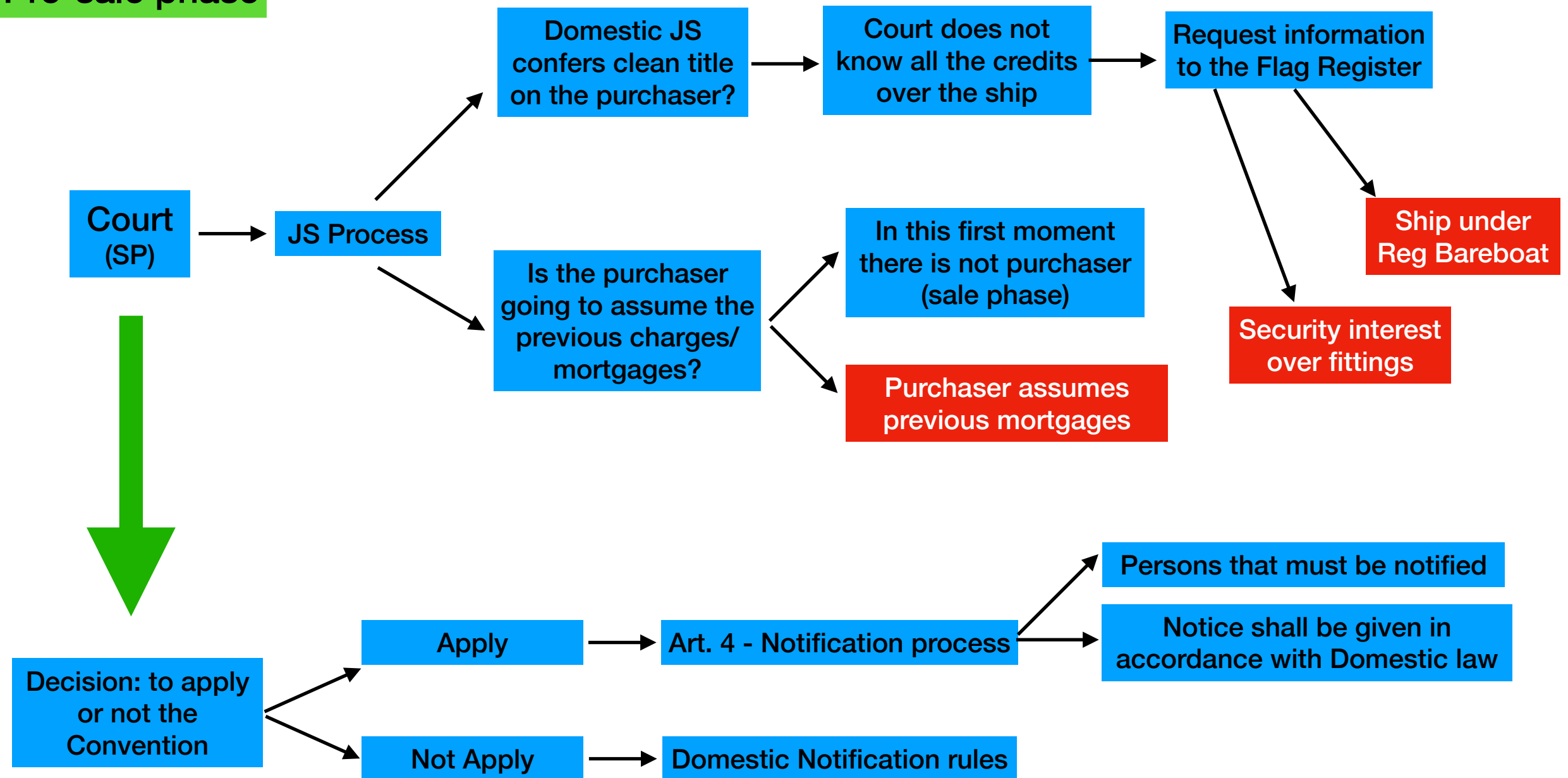
"CHARGE OR MORTGAGE"

- **Charge:**
 - any right whatsoever and howsoever arising which may be asserted against a ship, whether by means of arrest, attachment or otherwise,
 - includes a
 - **maritime liens:** any claim recognised as a maritime lien or *privilège maritime* on a ship [under applicable law]
- **Mortgage:**
 - (a) effected on a ship;
 - (b) recorded in the State in which the ship is registered; and
 - (c) recognised as such by the applicable law in accordance with the private international law rules of the State where the JS is conducted
- Consequence: **cease to attach the ship**
 - complete extinction of mortgages and charges does not take place at the time of sale, since remains the right to participate in the distribution of the proceeds of sale in accordance with the priority rules
 - Complete extinction occurs when the distribution of the proceeds of sale takes place, whether the claims are satisfied or not.

any **title to or rights and interests** in the ship existing prior to its judicial sale have been **extinguished** and that any **charge or mortgage** have **ceased to attach** to the Ship

Situations in which “clean title” comes into play in a Judicial Sale

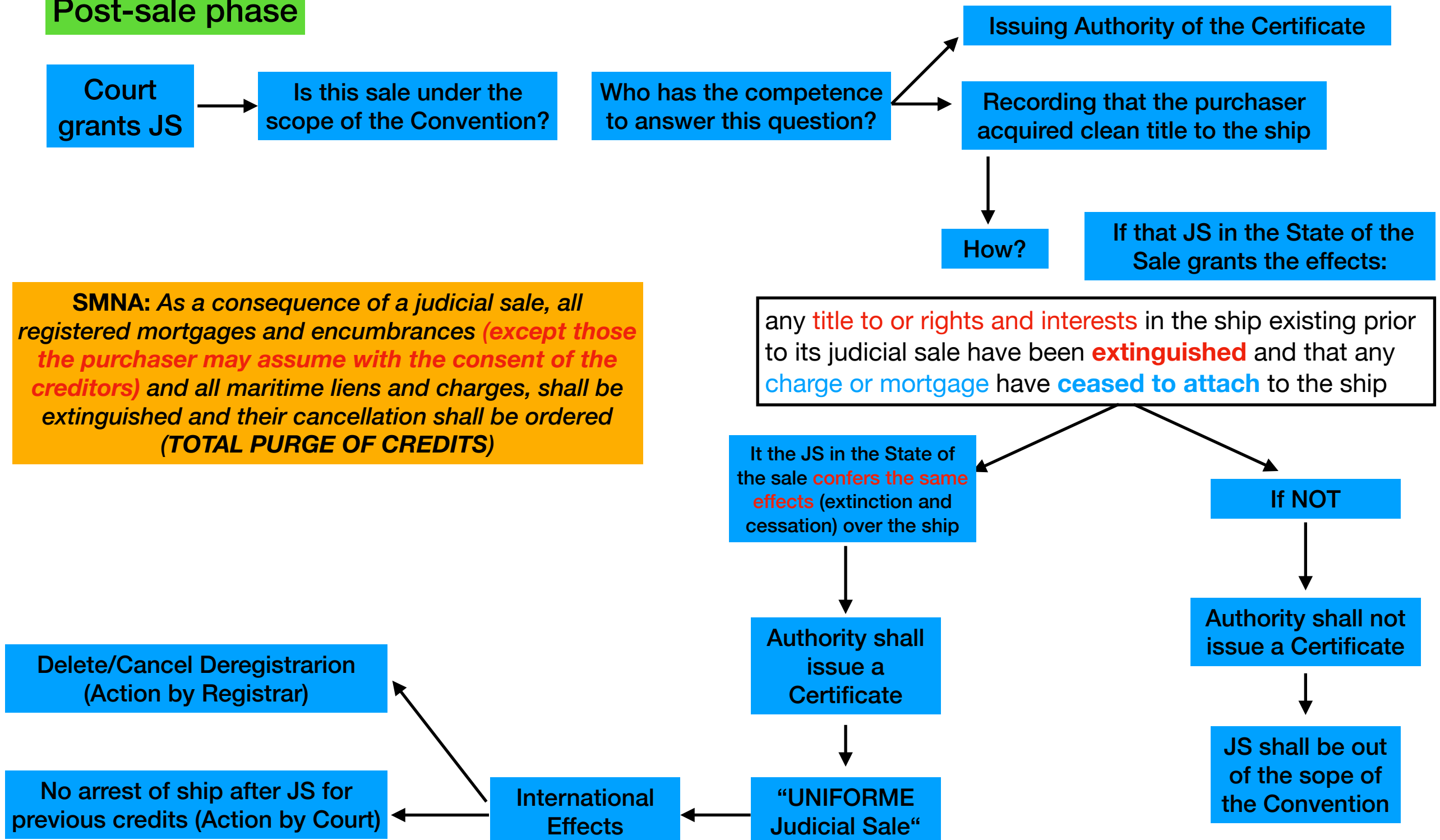
Pre-sale phase



se trata de ver si el efecto de la venta bajo el Derecho nacional incluye la purga en el sentido del convenio, conforme a su definición de clean title

[...]

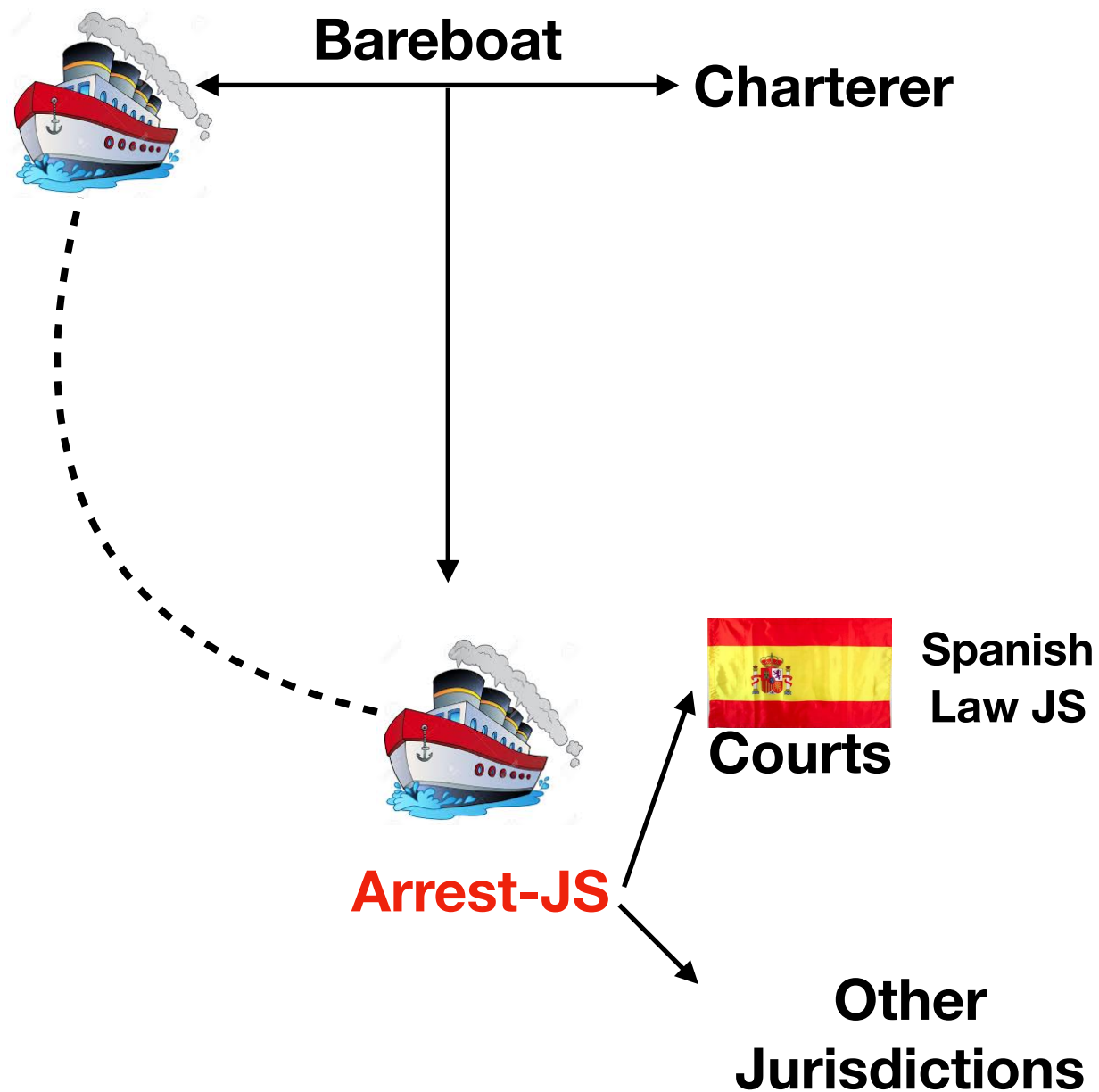
Post-sale phase



Important and problematic issues

- 1. Reg. Bareboat charter**
- 2. Charges assumed by the purchaser**
- 3. Security interests over fittings**

Bareboat charter



SMNA: As a consequence of a judicial sale, all registered mortgages and encumbrances (...), and all maritime liens and charges, shall be extinguished and their cancellation shall be ordered.

JS grants "clean title" on the purchaser

SMNA: "In the event of sale, the **purchaser shall be subrogated in the existing bareboat agreement**" (purchaser shall maintain in the pacific possession to the charterer)

Bareboat is not a "right in rem" (possession)

JS grants (int/domestic) "clean title"

Bareboat Agreement may be treated as a *right in rem* or *possessory interest*

Bareboat does not survive a JS

[...]

- **Spanish Issuing Authority:** issue a "clean title" certificate? **YES** (even the mandatory subrogation of the purchaser in the Bareboat)
- **Other jurisdiction Issuing Authority:** issue "clean title" certificate? **YES** (law does not preserve the rights of a registered charterer)
- **Similar situations, different result**
- WHAT IS THE PURPOSE OF THE CONVENTION REGARDING BAREBOAT AGREEMENTS? (preserves the rights of registered charterers or not?)
- A necessary clarification would be whether for the recognition of a clean title, the law of the state of the JS has to clearly mention that the bareboat charter does not affect the new purchaser. Possibilities (my opinion):
 - Specific addition definition: under national law, *"any previous bareboat charter does not affect/ bind the new purchase by virtue of the JS"*
 - Wider terms: include *"any possessory interest"* in the definition of clean title
- If this is the purpose of the Convention, a clarification should be added, since in some jurisdictions it may not be necessary (since the bareboat is included in the terms "right or interest"), but in other jurisdictions, such in Spain, a more precise addition would be necessary.

Charges “assumed by the purchaser”

- Many jurisdictions consider the possibility that in a JS the purchaser may subrogate, with the consent of the creditors, in those pre-existing charges or mortgages on the ship.

+ **SMNA:** *As a consequence of a judicial sale, all registered mortgages and encumbrances, **except those the purchaser may assume with the consent of the creditors**, and all maritime liens and charges, shall be extinguished and their cancellation shall be ordered.*

- Beijing Draft (assuming the wording of the art. 12 Convention 1993) excepted those charges/mortgages "assumed by the Purchaser" from the acquired clean title.

- During the sessions, have been found very difficult to regulate how the Courts of the JS States were going to issue a certificate with exceptions (charges assumed by the purchaser) on the basis that:

(a) those excepting rights and interests, that were “assumed by the Purchaser”, might be **problematic**,

(b) in **practice**, purchasers does not assume existing mortgages or charges.

- In order to avoid this challenging approach, the WG has agreed to maintain the omission to these charges

RESULT: In case of a JS in which the purchaser assumes previous charges, that JS shall be out of the scope of the Convention (issuing authority shall not issue a “clean title certificate”)

With this legislative option, the Convention is reducing its own scope of application.

Security interests over fittings



Registered Mortgage

Registered Mortgage/charge/pledge over integral components or fittings (engine)

CT: any title to or rights and interests **in the ship** existing prior to its judicial sale have been extinguished and that any charge or mortgage have ceased to attach **to the ship**

Clean title: Registered Mortgage shall cease to attach the ship

JS

Registered mortgage/charge/pledge over the engine?

shall cease to attach the ship?

Problem: definition of ship under the Convention? - The ship is not defined in the Instrument, so it is a domestic law problem (State JS)

Are those creditors between the persons that must be notified (art. 4)?

May this situation (failure of notification) trigger the public policy ground for refusal of the JS?

SMNA: 1. Legal transactions related to a ship (JS is included), the ownership thereof shall include its integral components and fittings.
2. Notwithstanding this, it does not include integral components and fittings registered at the Register of Moveable Assets.

Consequence in Spain: integral components and fittings are part of the ship (talking about legal transactions), but, in case of registered security interest over fittings, those components are not part of the ship - those interests are not under the "clean title term", so the purchaser is not granted with a clean sale

Conclusions

- **Form of Instrument:** the international recognition of JS of ships may only take the form of a Convention, effective mechanism to reach the harmonization of such recognition.
- AEDM is pushing in favor of this Instrument
- An “**absolute clean title**”, if this is the aim of the Convention, is quite ambitious and difficult to acquire in many jurisdictions:
 - Bareboat charter
 - Charges assumed by the purchaser
 - Security interests over fittings
- Some aspects of the Convention still need to be under **further analysis** (WP. 87 is not the final version)



Thank you