

## CMI International Working Group

### Ship Financing Security Practices - Questionnaire

#### 1 MARITIME AND OTHER CONVENTIONS

- 1.1 Has your jurisdiction ratified the 1952 and/or the 1999 Arrest Convention or neither?

*The U.K. ratified the 1952 Convention and this was enacted in the Administration of Justice Act 1956 and re-enacted in the Senior Courts Act 1981. The UK has not ratified the 1999 Convention.*

- 1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest' of a vessel?

N/A

- 1.3 In particular, can arrest be made:

- (a) by a mortgagee of a vessel registered under the laws of your jurisdiction?
- (b) by a mortgagee of a vessel registered under the laws of a different jurisdiction?

*A mortgagee has the right to arrest a ship within the jurisdiction of the Admiralty Court irrespective of the country of registration. This jurisdiction was given in the Admiralty Courts Act 1840 in relation to UK registered ships and extended to all ships by the AJA 1956.*

- 1.4 Has your jurisdiction ratified the 1926 and/or the 1993 Maritime Liens and Mortgages Convention or neither?

No.

- 1.5 If your jurisdiction has not ratified either Maritime Liens and Mortgages Convention does your jurisdiction recognize foreign maritime liens? If so what types of claim are recognised as maritime liens?

*The only maritime liens recognised in English law are claims for crews wages, salvage, collision damage, master's wages and disbursements (this is now statutory under s.41 Merchant Shipping Act 1995) – and also bottomry and respondentia although these are now obsolete. The question of whether a foreign maritime claim could constitute a maritime lien was considered by the Privy Council in *The Halcyon Isle* [1980] 2 Lloyd's Rep 325 which decided that whether a maritime claim created a maritime lien was to be determined by the *lex fori* (in practice the law of the state in which the ship was arrested) and not the law of the state where the claim arose. This analysis of the position in English law has been questioned by certain academic writers.*

- 1.6 Does the law of your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents?

*Yes.*

## 2 NATURE OF THE SHIPS' REGISTER

- 2.1 Is the ships<sup>1</sup> register<sup>2</sup> in your jurisdiction a register of legal title?

*In Baumwoll Maunufactur von Carl Scheibler v Furness [1893]AC 8 Lord Herschell L.C. said in the relation to the statutory registration system "all that it (the Act) has done is to make the register prima facie evidence of ownership. In fact it assumes that anybody may displace altogether the statutory effect which has been given to it by proving what the facts really are".*

*In practice however registration is accepted as proof of legal title to the ship subject the power of the Admiralty Court or the Registrar to rectify any incorrect entry on the Register.*

- 2.2 Does the ships' register in your jurisdiction (whether or not a register of legal title) provide for registration of the interest of a demise charterer in circumstances where legal title is registered in another jurisdiction (the 'underlying register').

*Yes. Section 17 Of the MSA 1995 permits a British charterer which has entered into a demise charter on a ship registered on a foreign register to register that ship in Part IV of the U.K. Register.*

- 2.3 If your jurisdiction does provide for registration of the interest of a demise charterer, does it provide for registration or notation of a mortgagee registered on the underlying register?

*No. However Form MSF 4738 which is the Application to Register a Bareboat Charter Ship does require the applicant to state whether there are any "outstanding registered mortgages" on the ship – however this information is not recorded on the Register.*

- 2.4 Does your jurisdiction allow a vessel registered in the ships register in the name of the holder of legal title also to be registered in another jurisdiction in the name of a demise charterer? If so is such registrations permitted when the vessel is subject to a mortgage registered in the ships' register in your jurisdiction and is the consent of the mortgagee required?

*The MSA 1995 does not prohibit the owners of UK registered ships from demise chartering them to foreign charterers nor does it impose any restriction on the charterer from registering that charter in a foreign*

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<sup>1</sup> The term 'arrest' is used throughout for convenience but it is acknowledged that this may not be a concept known to the laws of all jurisdictions. If in your jurisdiction the equivalent concept is attachment or something else, please briefly explain.

<sup>2</sup> The term 'ships register' means a specialist register only for ships.

*jurisdiction. However a ship so chartered will still have fully to comply with the MSA 1995 requirements including flying the correct ensign. Accordingly the consent of the Registrar is not required for a UK ship to be demise chartered ( whether there is a mortgage registered against the ship or not) but invariably the mortgage documents will contain a covenant against demise chartering the ship without the mortgagee's prior consent.*

- 2.5** Please describe (briefly) the criteria for registration of a vessel on the ships' register in your jurisdiction, with particular reference to eligibility or not for registration of different types of assets employed in offshore oil and gas exploration, production, processing and storage.

*A ship is defined in the MSA 1995 as including "every description of vessel used in navigation" and only such ships may be registered. There are numerous decisions of the courts interpreting what a ship is, many of which are conflicting. However off shore installations engaged in offshore oil and gas exploration and storage are generally outside the definition of ship unless they are capable of self propelled motion. The Secretary of State has the power under section 311 of the MSA 1995 to extend the application of the MSA to "a thing designed or adapted for use at sea". At present no such order has been made.*

*In order for a ship to be registered under the MSA 1995 at least 33 (of 64) shares must be owned by a qualified person or persons ( in summary British or EEA nationals or companies) and it must conform to the technical requirements of the MSA 1995 – e.g. loadline, safety construction, safety equipment etc.*

### **3 FORMALITIES FOR MORTGAGE REGISTRATION**

- 3.1** Does a mortgage in respect of a vessel registered in your jurisdiction need to:
- (a) attach documents, such as a loan agreement, evidencing the obligations secured?
  - (b) set out in detail the circumstances giving rise to a right of enforcement?

*3.1 (a) and (b) No. Generally the owner's obligations are set out in the loan agreement which is not attached to the deed of covenant collateral to the mortgage: such a loan agreement is not registrable with the Registrar of Ships nor with the Companies Registry – unless the document includes a charge.*

- 3.2** Does a mortgage in respect of a vessel registered in your jurisdiction need to be notarised and/or legalised?

*No.*

- 3.3** What are the registry fees in order to have a mortgage registered against a vessel registered in your jurisdiction?

*£84.00 or £184.00 for premium(expedited) service.*

- 3.4 Is registration indefinite or is there any requirement for re-registration after a certain period?

*The registration of the ship has to be renewed every five years and if it is not renewed the registration is terminated.[Regulations 41 and 42 of the Registration Regulations]: however such termination will not affect any mortgage which will remain registered [section 16(4) MSA 1995].*

- 3.5 In your jurisdiction is a mortgage of a vessel required to be registered only in the ships register or, in addition, in another register? If so, please give brief details.

*The mortgage deed in the form prescribed by the Secretary of State (MSF 4736 or 4737) has to be registered with the Registrar of Ships: if the owner is a limited company incorporated in the UK then the mortgage deed , the collateral deed of covenant and any other document creating a charge has to be registered with the Companies Registry within 21 days otherwise it will be void against the liquidator, administrator and any other creditor of the owner [Part 25 Companies Act 2006 – section 859].*

#### 4 INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS

- 4.1 Please advise if information concerning security interests in ships registered in your jurisdiction is publicly available, and if so, how it may be obtained, including the following issues, as applicable.

- (a) Does a person seeking such information need the authorization of the vessel owner to get such information?

*No.*

- (b) Does your jurisdiction certify the accuracy of the information?

*Anyone can request a Transcript of Register from the Registry on payment of the relevant fee [£21.00 for current entries] and this sets out the particulars contained in the Register i.e. details of the ship, the owners and the mortgages registered. The Transcript sets out the entries in the Register but does not certify that the entries accurately state the factual position.*

- (c) How much time is generally required to obtain such information?

*About five working days.*

- 4.2 May a vessel subject to a security interest be sold by the owner prior to the release of the security interest, and if so, under what conditions or circumstances.

*A mortgaged ship may be sold subject to the mortgage with the mortgagee's prior consent. If the owner sells the ship without the mortgagee's consent then this will invariably constitute an event of default giving the mortgagee the right to enforce its security. If an owner sells the ship without the mortgagee's*

*consent the registration of the owner will be terminated but the mortgage will remain registered against the ship.[s.16(4)MSA 1995].*

## **5 ARREST OF A CHARTERED VESSEL**

- 5.1** Does your jurisdiction allow a mortgagee to arrest vessels on bareboat charter or time charter?

*Yes.*

- 5.2** Under the laws of your jurisdiction, could the mortgagee incur any liability in tort, delict (or similar) to charterers or cargo interests if the mortgagee arrests the vessel when it is subject to charter and/or carrying cargo (on the grounds of interfering with the contractual relationship between owner and charterer or bill of lading holder)?

*This is a complex area of the law. There is authority that the mortgage constitutes a superior right giving power to the mortgagee to enforce its security by sale or arrest even if this results in a breach of any contract between the owner and a charterer or the cargo interests. However the view stated in a recent decision [The Tropical Reefer – Anton Durbeck GmbH v Den Norske Bank ASA [2005]EWC 2497]] based on 19th century decisions is that a mortgagee can only enforce its mortgage if its security is imperilled. In English law [OBG v Allan [2008] AC1] there is no tort of wrongful interference with a contract but only the two economic torts: first, inducing breach of contract and second, causing loss by unlawful means. It is improbable that a mortgagee merely taking steps to enforce its security after a default by the owner would ever be held to have committed either of these torts.*

- 5.3** What are the procedures or requirements, if any, applied to the cargo on board a vessel that has become subject to judicial sale in your jurisdiction? Must the cargo be discharged before sale, and if so, who bears the costs and risks of such discharge?

*If the ship is under arrest the cargo owners may ask the Admiralty Marshal to arrange for the discharge the cargo at the cargo interest's cost. If no such request is made the mortgagee may request the Admiralty Marshal to arrange for the discharge of the cargo: if the cargo interests then refuse to pay the costs of discharge and collect the cargo, the Admiralty Marshal will sell the cargo to recover his costs from the proceeds of sale.*

## **6 PRIORITY ISSUES BETWEEN MORTGAGES REGISTERED IN THE SHIPS' REGISTER IN YOUR JURISDICTION**

- 6.1** Does your jurisdiction have a system of "priority notice" to enable priority to be reserved for a period before actual registration of the mortgage?

*An intending mortgagee can register a Notice of Mortgage Intent [MSF 4739] with the Registrar and the mortgage when granted will rank in priority from the date of the Notice of Mortgage Intent.*

- 6.2 Once a mortgage is registered in your jurisdiction is it possible for a subsequent mortgage to be registered without the consent of the first registered mortgagee?

*Yes.*

- 6.3 When there are two or more registered mortgages what determines their priority?

*The order of registration with the Registrar of Ships [Para 8 Sch.1 MSA 1995].*

- 6.4 Is there any doctrine of notice such that the priority of a registered mortgage is deferred to that of an earlier but unregistered mortgage of which the registered mortgagee has notice?

*Again this is a complex area of the law. The preferred view is that registered mortgages rank in order of registration and in priority to any unregistered mortgages irrespective of notice. However it is arguable that if a mortgagee had notice of a prior floating charge at the time that the mortgage was granted and the floating charge included a negative pledge then the mortgage will be subordinated to the floating charge.*

- 6.5 Can a second registered mortgagee exercise enforcement remedies without the consent of the first registered mortgagee?

*Yes – in theory. However in practice a mortgagee taking a second mortgage will require the prior consent of the first mortgagee because the first mortgage documents will stipulate this and as a condition of giving such consent the first mortgagee will require the second mortgagee to enter into a subordination agreement in which it will undertake (inter alia) not to enforce its mortgage without the first mortgagee's consent. A second mortgagee cannot exercise its statutory power of sale without the consent of the first mortgagee unless it has obtained an order from the court to do so.*

- 6.6 Does your jurisdiction have a system for registration of security or liens other than mortgages, whether consensual or non-consensual? If so, please describe.

*No.*

## **7 GENERAL ENFORCEMENT ISSUES**

- 7.1 Does your jurisdiction make a distinction between the enforcement of mortgages registered under the flag of your jurisdiction and the enforcement of any other foreign mortgages?

*No.*

- 7.2 Is it necessary for the mortgagee to obtain a judgment in your jurisdiction on its claim under the loan agreement or other applicable debt instrument before it can enforce that mortgage?

No.

- 7.3** If so, how long is it likely to take to obtain a judgment if the claim is contested? Will the local court expedite the proceedings having regard to the ongoing costs of maintaining the vessel?

*Once the ship is arrested and it is obvious that the owner cannot provide security to obtain its release but there are issues in dispute between the parties, the Admiralty Court may order a sale pendente lite so that the ship is sold and the proceeds of sale are paid into court: the parties may then proceed to a trial if there are still substantive issues in dispute.*

- 7.4** Will the court in your jurisdiction accept jurisdiction for the mortgage claim under Article 7 1952 Arrest Convention, or equivalent domestic legislation in your jurisdiction?

*Section 23 of the Senior Courts Act 1981 provides that the court shall not have jurisdiction over claims which are to be determined under the Rhine Navigation Convention 17 October 1868.*

## **8 JUDICIAL DECISIONS AND APPEALS**

- 8.1** Do all courts in your jurisdiction have authority to sell vessels free of maritime liens and prior claims, or is such authority limited to special courts, such as admiralty courts?

*Whilst the High Court has the power to order the sale of a ship in the appropriate proceedings only the Admiralty Court has the power to transfer a clean title to a buyer free of all maritime liens, mortgages and other maritime claims.*

*Also a port authority which has a statutory power to sell a ship in order to recover port dues etc can sell the ship free of all mortgages and other claims and possibly free from all maritime liens. [The Blitz [1992] 2 Lloyd's Rep 441].*

- 8.2** What formalities, including evidence of claim, or evidence of notice, are required to effect the sale of a vessel free of liens and prior claims?

*An order for a sale pendente lite may be made at any time after the arrest but if such an order has not been made then if the owner has not filed a defence to the claim set out in the claim form the mortgagee has to apply to the court for a judgment in default and produce to the court evidence supporting the claim – e.g. loan and mortgage documents, accounts showing the amounts due, notice of default and demand for repayment etc. If the owner has filed a defence then usually the matter would proceed to trial.*

- 8.3** If the owner presents an appeal against judgment, will the court make an order for sale of the vessel before that appeal has been heard and decided?

*If an order for sale has been made then in theory the owner could apply to the court for a stay pending an appeal to the Court of Appeal. The Admiralty*

*Court's position would generally be that if the owner wanted to stop the sale it should provide security for the mortgagee's claim and a stay would only be granted in very exceptional circumstances.*

## **9 SALE PROCEDURE**

- 9.1** Can a mortgagee enforce his mortgage in your jurisdiction by applying for a judicial sale by auction?

*A mortgagee has the right to arrest the ship and apply to the Admiralty Court for an order for sale: such a sale, which is conducted by the Admiralty Marshal, is usually by tender rather than by public auction.*

- 9.2** What are the criteria for an application for a judicial sale by auction and what is the procedure and timetable for such an application and sale?

*An order for sale pendente lite may be made at any time after an arrest by the Admiralty Court "for good reason" – e.g. the ship is a wasting asset and the costs of maintaining the arrest will significantly reduce any ultimate sale proceeds. If no order for sale pendente lite is made then the mortgagee can apply to the court for an order for sale when it has obtained a judgment on its claim. In summary when an order for sale has been made the Admiralty Marshal will arrange for the ship to be appraised [inspected and valued] by a ship surveyor and will then instruct ship brokers to offer the ship for sale on the Admiralty Marshal's terms and conditions: the ship may be advertised in shipping newspapers such as Lloyd's List or Tradewinds. Usually tenders by prospective buyers are required within 28 days of the appraisal, although this time may be abridged or extended in the Admiralty Marshal's discretion. The Admiralty Marshal will generally accept the highest tender and on acceptance of its bid the buyer then has to pay a 10% deposit: after seven days the buyer has to pay the balance of the price in exchange for the delivery of the ship and the Admiralty Marshal's Bill of Sale.*

- 9.3** Will the court in your jurisdiction order a sale of the vessel pending judgment (*pendente lite*), recognising that the vessel is a wasting asset?

*Yes – see 9.2.*

- 9.4** Will the court in your jurisdiction fix a minimum bid price (reserve price) for the vessel and will the amount of that minimum bid price be disclosed to interested parties? What happens if the maximum amount bid for the vessel is lower than the reserve price?

*The appraised value is not disclosed to interested parties. The Admiralty Marshal may only accept a tender lower than the appraised value with the approval of the Admiralty Court.*

- 9.5** Can the owner or other creditors influence the amount of the reserve price?

*No.*

- 9.6** What arrangements will be made for public advertisement of the sale?



*See 9.2 above.*

- 9.7 To what extent is it possible for the owner or other creditors to influence the timetable or procedure for sale?

*The timetable is decided by the Admiralty Court and generally it is not possible to influence this.*

- 9.8 Can a mortgagee enforce its mortgage in your jurisdiction by applying for a court approved private sale? If so, what are the criteria for an application requesting the court to approve a private sale and what is the procedure and timetable for such an application and sale?

*Save in exceptional circumstances it is not possible to arrange a 'private sale' approved by the Admiralty Court. An example of an exceptional circumstance would be where a delay in the sale of the ship would result in the loss of a valuable charter.*

- 9.9 Can a mortgagee bid its debt (*animo compensandi*) so as to allow a set off of the debt against the purchase price (and provide security for the claims of potential prior lien holders)? Or does a mortgagee (or its preferred bidder or buyer) have to pay the full price in cash?

*No. The buyer (whether mortgagee or otherwise) must pay the full price in cash.*

## 10 SALE PROCEEDS

- 10.1 Will the sale proceeds be held in an interest bearing account?

- (a) Will they be held in the currency of the sale or will they be converted into local currency?
- (b) Will the proceeds of sale ultimately be subject to any exchange control or similar restrictions (and/or court fees) when they are paid out? If so, what is the procedure and likely timetable for obtaining permission to remove the funds?

*The sale proceeds will be held in the currency of the sale – usually US Dollars or UK Sterling on a one day call interest bearing account. There are no exchange control regulations relating to the payment out of the sale proceeds.*

## 11 PRIORITIES GENERALLY

- 11.1 Are priorities determined under local law (*lex fori*), or the law of the jurisdiction in which the claim arose (*lex causae*), or the law of the flag of the vessel?

*Priorities will be determined by the lex fori – English law.*

- 11.2 If local law, where does the mortgagee rank amongst other maritime claims in the order of priority and which are those claims which rank prior to the

mortgagee. Do the claims which rank ahead of a mortgage in your jurisdiction vary depending on whether the mortgage is:

(a) a mortgage of a vessel registered under the laws of your jurisdiction?

*The order of priority for payment out is:*

(a) *Admiralty Marshal's costs of arrest, custody and sale.*

(b) *legal costs of arresting party.*

(c) *maritime lien claims (as recognised in English law).*

(d) *possessory lien claims.*

(e) *mortgages valid under the law of the country of registration: in certain circumstances if the mortgage is not enforceable under the law of the country of the registration of the ship it may be valid under English law as an equitable mortgage or charge.*

(f) *statutory lien claims.*

(g) *the owner or any judgment creditor of the owner.*

**11.3** Are there any special rules on priority for local creditors?

*No.*

**11.4** Is it necessary for claimants to introduce their claims prior to the date of sale or within some specified period thereafter?

*Claimants have to file notice of claims within a certain period ( e.g.60 days) set out in the order for sale.*

**11.5** What is the timetable leading up to the distribution of the proceeds of sale?

*An order for payment out is usually made at the same time as order for priorities is made.*

**11.6** Is the distribution order decided by the court?

*Yes.*

**11.7** Is that order subject to a right of appeal?

*In theory an appeal against an order for priorities may be made to the Court of Appeal but this does not usually happen in practice.*

## **12 MORTGAGEE'S SELF-HELP REMEDIES**

**12.1** Under the laws of your jurisdiction does a vessel mortgage governed by and registered in accordance with such laws give the right to take the following enforcement steps without a court order in your jurisdiction?

- (a) to take possession of the vessel;
- (b) to appoint a receiver, manager or other party to operate the vessel;
- (c) to sell the vessel as mortgagee;
- (d) to sell the vessel as attorney in fact of the owner.

*Yes: the powers set out in subparagraphs (a) to (d) are all exercisable by a mortgagee, such powers being granted by statute or by the mortgage documents.*

- 12.2** If, under the law of the ships' register (where that is a different law from the law of your jurisdiction) a mortgagee is given the right to take the enforcement steps referred to at (a) — (d) of 12.1 without a court order would its right to do so be recognised or prohibited in each case in respect of a vessel physically located in your jurisdiction?

*If the law of the country of registration of the ship gives the mortgagee the powers set out in subparagraphs (a) to (d) and the ship was within the jurisdiction of the Admiralty Court, it would be lawful for the mortgagee to exercise these powers. However if the ship were arrested before the ship was sold this would prevent any further exercise of these powers. Also a sale by a mortgagee under a power of sale would be subject to maritime liens and to those statutory liens in respect of which the claimant had issued an in rem claim form prior to the completion of the sale.*

- 12.3** Where answers to the questions in 12.2 are negative would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?

*This rather depends on the terms and effect of the order of the court in the country of registration: for example if the competent court in the country of registration declared that the mortgage was invalid or unenforceable under the law of the country of registration then the Admiralty Court would probably recognise that declaration or judgment and not enforce the mortgage subject to our comment in sub para 11.2(e).*

## **13 INSOLVENCY PROCESSES<sup>3</sup>**

- 13.1** Has your jurisdiction adopted the UNCITRAL Model Law on Cross-Border Insolvency?

*The UNCITRAL Model law was adopted in Great Britain by the Cross-Border Insolvency Regulations 2006 (SI/2006/1030) ("CBIR") and in Northern Ireland by the Cross-Border Insolvency Regulations (Northern Ireland) 2007 (SR 2007/115): the UK is also governed by the EU Insolvency Regulation 1346/2000 which was amended by the 'Recast' EU Insolvency Regulation in June 2017.*

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<sup>3</sup> If your jurisdiction is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation, please so indicate — but also respond to the questions.

- 13.2** Do the laws of your jurisdiction provide for recognition of foreign insolvency proceedings? (if the UNCITRAL Model Law has been adopted, in addition to its provisions)

*Yes. In addition to recognition under the 'Recast' EU Insolvency Regulation and the CBIR, foreign insolvency proceedings may also be recognised under section 426 of the Insolvency Act 1986 and the common law.*

*Under section 426 of the Insolvency Act 1986, courts in certain Crown dependencies and countries/territories designated by the Secretary of State, namely Commonwealth countries, can apply to the UK courts for assistance in insolvency proceedings. The UK courts also operate the concept of modified universalism in providing common law assistance to foreign insolvency proceedings.*

- 13.3** Do the laws of your jurisdiction provide that the enforcement of rights of secured creditors (such as the mortgagee of a vessel) can be stayed or suspended during applicable insolvency proceedings?

*Yes.*

*Should a company be placed into administration a statutory moratorium will apply; restricting the ability of creditors or third parties from taking action against the company or its assets. Unless the administrators' consent or a court order permits, secured creditors cannot enforce security over the company's property. The moratorium also prevents creditors from bringing any other kind of insolvency proceeding against the company or any form of legal process. The moratorium does not have extra-territorial effect, so does not restrict the ability of a creditor to take enforcement action against assets of the company located outside England and Wales. An interim moratorium will also apply for a limited period where a notice of intention to appoint administrators has been filed with the court.*

*In a compulsory liquidation scenario, there is no stay on the enforcement of security or the forfeiture of a lease. However there is a stay on commencing or continuing legal proceedings against the company in liquidation without the leave of the court. In a voluntary liquidation, the liquidator, any creditor or contributory may apply to court for a stay on proceedings.*

*Another insolvency proceeding is company voluntary arrangement ("CVA"). A statutory moratorium will not automatically arise under a CVA however certain small companies are eligible to adopt a 28-day moratorium.*

*While not an insolvency proceeding, under a scheme of arrangement which is a court sanctioned restructuring/reorganisation of a company, a moratorium may be granted at the court's discretion.*

- 13.4** Is the answer to 13.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

No.

*Under the CBIR and in respect of foreign main proceedings, an automatic moratorium, equivalent to the moratorium arising in a compulsory liquidation will apply to prevent execution or proceedings against the debtor's asset but will not prevent a creditor from exercising their rights to enforce security over the debtor's property nor the ability to exercise rights of set off. It will also not affect a creditor's ability to commence British insolvency proceedings (which will be limited to assets in Great Britain). In respect of foreign non-main proceedings, no automatic stay applies but discretionary relief may be granted to protect the assets of the debtor or the interests of creditors. The 'Recast' EU Insolvency Regulation does not offer this level of protection.*

**13.5** If the mortgage over a vessel located in your jurisdiction is being enforced through a maritime court sale in circumstances where the owner of the vessel is subject to insolvency proceedings in your jurisdiction, do the maritime court sale proceedings take precedence over the insolvency proceedings, or vice versa?

**13.6** Is the answer to 13.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

*The Admiralty Court may stay an in rem action if so required by a foreign insolvency court: The Sanko Mineral [2015] EWHC 1031.*

**13.7** If a vessel is sold in your jurisdiction through a maritime court sale is the mortgagee's claim to the sale proceeds subject to the risk of the mortgage being challenged or set-aside by applicable insolvency claw-back rules for transactions prior to insolvency?

*The Admiralty Court will give effect to the sections in the Insolvency Act 1986 (as amended) which set out the circumstances in which a mortgage may be deemed invalid e.g. transactions at an under value or a preference given to the mortgagee.*

**13.8** Is the answer to 13.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

*No. Local law would still apply.*

**13.9** Do the insolvency courts of your jurisdiction have, or claim, extraterritorial jurisdiction, such as over vessels located in a different jurisdiction? If so, how?

*No. An insolvency court in England would apply to a foreign court which had arrested the ship to claim the proceeds of sale so that they could be applied in accordance with English insolvency rules.*

## 14 LEASING<sup>4</sup>

### 14.1 In your jurisdiction is leasing of vessels common as a method of financing?

*Since a change in the tax regulations relating to capital allowances finance leases of ships are no longer usual. However hire purchase agreements may still be used for financing the purchase of pleasure vessels.*

### 14.2 Do the laws of your jurisdiction give effect to a lease in accordance with the form of the document (formal approach) or is there a risk they will re-characterise certain leases as security interests (functional approach)?

*Generally the court would adopt the "formal approach" i.e. give effect to the demise charter according to its terms unless the court considered that the transaction was a sham.*

### 14.3 If the laws of your jurisdiction adopt a functional approach (14.2) please describe briefly how this is applied; also, please say whether your courts would adopt a functional approach even where the governing law of the lease follows the formal approach.

*See above.*

### 14.4 Do the laws of your jurisdiction permit the parties to the lease of a vessel governed by that law to expand by contract the rights and remedies of the lessor on default by the lessee? Or are such rights and remedies provided for exclusively by law?

*The parties to a demise charter/lease may agree the rights and remedies of the owner in the event of a default and these would be enforceable subject to certain overriding rules e.g. the rule against penalties, the right to relief from forfeiture etc. The Consumer Credit Act would also restrict certain rights of enforcement. However that Act applies primarily to pleasure vessels owned by individuals.*

### 14.5 Do the rights and remedies of the lessor of a vessel include steps to terminate the leasing and re-take possession of the vessel through self-help or is this only possible in your jurisdiction with the assistance of the court?

*Subject to the terms of the demise charter the owner may terminate the lease and take possession of the ship if the demise charterer is in default. However if the demise charterer disputed the owner's right to terminate and refused to surrender possession of the ship the owner would have to arrest the ship to enforce its right to possession. The demise charterer could also apply to the*

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<sup>4</sup> By 'leasing' is meant a demise chartering of a vessel where the holder of legal title ('lessor') is a financier rather than a commercial shipping company and the vessel is demise chartered to a shipping company ('lessee'). It might or might not involve the lessee having an option to purchase for a pre-agreed price or title automatically passing to the lessee at the end of the lease term. It covers both finance leases, where the lessee by one means or another has substantially the whole economic interest in the vessel and operating leases where the lessor retains some economic risk and interest in the vessel.

*court for relief against forfeiture i.e. the owner's claim to terminate the demise charter.*

- 14.6** Under the laws of your jurisdiction is a leased vessel considered to be an asset of the lessor or the lessee, or both?

*This is a complex area of the law. For certain taxation purposes the ship may be regarded as the asset of the demise charterer – but for other purposes both the owner and the demise charterer may be deemed to have a legal interest in the ship.*

- 14.7** Under the laws of your jurisdiction what impact would an insolvency process (or different processes) in respect of the lessee have on the rights and remedies of the lessor of a vessel? Is this affected by the type and terms of the lease?

*The rights of enforcement would be governed by the terms of the lease which would usually provide for the surrender of the vessel by the lessee. However, in the event the lessee fails to surrender the vessel, the rights of the lessor will be dependent on the insolvency process the lessee enters into (described above at 13.3). For example, under administration, the statutory moratorium would restrict the rights of the lessor to repossess assets in the lessee's possession without the administrators or the court's permission.*

- 14.8** Under the laws of your jurisdiction can a lessor arrest a vessel which it leases? Can it join in arrest proceedings initiated by a third party?

*An owner could arrest a ship under a demise charter to obtain possession if the demise charterer was in default under the demise charter. If a third party had begun arrest proceedings the owner could commence its own in rem proceedings or intervene in the third party arrest action.*

- 14.9** Under the laws of your jurisdiction what priority is given to the rights of a lessor of a leased vessel as against third parties with maritime liens/claims?

*None.*

- 14.10** Do the laws of your jurisdiction recognise registered leases in respect of vessels registered in a different jurisdiction? If so, please give brief details.

*A demise charterer may register its demise charter in Part IV of the Register if it is qualified so to do under the MSA 1995 but it would have to comply with the requirements of the MSA and the regulations made under it.*

- 14.11** In your jurisdiction is there generally a wish to promote leasing of vessels, including by reforming the law? If so please provide a brief explanation.

*No.*

## **15 RESERVATION OF TITLES**

- 15.1** Do the laws of your jurisdiction treat the holder of title under reservation of title as the holder of a security interest?

*No. If the legal owner retains legal title to the ship – generally to secure payment of the purchase price- but has given possession of the ship to a third party it would not be regarded as having a ‘security interest’ as it remained the legal owner of the ship. This is the effect of a demise charter such as BARECON 2001 (Part IV) in which legal title remains in the legal registered owner until the expiry of the charter term when legal title is transferred to the demise charterer.*

- 15.2** Do the laws of your jurisdiction provide for reservation of title arrangements to be registered in the ships’ register in any way different from a standard registration of the holder of title as registered owner? If so, please give brief details.

*It is not possible to register a reservation of title in the Registry – except to the extent that if certain shares in the ship were retained by the seller then it could be registered as a co-owner of the ship.*

- 15.3** If the laws of your jurisdiction do provide for reservation of title arrangements to be registered as referred to in 15.2, what rights and remedies are given to the holder of title?

*See above.*

- 15.4** Do the laws of your jurisdiction recognise foreign reservation of title<sup>5</sup> arrangements of a type referred to in 15.2? If so, please give brief details of how these arrangements would be recognised.

*If an owner retained legal title to the ship but transferred possession to a third party e.g. a purchaser or a demise charterer and such an arrangement was valid under the law of the country of the registration of the ship the Admiralty Court would usually give effect to such an arrangement – however whether the owner was deemed to remain as legal owner or the holder of ‘mortgage or charge’ for the purpose of sec.20 (7) ( c ) of the Senior Courts Act 1981 would be a matter of construction.*

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<sup>5</sup> References to ‘reservation of title’ are intended to include arrangements where a seller retains title to the vessel until the buyer pays the full price in circumstances where the buyer’s obligation to pay the full price is deferred over time.