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**Mr. Stuart Hetherington**  
**President of the Comité Maritime International**

CC: Ms Evelien Peeters

Madrid, 26<sup>th</sup> April, 2018

**CMI IWG Questionnaire on Ship Finance Security Practices — AEDM Response**

Dear Mr. President,

I refer to your letter of 26 March 2016, addressed to the Presidents of all national Maritime Law Associations.

Please, find enclosed the response of the Spanish Maritime Law Association (AEDM) to the CMI IWG Questionnaire on Ship Finance Security Practices.

The answers to this CMI Questionnaire have been prepared by an internal AEDM Working Group on the issue. The members of the national working group on ship finance security practices who have contributed to the AEDM response to the CMI IWG Questionnaire were Ms. Mercedes Duch, Mr. Tomás Fernández-Quirós, Mr. Javier Portales, Mr. Manuel Alba, Mr. Carlos López-Quiroga, Ms. Luz Martínez Azcoitia, Mr. José Sánchez-Fayos, Mr. José Manuel González Pelllicer and myself.

I thank all participants of this internal working group for their cooperation and their efforts.

Yours sincerely,

Eduardo Albors  
President of the Spanish Maritime Law Association



**RESPONSE BY THE SPANISH MARITIME LAW ASSOCIATION TO THE CMI INTERNATIONAL WORKING GROUP ON 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?**

Spain is a State party in the 1999 Arrest Convention (hereinafter Arrest99; Instrument of Adhesion dated on May 31, 2002 – Official Journal no. 104, of May 2, 2011, at p. 44296).

**1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest<sup>1</sup> 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?**

N/A

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

Spain is a State party to the 1993 Maritime Liens and Mortgages Convention (hereinafter MLM93, Instrument of Adhesion dated on May 31, 2002 – Official Journal no. 99, of April 23, 2004, at p. 16350).

**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?**

N/A

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

Yes, Spain is a State party to the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents (Instrument of Ratification dated on April 10, 1978 – Official Journal no. 229, of September 25, 1978, at p. 22329).



## **2 NATURE OF THE SHIPS' REGISTER**

### **2.1 Is the ships' register in your jurisdiction a register of legal title?**

Spain has established a double registry system for vessels. Vessels flying the Spanish flag have to be registered in the Public or Administrative Vessel Registry, which is the registry for administrative (Flag State) purposes, as well as in Section of Vessels and Aircrafts (section 1) of the Title Registry for Movable Goods (Art. 65 of the Maritime Navigation Act 14/2014 –hereinafter MNA). The transfer and acquisition of ownership of a vessel requires written form, as well as registration in the Title Registry for being effective as against third parties (Art. 63 MNA). Likewise, perfection of voluntary security interests upon a vessel, their enforceability and the corresponding priority require registration in the Title Registry of a written deed (*e.g.*, Art. 128 MNA for vessel mortgages).

### **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').**

Spanish legislation regulates the temporary change of flag of a vessel (for both flagging-in and flagging-out) under the MLM93 and Arts. 94 to 96 MNA, which follow the MLM93 scheme. Consequently, and provided that the conditions stated therein are met, Spanish law does allow temporary registration of a vessel in Spain, and use of the Spanish flag, under the responsibility of a demise charterer.

### **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?**

For the temporary flagging-out of a Spanish vessel, the rules require that all security interests in the Title Registry be cancelled, or alternatively that the holders of such interest give their consent to the temporary flagging-out. In such case, the temporary Flag State is annotated both in the Administrative Registry (where the right to fly the Spanish flag is suspended) and in the Title Registry. Also, the Administrative Registry must require the authority in charge of the underlying (flagging-out) registry to make an annotation stating that the vessel is registered in Spain.

Likewise, Spanish law subjects the flagging-in of a foreign vessel to the cancellation of all outstanding registered security interests or alternatively to the consent of the holders thereof, in any case in accordance with the certification issued for that purpose by the authority in charge of the registry of the State of origin.

In both of the foregoing cases, the rules expressly state that all security interests on the vessel remain subject to the law under which they have been created (the law of the Flag state of origin).

### **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?**

See response to the previous question.

**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.**

As mentioned in section 2.1 above, Spain has a double registry system for vessels: the Administrative Registry and the Title Registry. Moreover, the Administrative Registry is also divided in two: the Ordinary Administrative Registry and the Special Administrative Registry. The concept of “vessel” and its eligibility for registration varies depending on the registry.

The criteria for the registration of a vessel on the Ordinary Administrative Registry is very wide. The Royal Decree 1027/1989 (*Real Decreto 1027/1989, de 28 de julio, sobre abanderamiento, matriculación de buques y registro marítimo*), which, pursuant to its article 1 is applicable to every vessel, ship and naval artefact, states that the Administrative Registry shall be organised throughout nine “lists” where said vessels, ships or naval artefacts are to be registered:

- 1<sup>st</sup> list: platforms, high seas tugboats, support vessels and platform supply vessels.
- 2<sup>nd</sup> list: Spanish built vessels or vessels imported in accordance with the applicable laws in force, dedicated to the carriage of goods and/or passengers.
- 3<sup>rd</sup> list: Spanish built vessels or vessels imported in accordance with the applicable laws in force, dedicated to fishing activities and the extraction of other living marine resources.
- 4<sup>th</sup> list: auxiliary fishing ships, auxiliary ships to aquaculture, and those artefacts dedicated to the cultivation or farming of marine species.
- 5<sup>th</sup> list: tugboats, ships and naval artefacts dedicated to port and bay services.
- 6<sup>th</sup> list: recreational ships used for commercial purposes.
- 7<sup>th</sup> list: Spanish built ships or ships duly imported, exclusively used for recreational activities without commercial purposes.
- 8<sup>th</sup> list: public vessels or ships.
- 9<sup>th</sup> list: vessels or ships under construction.

On the other hand, the Special Administrative Registry opts for a different criterion regarding registration of vessels and ships therein. Additional Disposition 16<sup>th</sup> of the Royal Decree 2/2011 of State Ports and Merchant Marine foresees the relevant requirements: (i) any civil vessel operated with commercial purposes, excluding fishing vessels; and (ii) of at least 100 GT.



### **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?**

No. In order for a ship mortgage to be validly constituted and registered on the Register of Moveable Assets, it merely requires to be granted in a public deed or a private document. All agreements constituting a ship mortgage shall record the following compulsory details: a) Creditor, debtor and, where appropriate, non-debtor mortgagor, specifying all the personal particulars required by the mortgage legislation; b) The amount of the loan guaranteed by mortgage and of the sums that, if appropriate, shall cover the encumbrance for enforcement costs and expenses, and of the remuneration and delay interest and other expenses; c) Maturity date of the capital and payment of the interest; d) Description of the ship, stating, where appropriate, that the ship is under construction; e) The value or appraisal made of the ship and, where appropriate, that may be taken as the auction rate; and the addresses that the debtor and, where appropriate, the non-debtor mortgagor, provide for demands and notifications; f) Sums assigned to each ship, in the event of two or more being mortgaged to secure a single debt or loan; g) The regulatory circumstances determined in the case of a mortgage to guarantee titles, whatever their denomination; h) The other clauses that are established by the parties to the contract on interest, insurance, early maturity, extension and any others deemed convenient.

- (b) set out in detail the circumstances giving rise to a right of enforcement?**

The ship mortgage creditor may exercise its right against the ship or ships encumbered to its satisfaction in the following cases: a) On expiry of the term to return the capital or pay interest, in the manner that may have been agreed upon between the parties; b) Should the debtor be declared bankrupt; c) Should the ship mortgaged suffer deterioration that makes it definitively unseaworthy (incapable of sailing); d) When there are two or more ships assigned to fulfil the same obligation and loss or deterioration arises that makes either of them definitively unseaworthy, unless otherwise agreed; e) On fulfilment of the conditions agreed to terminate the obligation guaranteed, and all those that take the effect of making the capital or interest callable.

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

In accordance with Art. 128 MNA, the constitution of a valid mortgage would require either a public deed or a private document, although we would strongly suggest to notarize the same, since not all the Registrars have unified views about the construction of such article. As a matter of practice all the banks notarize their mortgage agreements.



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

The Registrar's fees are published in the Spanish Official Gazette and are calculated according to a Scale which takes into account the amount of the "mortgage responsibility" (being the sum of the loan's amount plus an estimate of the eventual enforcement costs, which varies among banks in the region of 30% to 50%). The Maximum Fees would never exceed the figure of 1,75 per 1000.

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

There is no re-registration requirement. The registration is indefinite (as long as the mortgage is not cancelled).

### **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.**

In order to be validly constituted (in accordance with Art. 128 MNA), the mortgage has to be compulsorily registered on the so-called Register of Moveable Goods; on top of that, for administrative reasons, the mortgages shall also have to be mentioned in the Spanish Administrative Register, which is coordinated with the Register of Moveable Goods (ex Art. 66 MNA).

## **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. A person seeking such information does not need the authorization of the owner. Security interests over vessels are registered within the Title Registry (Registry of Movable Goods) where the ownership is registered. The information recorded in the Title Registry is public and can be consulted by any interested person by submitting the corresponding request to the registry.

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

Publicity of the information is produced by the Title Registry by way of two different means: (i) certificates, which can be used to evidence to third parties the rights and securities registered over the vessel; or (ii) excerpts (*notas simples informativas*) which are issued for informative purposes only.

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



Generally, up to five business days as of the date upon which the certificate or excerpt was requested to the Title Registry.

**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.**

Yes. A vessel subject to a security interest can be sold by its owner prior to the release of the security interest. As a right *in rem*, the mortgage follows the vessel notwithstanding the ownership and the identity of the mortgagor. Therefore, the mortgage will still be in place over the sold vessel. There are no special conditions or circumstances established by law different to those applicable to the sale of a vessel free of security interest.

In any event, Art. 118.4 MNA establishes that in those cases in which the parties aim to have the sale contract notarized in a public deed or a notarial deed (or any other documents established under Art. 73 MNA), prior to notarization thereof, the Notary Public (or the Consul, as the case may be) shall obtain the appropriate information from the Title Registry regarding the status of ownership and charges over the vessel.

**5 ARREST OF A CHARTERED VESSEL**

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

Yes. Mortgage does constitute (i) a maritime lien on the vessel under Arts. 1 and 5 MLM93, and (ii) a maritime claim under Article 1 (u) Arrest99. Both Conventions are as well incorporated to the Spanish Maritime Navigation Act of 2014.

**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)?**

Under Article 1 (u) Arrest99 there is no limit to the right of arrest if the mortgage has been validly constituted according to the applicable law. Liability of the arresting party only would arise if (i) proceeding for enforcement is not produced within the legal period after the arrest (twenty working days); (ii) enforcement proceedings are dismissed because the mortgage does not meet with legal requirements provided by the applicable law. Liability for wrongful arrest is a strict liability. Please see SMLA's responses to the Questionnaire on damages for wrongful arrest.

**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?**



The arrest, or the enforcement of the vessel by judicial sale, does not affect to the cargo on board. Usually, the cargo is discharged with enough anticipation prior to the judicial sale. Costs of discharge use to be assumed by any interested party without prejudice the rights of recovery under relevant carriage/charter contracts.

## **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?**

There is not a priority notice as such, but there is a mechanism which covers and deals with the time period comprised between the execution of the mortgage and its actual registration.

In Spain, the registration of the mortgage within the Title Registry has constitutive effects. This means that the mortgage does not exist as a right *in rem* until it has been registered. However, given that the registrar has, in general terms, up to 15 business days as of the date the executed mortgage was filed to proceed with final registration, our mortgage legal system states that, once final registration is achieved, the mortgage will be effective as of the date of presentation.

### **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, it is possible to register subsequent ship mortgages without the prior consent of the existing registered mortgagees, even when the first mortgage contract states that no further mortgages over the ship will be created.

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

The priority of mortgages is determined by the date (time and hour) of registration (*prior tempore, potior iure*). The mortgage which is registered first has priority over subsequent mortgages.

However, the priority of registered mortgages can be negotiated between the interested parties. Therefore, the rank of a registered mortgage can be postponed in favour of a subsequent mortgage provided the mortgagees of the postponed mortgage consent to such postponement.

### **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?**

There is not a doctrine of notice as such. However, as mentioned in section 6.3 above, the priority of mortgages is negotiable between the interested parties, so that the



priority of a registered first mortgage can be deferred to that of a non-registered mortgage (earlier or not to the registered mortgage), by way of agreement between the interested parties.

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

Yes. A second mortgage can be enforced before a first mortgage and without the consent of the mortgagees of the first mortgage. However, the enforcement of the second mortgage does not affect the validity of the first mortgage, which will still be in place over the vessel after the enforcement of the second mortgage.

**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.**

The concept of lien may not have an equivalent under Spanish law. As a general rule, the only security over a vessel which has access to the Title Registry is a ship mortgage. However, according to Law 28/1998 of 13 July 1998 on the hire-purchase of movable assets, the reservation of title can be registered in the terms therein established, and some scholars consider that this reservation of title can be treated as some kind of security (see section 15 below).

**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?**

Spanish jurisdiction makes no important distinctions between the enforcement of ship mortgages registered under the flag of Spanish jurisdiction and those registered in any other foreign jurisdiction; however, the MNA establishes certain special features which concerns to the mortgages on foreign ships.

Therefore, the action to enforce a ship mortgage registered under the flag of Spanish jurisdiction or the one registered in any foreign jurisdiction, as well as the rest of provisions related to the procedure to be followed and competence to hear such, shall be subject to the terms set forth in Chapter V of Title IV of Book Three of the 2000 Spanish Civil Procedure Act, notwithstanding the special features established in the MNA.

With respect to the recognition of mortgages on foreign ships, Art. 143 MNA states that recognition and enforcement by the Spanish Courts of the mortgages and in rem encumbrances constituted on foreign ships shall be subject to the fulfilment of the following requisites:



a) For them to have been constituted and registered on a public register pursuant to the laws of the State in which the ship has been registered;

b) For such registration, pursuant to the laws of the State of registration of the ship, to be freely available for consultation by the public and it being possible to apply for and obtain statements and copies of the entries or documents recording such from the registry;

c) For the registration or some of the documents stated in Section b) to specify at least the name and address of the person in favour of whom the mortgage or encumbrance has been constituted, or the fact that the guarantee has been constituted to the bearer, the maximum amount guaranteed, if the laws of the State of registration to established that requisite, or whether that amount were to be specified in the document of establishment of the mortgage or encumbrance, and the date and other circumstances that, pursuant to the laws of the State of registration, determine their specific rank with regard to other registered mortgages and encumbrances.

On the hand, it must be taken into account that in both cases, enforcement of mortgages registered under the flag of your jurisdiction and/or enforcement of any other foreign mortgages, the following requirements must be also followed:

(i) That in the document constituting the mortgage the price which the parties evaluate the mortgaged ship at, so that this might serve as a rate in the auction, which may not be in any case lower than the 75% of the appraisal value.

(ii) That, in the same document, there is an address which sets out the debtor for the purposes o summons and notification. An email address it may also be fixed.

## **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, in principle a ship mortgage is already an enforceable title, which means that the mortgagee has the right to exercise directly its enforcement before the competent Court.

In particular the mortgagee may exercise its right against the ship or ships encumbered to its satisfaction in the following cases:

a) On expiry of the term to return the capital or pay interest, in the manner that may have been agreed;

b) Should the debtor be declared bankrupted;

c) Should the ship mortgaged suffer deterioration that makes it definitively not seaworthy;

d) When there are two or more ships assigned to fulfil a same obligation and loss or deterioration arises that makes either of them definitively not seaworthy, unless otherwise agreed;

e) On fulfilment of the conditions agreed to terminate the obligation guaranteed, and all those that take the effect of making the capital or interest callable.



Notwithstanding, said action to enforce shall only be exercised directly in the cases mentioned in the above letters for a) and e).

For the cases mentioned in the above letters c) and d), enforcement action may only be exercised when the real situation of the ship has been previously verified through a certification issued by the competent administration; for the case mentioned in the above letter b) it will be necessary to file evidence of Court's bankruptcy declaration.

**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?**

N/A

**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?**

As mentioned, Spain is not party to the 1952 Arrest Convention, but party to the 1999 Arrest Convention. Therefore, Spanish courts may accept jurisdiction for the mortgage enforcement under Art. 7 Arrest99.

## **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?**

There is not a special court, such as an admiralty court. Depending on whether the sale concerns to enforcement proceedings (e.g. compulsory enforcement, provisional enforcement or a ship mortgage enforcement) or administrative proceedings (e.g. ship abandoning), the vessel shall be sold by the competent judicial or administrative authority.

In case of a ship mortgage enforcement, pursuant to Art. 684 Spanish Civil Procedure Act, it shall be competent the Court of First Instance to which the parties submitted in the constitutional entitlement of the mortgage and, in the absence of this, the court of the place in which the mortgage was constituted, or of the port in which the ship mortgaged is located, or the court of the address of the defendant or of the place where the Registry in which the mortgage is registered, at the discretion of the claimant.

With respect to the Court of First Instance, it must be pointed out that Art. 684 Spanish Civil Procedure Act forgets to mention the objective and exclusive competence of the Commercial Courts granted by Art. 86 *ter* of the Spanish Judiciary Act in all claims and matters related to maritime law. Therefore, even though it could be debatable, it must be understood that the mortgage enforcement (and the subsequent ship's sale) must be filed before the Commercial Courts.



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

It must be taken into account that creditors may not be able to request directly for the sale of a vessel free of liens and prior claims, but an enforceable title against the debtor shall be necessary to apply for the enforcement of said (enforceable) title. That said, the main formality is to obtain this (true and valid) enforceable title. Once this enforceable title has been obtained, parties shall exercise an enforcement action. In case of ship mortgage, and as previously mentioned (see 7.2), in principle a ship mortgage is deemed as an enforceable title.

Once the enforcement action has been instigated, the sale of the ship shall be followed according to the terms set forth in the Civil Procedural Act, or in the administrative regulations that may be applicable for auction of moveable assets subject to public registration in all matters not provided in the MLM93, and the Maritime Navigation Act.

## **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?**

Assuming that the judgment is not yet final (therefore is subject to appeal) and the sale of the vessel is being conducted as a provisional enforcement measure, said provisional enforcement shall only be suspended (the writ of appeal does not interrupt the provisional enforcement) when the enforcement debtor has deposited in the Court the amount that he has been ordered to pay, to be delivered to the creditor, as well as the corresponding interests and costs for which the enforcement was carried out. After the payments have been settled and the costs assessed, the Clerk Court in charge of the provisional enforcement shall decide on the continuance or shelving of the enforcement. A direct appeal for judicial review against the order issued for this purpose may be lodged with the Court that has authorized the enforcement. Otherwise, in principle the court shall continue with the provisional enforcement.

Furthermore, and as far as the provisional enforcement is concerned, the enforcement debtor may not object to the provisional enforcement, but only to the specific enforcement actions of the distraint proceedings if, in his opinion, the said actions shall lead to a situation impossible to restore or to compensate financially by means of the compensation of damages. However, when lodging this objection to specific enforcement measures, the enforcement debtor shall indicate other enforcement measures or proceedings that are possible and shall not provoke situations similar to those that, in his opinion, would be caused by the proceeding or measure to which he objects, and shall offer security sufficient to make up for the delay in the enforcement if the alternative measures are not accepted by the Court and the monetary conviction is subsequently upheld. Otherwise, the objection to the enforcement shall under no circumstances be appropriate.

In principle this objection may not interrupt the provisional enforcement but only in the cases where the law so orders expressly or all the parties to the enforcement so agree.

## **9 SALE PROCEDURE**



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

Yes. The enforcement of a mortgage in Spain can be made by applying for a judicial sale by auction, which is the general enforcement remedy available to mortgagees.

### **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?**

Art. 141 MNA states that the enforcement (and procedure for the enforcement) of the mortgage shall be subject to that provided under Arts. 681 *et seq.* of the Spanish Civil Procedure Act, which governs the special enforcement procedure over mortgaged assets. Once the mortgagor has breached the secured obligations, the mortgagee can enforce the mortgage by initiating the procedure set out in Arts. 681 *et seq.* Basically: (i) the mortgagee files an enforcement claim against the mortgagor before the competent court; (ii) if the enforcement is admitted by the court, a request for payment will be submitted to the mortgagor; (iii) once a 20 day period has elapsed since the payment request was made, the procedure for the judicial auction may be requested by the mortgagee, the mortgagor, or third party in possession of the mortgaged vessel; (iv) the auction will be publicized on the Spanish Official Gazette (*Boletín Oficial del Estado*); (v) the auction price paid by the winning bidder will be applied towards payment to the mortgagee up to the maximum secured amount stated in the mortgage.

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

No. There are, however, certain events which allow a mortgagee not the sale of the mortgaged vessel but its interim possession to (i) preserve its value (Art. 117 of the Spanish Mortgage Act), or (ii) to benefit from payment of hire, if any, derived from the employment of the vessel which can be used to maintain and conserve the vessel and, should there be any surplus, to repayment of the secured amounts (Art. 690 of the Spanish Civil Procedural Act).

### **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?**

One of the requisites for enforcing a mortgage through the special enforcement proceedings set out in Arts. 681 *et seq.* of the Spanish Civil Procedure Law (the so called “direct enforcement”) to which Art. 141 MNA refers, is the inclusion in the mortgage deed of the value that the parties assign to the vessel so that it serves as the reserve price in the auction. Thus, it is up to the mortgagee and the mortgagor to agree in the mortgage deed such reserve price (or starting price for the auction). Moreover, Art. 132 MNA states that the mortgage agreement shall include, among others, the value or appraisal of the vessel which may be taken as the auction reserve price.



The reserve price is registered together with the mortgage and third parties can have access to such information by requesting the relevant certificate or excerpt to the Title Registry.

If the highest bid is equal to or higher than 70% of the value at which the vessel was put up for auction, the Court Clerk shall approve the final bid in favour of the highest bidder. If it is the mortgagee the person who made the highest bid, the Court Clerk shall carry out the settlement of the amount due as principal, interest and costs, and after such settlement is made, the mortgagee shall lodge the difference, if any (art. 670.1 and 2 of the Spanish Civil Procedure Act).

If the highest bid placed at the auction is lower than 70% of the value at which the vessel was put up for auction (art. 670.4 of the Spanish Civil Procedure Act): (i) the mortgagor may, within a time limit of ten days, present a third party improving the bid by offering an amount in excess of 70% of the appraisal value or that, albeit lower than such amount, proves to be sufficient for the complete satisfaction of the right of the mortgagee; or (ii) if the mortgagor has failed to present a third party, the mortgagee may, within the next five days, seek the award of the vessel at 70% of the aforementioned value or for the amount owed to the mortgagee for all items, provided that such amount exceeds sixty per cent of its appraisal value and the highest bid.

If the mortgagee does not make use of its right to request the award of the vessel as stated above, the auction will be approved in favour of the highest bidder, provided that the amount offered by the latter is higher than 50% of the appraisal value, or, if lower, covers at least the amount for which the enforcement proceeding was opened (including interest and costs). If the highest bid fails to meet these requirements, the Clerk, after hearing the parties, shall resolve in view of the circumstances of the case, and taking into account particularly the behaviour of the mortgagor in relation with secured obligations, the possibility of achieving the satisfaction of the mortgagee through the sale of other assets, the patrimonial implications on the mortgagor and the benefit of the same for the mortgagee.

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

See 9.4 above.

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

The judicial auction will be published in the Spanish Official Gazette (*Boletín Oficial del Estado*). Also, at the request of the mortgagee or the mortgagor and if the relevant judicial secretary deems it appropriate, the auction may be made public by other means taking into account the nature and the value of the asset.

The advertisement of the auction in the Official Gazette will contain important information such as the date of the auction, the Court where the enforcement proceedings are being carried out and the identification number and type of the proceedings.



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

The way the owner or the mortgagee act in a judicial auction has direct impact on the overall timetable so, to a certain extent, it is possible for these parties to influence the procedure.

**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?**

Under Spanish law, there are two main alternatives to a judicial sale under an enforcement procedure: (i) realisation agreements (*convenios de realización*), foreseen in article 640 of the Spanish Civil Procedure Act; and (ii) realisation by a specialized person or entity (*realización por persona o entidad especializada*), regulated in articles 641 and 642 of the Spanish Civil Procedural Act. Both alternatives were introduced in our procedural law with the aim of obtaining better prices for the enforced assets than those obtained in judicial auctions. However, their utilization is very limited if compared with auctions, basically, due to the uncertainty surrounding the procedural rules and other registration issues.

Regarding the realisation agreement, the mortgagee, the mortgagor and other parties evidencing a direct interest in the enforcement may seek the Court Clerk to summon an appearance in order to reach an agreement on the most efficient manner to realise the mortgaged vessel. Should the mortgagee and the mortgagor reach an agreement (which shall not be in detriment of third parties), the Court Clerk shall approve the agreement. Once the realisation has been fulfilled in accordance with the agreed terms and conditions, the Court Clerk will bring the enforcement procedure to an end. Should the agreement fail to be fulfilled as agreed, the mortgagee may request a judicial auction to be conducted.

The realisation by a specialized person or entity can be requested by the mortgagee or the mortgagor (with the mortgagee's consent). The Court Clerk may agree to this alternative if the nature of the enforced asset makes it advisable and, if so, will order the proceedings to move forward so that the asset is realised by a person or entity with knowledge of the market in which such assets are bought and sold and who meets the legal requirements, if any, to operate in said market (*e.g.*, ship brokers).

**9.9 Can a mortgagee bid its debt (*animus 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?**

The mortgagee can be allotted the vessel as payment (*adjudicación en pago*) when there are no admissible bids in the auction. There are two situations under which the allotment of the vessel to the mortgagee, as enforcing creditor, is allowed (article 670.2



and 670.4 of the Spanish Civil Procedure Act):

- (a) When the mortgagee, as enforcing creditor, is the bidder who placed the highest bid equal to or higher than 70% of the value at which the asset was put up for auction. In this case, once the final bid (*remate*) has been approved, the Court Clerk shall carry out the settlement (*liquidación*) of the amount due as principal, interests and costs and, after such settlement has been notified, the mortgagee shall lodge the difference, if any.
- (b) If the highest bid placed at the auction is lower than 70% of the value at which the vessel was put up for auction and the debtor does not suggest a third party improving the bid within ten days. If the debtor fails to do so in the terms of article 670.4 of the Spanish Civil Procedure Act, the enforcing creditor/mortgagee may, within five days, seek the award of the vessel at 70% of the aforementioned value or for the amount owed to him/her for all items, provided that such amount exceeds 60% of its appraisal value and the highest bid.

## 10 SALE PROCEEDS

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

in those cases where a judicial auction takes place, the sale proceeds are held in an account controlled by the Spanish ministry of justice that bears interests (*Cuentas de Depósitos y Consignaciones Judiciales*) although those interests will be paid to the Spanish public treasury (*Tesoro Público*) (article 2 of Royal Decree 467/2006 of 21 April).

### **(a) Will they be held in the currency of the sale or will they be converted into local currency?**

In a judicial auction in Spain, the currency will be euros.

### **(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?**

In accordance with Art. 486 MNA the proceeds of the sale shall first be used to pay the procedural costs and expenses arising from the arrest, or for the enforcement and subsequent sale of the ship. Such costs and expenses include, among others, the expenses of conserving the ship and maintaining the crew, as well as the wages and other sums, and the expenses to which Art. 4.1.a) MLM93 refers, accrued from the moment of the arrest, or from commencement of the enforcement. The remainder shall be distributed according to the terms set forth in the MLM93. Once all the credits are settled, the balance, if any, shall be delivered to the owner and shall be freely transferable.

## 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?**

Under Spanish conflict of laws provisions regarding rights in rem, priority issues are determined under the *lex rei sitiae*, for movable and non-movable goods (real state property), but under the *lex signum* (the law of the flag) for vessels (Art. 10 Spanish Civil code).

**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?**

**(b) a mortgage of a vessel registered under the laws of a different jurisdiction?**

According to Art. 2 MLM93, the ranking of registered mortgages or charges as between themselves and, without prejudice to the provisions of this Convention, their effect in regard to third parties shall be determined by the law of the State of registration; however, without prejudice to the provisions of this Convention, all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.

Article 4 of the Convention/1993 establishes a list of maritime liens which have priority over mortgages:

- a) Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- b) Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
- c) Claims for reward for the salvage of the vessel;
- d) Claims for port, canal, and other waterway dues and pilotage dues; and
- e) Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

In addition, the MLM93 foresees other credits which are not maritime liens (as are not recognized as such in the list of Art. 4) but which are to be paid with preference (Art. 12):

- a) The costs and expenses arising out of the arrest or seizure and subsequent sale of the vessel (such costs and expenses include, inter alia, the costs for the upkeep of the vessel and the crew as well as wages);



- b) A State Party may provide in its law that, in the event of the forced sale of a stranded or sunken vessel following its removal by a public authority in the interest of safe navigation or the protection of the marine environment, the costs of such removal shall be paid out of the proceeds of the sale, before all other claims secured by a maritime lien on the vessel. Spain has included such costs of removal as credits which are to be paid prior to maritime liens (Art. 122 MNA);
- c) If at the time of the forced sale the vessel is in the possession of a shipbuilder or of a ship repairer who under the law of the State Party in which the sale takes place enjoys a right of retention (this is the case in Spain), such shipbuilder or ship repairer must surrender possession of the vessel to the purchaser but is entitled to obtain satisfaction of his claim out of the proceeds of sale after the satisfaction of the claims of holders of maritime liens mentioned in article 4 (but before the mortgages over the vessel).

Thus, in light of the foregoing, the priority would be as follows:

1. Credits foreseen under Art. 12 MLM93 (i.e. costs and expenses arising out of the arrest and costs of removal);
2. Maritime liens of Art. 4 MLM93;
3. Credits of shipbuilders/ship repairers; and
4. Mortgages.

### **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?**

According to Art. 11 MLM93, prior to the forcible sale of a vessel in Spain, the competent authority shall ensure that notice in accordance with such article is provided, among others, to: (i) all holders of registered mortgages, “hypothèques” or charges which have not been issued to bearer and (ii) all holders of registered mortgages, “hypothèques” or charges issued to bearer and all holders of the maritime liens set out in Art. 4 MLM93, provided that the competent authority conducting the forced sale receives notice of their respective claims.

Upon the forcible sale of the ship or the judicial proceedings to enforce a maritime mortgage, the holders of maritime liens will be entitled to file a “third party claim with paramount rights” (*tercería de mejor derecho*) as provided under Arts. 614 to 620 of Spanish Civil Procedure Act. The “third party claim with paramount rights” can be exercised from the seizure of the vessel until the creditor who started the enforcement proceedings receives the sum of money or the title of the asset (Art. 615 of Spanish Civil Procedure Act).



In case there was a maritime mortgage enforcement procedure (Arts. 681 *et seq.* of the Spanish Civil Procedure Act) the “third party claim with paramount rights” can be exercised since beginning of the enforcement proceedings (*despacho de la ejecución*).

The “third party claim with paramount rights” will be governed by the terms set forth in administrative provisions when it is filed in an administrative enforced collection procedure (*procedimiento administrativo de apremio*).

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

The timetable depends on the specific procedure that leads to the distribution of the proceeds of sale: (i) realisation agreements (*convenios de realización*), foreseen in article 640 of the Spanish Civil Procedural Act (*vid.* question 9.8 above); (ii) judicial auction; or (iii) enforcement by a specialized individual or entity (Art. 642 *et seq.* Civil Procedure Act).

In case of a judicial auction, the timetable would include the following: (i) appraisal of the vessel unless there is a previous agreement regarding the value of the vessel; (ii) calling of the auction and advertisement and publicity of the auction; (iii) notice of the judicial auction to the Registrar, the owner of the ship, the holders of mortgages, encumbrances or maritime liens in the terms of the MLM93 and Art. 481 MNA; (iv) judicial auction; and (v) approval of the final bid, payment and awarding the assets to the creditor.

The maritime mortgage enforcement procedure (Arts. 681 *et seq.* of the Spanish Civil Procedure Act), has some special features which have been described in question 9.2 above.

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

The allocation of the amounts obtained in the auction will be decided by the Court Clerk through an order (*decreto*) which may be appealed against. When deciding the distribution order Art. 486 MNA shall apply (see section 10.1 (b) above).

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

The order may be appealed against only by virtue of a “*recurso de reposición*” before the Court Clerk.

## **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;**



No.

**(b) to appoint a receiver, manager or other party to operate the vessel;**

No.

**(c) to sell the vessel as mortgagee;**

No.

**(d) to sell the vessel as attorney in fact of the owner.**

No.

Under Spanish law, the so-called *pacto comisorio* prohibition entails that the creditor may not appropriate the collateral if the debtor fails to fulfil its obligation.

If the payment obligation is not performed the mortgage-backed loan shall be accelerated and the mortgage executed, that is, a foreclosure procedure shall be brought. As a result, the mortgaged property shall be enforced by virtue of its sale at a public auction, by an expert or by virtue of a realisation agreement.

**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 11.1 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?**

A Spanish court may refuse to give effect to any enforcement steps referred to at (a) – (d) on the grounds that it infringes Spanish public policy. Article 12.3 of the Spanish Civil Code states that a foreign law will not apply when its contrary to public policy; moreover, article 12.4 of the Civil Code says that the application of foreign law with the aim of circumventing a mandatory provision of Spanish law shall be deemed as fraud of law. The concept of public policy is not clearly defined under Spanish law, and whether or not said steps conflict with Spanish public policy needs to be determined on a case by case basis.

**12.3 Where answers to the questions in 11.2 are negative would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?**

No. The public policy test is applicable in any event.

### **13 INSOLVENCY PROCESSES**

**3 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.**



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

Spain is subject to the 2000 and the 2015 Insolvency Regulations. However, the 2003 Spanish Insolvency Act (Ley 33/2003 -hereinafter SIA) does also contain provisions on cross-border insolvency proceedings (Arts. 10 to 12, and Title IX of the SIA, Arts. 199 to 230). Such provisions are largely based on the European Regulation, but do also take into account the approach and solutions in the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter, the MLI). The provisions on the SIA do only apply where the European Regulation does not (in general, as against non-Member States and Denmark).

### **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, other than under the Regulation (which provides for the automatic recognition of insolvency proceedings opened in another Member State), the SIA provides for rules for the recognition of foreign main and territorial insolvency proceedings. As to the material rules that define the scheme, these provisions are based on the same principles that the EU Regulations and the MLI as regards the scope and the law applicable to foreign insolvency proceedings. Recognition, however, is subject to procedural rules on exequatur.

### **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?**

In national insolvency proceedings, and in accordance to the SIA, enforcement rights of secured creditors are stayed as of the opening of the proceedings, except that the encumbered assets or rights are not linked to the business or the activities of the debtor. In this latter case, the stay will apply until one year has passed since the opening of the proceedings without liquidation proceedings being opened or, alternatively, a composition agreement that does not affect such rights is approved, whatever comes first (a composition agreement would only bind a secured creditor if it votes in favour or adheres to it). In any case, and once the insolvency proceedings have been opened, enforcement of such rights must be done under the jurisdiction of the insolvency court.

As regards the claims secured with a maritime security interest on the vessel (be it a mortgage or a lien/privilege), the SIA states that the rights of these secured creditors may be separately enforced in accordance to their specific rules, and without being affected by any stay, provided such enforcement is done within one year as of the opening of the insolvency proceedings.

Where the main insolvency proceedings opened in Spain involve foreign flagged vessels as part of the debtor's estate, the provisions on cross-border insolvency would apply. Under the EU Regulation, the rights in rem of creditors on the debtor's vessels registered in another Member-State would not be affected by the main insolvency proceedings



(which means that creditors secured with any security interest over the vessel may enforce their rights under the law applicable thereto –Arts. 2.g and 5 Regulation 2000, Arts. 2.9.iv and 8 Regulation 2015). If, alternatively, the provisions of the SIA apply, Art. 201 states that the effects of the Spanish main insolvency proceedings will be those as determined by the insolvency laws of the State where the vessel is registered. If the laws of the State where the vessel is registered provide for the application of the Spanish law as the *lex concursus principalis* for ruling the effects of the proceedings on the said maritime secured creditors, the provisions in the first two paragraphs of this answer would apply.

All this being said, however, if the 1993 Maritime Liens and Mortgages Convention applies to the rights of secured creditors, these can be enforced in Spain in the terms of the Convention (as it does not exempt its application in cases of insolvency and the Convention has a superior legal rank than national laws, with the corresponding overriding application).

**13.4 Is the answer to 12.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?**

Where foreign main insolvency proceedings are recognized, the rules that apply in Spain would symmetrically correspond to those referred to in the previous question. Thus, if the EU legislation applies, and where the vessel is registered in Spain or in another Member State that is not the State of the opening of the main or territorial/secondary insolvency proceedings, the rights of maritime secured creditors would be treated as not affected by the effects of the proceedings.

If foreign main insolvency proceedings are recognized in Spain under Spanish domestic legislation, the SIA provides that effects of the insolvency proceedings upon the rights of maritime secured creditors, where the vessel is registered in Spain, and even if the effects of the insolvency proceedings are generally subject to the *lex concursus principalis*, are those as determined by Spanish insolvency laws (see therefore the response to question 13.3, in the first two paragraphs). Where the recognized foreign proceedings are territorial ones, a vessel registered in Spain will be held as beyond their reach (territorial proceedings effects are limited to the debtor's assets situated in the State where the proceedings have been opened).

Again, all this provided that the 1993 Convention does not apply. Otherwise, maritime secured creditors may enforce their right in accordance to the terms of the Convention.

**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?**

Spain lacks a specific maritime jurisdiction; Commercial Courts are the ones with competence to decide on private law-related maritime disputes. Maritime security



interests' enforcement proceedings are subject to the effects of insolvency proceedings to the extent stated in responses to questions 13.5 and 13.4. The sale or enforcement proceedings would take precedence over such effects in accordance thereto.

**13.6 Is the answer to 12.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?**

See also answer 13.3 and 13.4.

**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?**

Acts by the debtor that are detrimental to the bankrupt debtor's state may be rescinded (claw-backed) in Spain if they have been performed with the two years prior to the opening of the insolvency proceedings. These may include voluntarily created security interests (e.g., ship mortgage) or contracts or other acts that any give rise to a claim secured with a legally created security interest (e.g., a maritime lien or privilege –not the lien or privilege itself separately).

If a vessel has already been sold (by auction), on the basis of a maritime security interest, even if the contract or the act by the debtor giving rise to the involved security interest was rescindable (claw-backed), the sale may not be challenged. Otherwise, and if the conditions for the claw-back are met, the acts of the debtor may be subject to rescission, and their consequences corrected or subject to restitution. In cases, where, e.g., the involved asset cannot be claimed from a third party protected by the law (such a good faith purchaser in public auction after enforcement of a security interest), the involved secured creditor may be condemned to restitution of any amounts perceived as proceeds as a consequence of the claw-backed right (Arts. 71 to 73 SIA).

If the situation involves a bankrupt debtor subject to main insolvency proceedings opened in Spain, and the ship is registered in a foreign State, where also the sale may take place in Spain and under the jurisdiction of Spanish courts, the foregoing would also apply. Both the EU Regulation and the Spanish SIA cross-border insolvency provisions foresee the application of Spanish law (as the *lex concursus principalis*) as regards rescission, reintegration or claw-back actions, even if the rights in rem or security interests of creditors upon a vessel registered in another State are involved (and except where the secured creditor proves that the act or rights subject to rescission or reintegration cannot be claw-backed in any circumstances under the law applicable to its right).

The said situation, when approached under the application of the 1993 Convention, poses some interesting difficulties, but it is submitted that in this case its provisions would not alter the rules just described, as they require the valid existence of a mortgage



(to be recognized and possibly enforced under the Convention), or the valid existence of one of the claims that the Convention sets as secured by a maritime lien or privilege. Neither of these elements or conditions is, however, addressed in the Convention, as a matter of substance and its material scope.

**13.8 Is the answer to 12.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?**

If foreign main insolvency proceedings are recognized in Spain, where a vessel that is part of the bankrupt debtor involved is sold after enforcement of a mortgagee's rights, the rules applicable to rescission, reintegration or claw-back actions, and their consequences, would be those under the *lex concursus principalis* (under both the EU Regulation and the provisions of the SIA). This would be so also if the ship is registered in Spain or in another State other than the State of the opening of the insolvency proceedings, in which case, however, the creditor may oppose rescission or reintegration if it proves that its right (or its consequences) cannot be claw-backed in any circumstances under the law applicable thereto.

If the recognized insolvency proceedings are secondary or territorial ones, the foregoing reasoning would also follow only if the vessel is registered in the State of the opening of the proceedings (the rules applicable to rescission or reintegration actions would be those under the *lex concursus*).

For the reasons stated in the response to the previous questions, the foregoing would apply also where the sale of the ship has been done pursuant to the 1993 Convention.

**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?**

Spanish courts claim jurisdiction on civil or private law matters over national (Spanish) or foreign vessels on the basis of the legislation in force in Spain in accordance to the 1982 United Nations Convention on the Law of the Sea.

Thus, judicial civil jurisdiction may be claimed and exercised by Spanish courts over Spanish vessels wherever they are; however, enforcement jurisdiction may only be exercised if the Spanish vessel is on the High Seas, the Spanish Exclusive Economic Zone, Contiguous Zone or Territorial Sea (other than on the internal waters or in Spanish ports).

Where a foreign vessel is involved, Spanish courts may establish their jurisdiction to decide in civil or private law disputes that may affect the vessel (which would depend on different circumstances and/or legal rules). Any resulting enforcement jurisdiction in these cases, however, requires that the foreign vessel is on Spanish internal waters, in Spanish ports, or in the Spanish Territorial Sea (with the corresponding limitations in this latter case –Art. 28 UNCLOS).



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

<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.*

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

The leasing of vessels is not a common method of financing in Spain because of the lack of knowledge by the financial and banking sector of the ship industry, among other reasons. However, leasing agreements are used in the context of tax lease structures, which are commonly used to finance the construction of 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)?

Spanish laws follow a functional approach. However, as explained below, the re-characterisation of the leasing agreement does not necessarily have to be as a security interest, but as any contract that corresponds to the agreement's actual nature.

### 14.3 If the laws of your jurisdiction adopt a functional approach (13.2) 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.

According to the Spanish Supreme Court's case law, agreements are what they are and their character does not rely on the name (*nomen iuris*) that the parties have given to it ("*los contratos son lo que son y la calificación no depende de las denominaciones que le hayan dado los contratantes*"). Consequently, even if an agreement is formally characterised as a leasing, if it does not have its typical elements, the agreement will be re-characterised.

However, Spanish courts have to interpret contracts according to the applicable law. If, under Spanish conflict-of-law rules, the applicable law follows the formal approach, that will be the approach that Spanish courts will apply (unless such application is manifestly incompatible with the public policy (*ordre public*) of the forum).

### 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?**

Leasing agreements, although admitted under Spanish law, are atypical contracts (i.e., there is not a systematic regulation but different rules that govern it for different purposes –e.g., accounting, tax and administrative purposes–). There are no laws that specifically permit the parties to the lease of a vessel governed by Spanish law to expand by contract the rights and remedies of the lessor on default by the lessee.

Consequently, the contracting parties may establish any covenants, clauses and conditions deemed convenient, provided that they are not contrary to the laws, to the morality or to public policy.

**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?**

“Self-help” remedies are not allowed under Spanish law. The creditor should always ask for the consent by the debtor possessing the asset to be returned or, failing such consent, the approval by the competent court once the relevant actions have been exercised.

In the case of finance leasing agreements which have been formalised in a public deed (*escritura pública*) or notarial deed (*póliza*) or which have been registered with the Moveable Assets Hire-Purchase Registry and formalised according to the official form set forth for that purposes, the lessor can claim the repossession of the asset by means of the notarial procedure established under the First Additional Provision, section 3, of Law 28/1998 of 13 July 1998 on the hire-purchase of movable assets (*Ley 28/1998, de 13 de julio, de Venta a Plazos de Bienes Muebles*).

**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?**

The leased vessel is considered an asset of the lessor (i.e., the lessor is the owner of the vessel).

**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?**

In an insolvency scenario, the rights and remedies of the lessor are affected by the type of lease.

In this regard, claims existing before the declaration of insolvency of the debtor for finance leasing agreements have special priority (*crédito con privilegio especial*).

In addition, creditors may not perform actions aiming at the recovery of assets assigned under a finance leasing agreement until: (i) a composition agreement (*convenio*) is reached whose content does not affect exercise of that right; or (ii) until one year



elapses from the declaration of the insolvency proceedings without the winding-up having commenced. Such finance lease must have been created by virtue of an agreement registered at the Movable Assets Registry or formalised in a document that involves enforcement (e.g., a public deed (*escritura pública*) or a notarial deed (*póliza*)).

**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?**

In Spain, the arrest of vessels is governed by the Arrest99 Convention and Arts. 470 to 479 MNA.

According to article 1(f) Arrest99, claims arising out of any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise is a maritime claim. Given this broad description, claims arising out of leasing agreements could be considered a maritime claim. In addition, the arrest would be permissible if: (i) it is considered that the lessee was a demise charterer of the ship at the time when the maritime claim arose and is liable for the claim; and (ii) the lessee is demise charterer of the ship when the arrest is takes place.

Notwithstanding the above, the arrest of a ship which is not owned by the person liable for the claim (in this case, the owner will be the claimant) shall be permissible only if, under the law of Spain, a judgment in respect of that claim can be enforced against that ship by judicial or forced sale of that ship. There are precedents of the arrest of a vessel in Spain for claims arising out of a leasing agreement under the 1952 Arrest Convention (order of the Provincial Court of Barcelona 160/2010 of 6 October 2010 (*auto de la Audiencia Provincial de Barcelona 160/2010 de 6 de octubre de 2010, Rec. 268/2010*)). However, the arrest of a vessel by the lessor under the 1999 Arrest Convention is not that clear.

**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?**

The rights of a lessor of a leased vessel have no priority against those of third parties with maritime liens/claims which will be those established under the MLM93 and the Spanish Maritime Navigation Act.

**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.**

According to Spanish law, vessels as well as any rights over them are governed by the law of her flag, matriculation or registration. In this regard, please note that according to Spanish Law 1/2000, of 7 January, on civil procedure (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*), foreign law must be proved as regards its content and validity and a Spanish court may use any means of verification it considers necessary for its implementation.

**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.**

Finance leases are not generally promoted in Spain. However, certain leasing agreements (not only in relation to vessels) have been promoted by establishing an especial corporate income tax regime only applicable to those finance leases with the characteristics established under Spanish Law 27/2014 of 27 November on corporate income tax (*Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades*). This special regime is applied as part of the tax lease structures used in order to finance the construction of vessels.

## **15 RESERVATION OF TITLE<sup>5</sup>**

**<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**

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

The “reservation of title” clause (“**ROT**”) (*pacto de reserva de dominio*) is a legal figure admitted under Spanish law as a way to protect the rights of the seller when a deferred payment has been agreed on a sale and purchase agreement. However, traditionally there has been a strong debate to determine its nature and its enforcement against third parties.

The scholars and the case law have developed different theories among which the most important ones are the following: (i) the ROT is a condition precedent (*condición suspensiva*) for the actual acquisition by the purchaser; (ii) the ROT is a condition subsequent (*condición resolutoria*) of the sale and purchase agreement; and (iii) the ROT is a right *in rem* similar to a non-possessory pledge (i.e., the holder of title under reservation of title is the holder of a security interest). Although the first interpretation seems to be the most extended one, the nature of the ROT is not clear under Spanish law.

### **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.**

Law 28/1998 of 13 July 1998 on the hire-purchase of movable assets (*Ley 28/1998, de 13 de julio, de Venta a Plazos de Bienes Muebles*) (“**Law 28/1998**”) is the only Spanish law that provides for the registration of a ROT (together with its Rule of 19 July 1999 (*Orden de 19 de julio de 1999 por la que se aprueba la Ordenanza para el Registro de Venta a Plazos de Bienes Muebles*)). According to Law 28/1998, a ROT will only be registered if it has been established in the sale agreement in written. There are no further requirements for the registration of the ROT apart from those required for the



registration of the sale and purchase agreement.

In the case of a ROT falling out of the scope of Act 28/1998, there is not a clear answer on the requirements to be complied with by the ROT in order to be registered.

**15.3 If the laws of your jurisdiction do provide for reservation of title arrangements to be registered as referred to in 14.2, what rights and remedies are given to the holder of title?**

The main effect of the registration of the ROT with the Moveable Assets Hire-Purchase Registry in those cases where Law 28/1998 applies (upon compliance of all other requirements set out therein) is its enforceability against third parties:

- Once the court has been informed about the existence of a registered ROT clause, seizure of the asset subject to the ROT will stay, when ordered by a court as a result of proceedings initiated by any person other than the beneficiary of the ROT.
- Sellers with a registered ROT may promote two specific summary proceedings to enforce the obligation being secured by the ROT, apart from the remedies at the disposal of any other creditors (the seller will only be entitled to promote those summary proceedings if he/she has requested the payment to the debtor via a notarial request (*requerimiento notarial*) established under Law 28/1998);
- In an insolvency scenario, only creditors with a registered ROT have special priority (*crédito con privilegio especial*). This means that all the money obtained from the sale of the asset will be firstly directed to pay the outstanding instalments in favour of the seller.

When Law 28/1998 does not apply, there is not a clear answer on the enforceability against third parties of ROT's that may be registered. The registration of the ROT may give reasonable grounds to support its enforceability, but unfortunately there is not a certain answer on this as Spanish law does not provide anything in these cases.

**15.4 Do the laws of your jurisdiction recognise foreign reservation of title arrangements of a type referred to in 14.2? If so, please give brief details of how these arrangements would be recognised.**

According to Spanish law, all "*in rem rights*" aspects of a ROT in relation to a vessel (e.g. enforceability against third parties) will be subject to the law of her flag, matriculation or registration.

In this sense, if the vessel is registered in Spain at the time of a potential enforcement of the ROT vis-à-vis third parties, the recognition and enforceability of the ROT shall be analysed under the perspective of Spanish law (with the uncertainties arising from the regulation of the ROT under Spanish law).