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Ms Ann Fenech
Chair, International Working Group on Ship Finance Security Practices
Comité Maritime International
By email only: ann.fenech@fenlex.com

Dear Ann

IWG Questionnaire on Ship Finance Security Practices

I attach our answers to the IWG questionnaire and hope they assist in your review, which will obviously require significant time and energy on the part of the group, for which we are grateful.

We are publishing our answers to our members in the hope they are helpful to all, though on the basis that they are prepared for the IWG and are not to be relied upon in their commercial dealings.

Kind regards

A handwritten signature in black ink, appearing to read "Neil Beadle", with a long, sweeping horizontal stroke extending to the right.

Neil Beadle
President

CMI International Working Group

Ship Financing Security Practices – Questionnaire

Response of the Maritime Law Association of Australia and New Zealand (MLAANZ)¹

1 MARITIME AND OTHER CONVENTIONS

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

Australia

Australia is not a party to either convention. Its domestic law has, however, been heavily influenced by the 1952 Arrest Convention. The *Admiralty Act 1988* (Cth), which regulates the admiralty jurisdiction of Australian courts, was enacted in response to the recommendations contained in a report on ‘Civil Admiralty Jurisdiction’ prepared by the Australian Law Reform Commission in 1986. That report was, in some respects, guided by the 1952 Arrest Convention. Furthermore, the admiralty provisions of the Act were based on Part I of the *Administration of Justice Act 1956* (UK), the primary purpose of which was to give domestic effect to the 1952 Arrest Convention.²

New Zealand

New Zealand is not a party to either convention. Its domestic law has, however, been heavily influenced by the 1952 Arrest Convention. The Admiralty Act 1973, which regulates the Admiralty jurisdiction of the New Zealand courts, was enacted in response to the recommendations of a 1972 law reform committee on the subject. That committee was heavily influenced by the United Kingdom’s Administration of Justice Act 1956, which was in turn based on the 1952 Convention.

1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest³ of a vessel?

Australia

In Australia, the arrest of ships is governed by the *Admiralty Act 1988* (Cth) and Part VI of the *Admiralty Rules 1988* (Cth).⁴ An application for an arrest warrant may be made if the party has commenced an action *in rem* against the ship (r 39).

The Act governs when an action *in rem* may be commenced against a vessel (s 14). It recognises that:

¹ These answers are prepared for the IWG only and may not be relied upon by others in commercial dealings.

² *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co* [1985] 1 AC 255 at 266.

³ [Explanation given in original questionnaire] 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.

⁴ The *Admiralty Rules 1988* (Cth) are enacted pursuant to s 41 of the *Admiralty Act 1988* (Cth).

1. an action on a recognised maritime lien may be commenced *in rem* against the ship concerned (s 15);
2. an action on a ‘proprietary maritime claim’ may be commenced *in rem* against the ship concerned (s 16);
3. an action on a ‘general maritime claim’ may be commenced *in rem* against the ship concerned where a ‘relevant person’:⁵
 - a. was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; and
 - b. is, when the proceeding is commenced, the *owner* of the ship (s 17).
4. an action on a ‘general maritime claim’ or ‘proprietary maritime claim’ may be commenced *in rem* against the ship concerned where a ‘relevant person’:
 - a. was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; and
 - b. is, when the proceeding is commenced, the *demise charterer* of the ship (s 18).
5. an action on a ‘general maritime claim’ concerning a ship may be commenced *in rem* against a second ship where:
 - a. a ‘relevant person’ in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first ship; and
 - b. that person is, when the proceeding is commenced, the owner of the second ship (s 19).

Proprietary maritime claims generally relate to property in or possession of the ship, and an exhaustive list is contained in s 4(2). General maritime claims generally relate to the use of the ship, and an exhaustive list is contained in s 4(3).

New Zealand

The arrest of ships is governed by the Admiralty Act 1973 and Part 25 of the High Court Rules. An application for arrest may be made if the party has commenced an action *in rem* against the vessel.⁶

A list of claims which can be brought against a vessel is set out in s 4 of the Act:

- (a) Possession or ownership of a ship

⁵ Defined in s 4 as ‘a person who would be liable on the claim in a proceeding commenced as an action in personam’.

⁶ High Court Rules, r 25.34.

- (b) Disputes between co-owners of a ship
- (c) Mortgages and charges over ships
- (d) Damage done by a ship
- (e) Damage received by a ship
- (f) Ship-related loss of life or personal injury
- (g) Loss or damage to goods carried by a ship
- (h) Agreements for the carriage of goods
- (i) Salvage
- (j) Towage
- (k) Pilotage
- (l) Goods or services supplied to a ship
- (m) Port or harbour charges or Construction or repair of a ship
- (o) Wages owed to masters or crew
- (p) Any claim by a master, shipper, charterer for disbursements
- (q) General average
- (r) Bottomry
- (s) Forfeiture or condemnation of a ship

The s 4 claims dealing with property in vessels ((a), (b), (c) and (s) above) can only be invoked by an action *in rem* against the particular vessel in question. The others can be invoked *in rem* against the particular vessel in question, or against a “sister ship”.⁷

In addition, s 5(1) of the Act permits an action *in rem* in “any case in which there is a maritime lien or other charge on any ship” to be invoked against that particular ship.

1.3 In particular, can arrest be made:

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

Australia

Under s 4(2) of the Act, a claim relating to ‘a mortgage of a ship or of a share in a ship’ is a proprietary maritime claim. As explained in the answer to 1.2, this would

⁷ Admiralty Act 1973, s 5(2).

allow a mortgagee to commence proceedings *in rem* against the mortgaged vessel and then to apply for an arrest warrant.

New Zealand

Yes, this is a proprietary maritime claim and a mortgagee would be able to commence proceedings under s 4(1)(c) and 5(2) of the Admiralty Act 1973 and apply for arrest under the High Court Rules.

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

Australia

The Act applies to ‘all ships, irrespective of the places of residence or domicile of their owners’ (s 5(1)(a)). As such, the answer to 1.3(a) is applicable to domestic and foreign vessels.

New Zealand

Yes, the New Zealand admiralty legislation applies to all vessels regardless of the state of registration.⁸

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

Neither Australia nor New Zealand are parties to either convention.

- 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?

Australia

Section 15(2) of the Act specifically recognises maritime liens for:

1. salvage;
2. damage done by a ship;
3. wages of the master, or of a member of the crew, of a ship; and
4. master’s disbursements.

In addition, the reference to ‘a proceeding on a maritime lien’ in s 15(1) has been interpreted as requiring the proceeding to be ‘on a maritime lien of a character recognised by Australian law, including Australian rules of private international law’.⁹

⁸ Admiralty Act 1973, s 4(4)(a).

⁹ *Elbe Shipping SA v The Ship “Global Peace”* (2006) 154 FCR 439 at [133].

Australian courts determine whether the Australian rules of private international law recognise a foreign maritime lien through a two-stage process:

1. first, the court determines what rights exist by reference to the *lex causae*; and
2. second, the court characterises those rights, in the circumstances in which they arose, for the purposes of Australian law to determine whether they can be described as a “maritime lien”.¹⁰

New Zealand

The New Zealand courts have followed the approach in *The Halcyon Isle*, ie that the law of the forum will determine the evaluation and ranking of maritime liens.¹¹ New Zealand law recognises maritime liens for seamen’s wages, masters’ wages and disbursements, damage and salvage (along with the now redundant liens for bottomry and respondentia).¹² Although the definition of “maritime lien” in the Admiralty Act 1973 is not exhaustive, there is virtually no possibility that the New Zealand courts will recognise any further liens without legislative intervention.

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

Australia is a party to this convention, having ratified it on 9 August 1994. It is given effect through the *Foreign Evidence Act 1994* (Cth).

New Zealand is a party to this Convention, and it has been implemented through ss 141-147 of the Evidence Act 2006.

2 NATURE OF THE SHIPS' REGISTER

2.1 Is the ships' register¹³ in your jurisdiction a register of legal title?

Australia

Australia has two ships’ registers, which are governed by the *Shipping Registration Act 1981* (Cth):

1. The Australian General Shipping Register; and
2. The Australian International Shipping Register.

¹⁰ *The Ship “Sam Hawk” v Reiter Petroleum Inc* [2016] FCAFC 26.

¹¹ *Bankers Trust International Ltd v Todd Shipyards Corp* [1981] AC 221 (PC); *The ship “Betty Ott” v General Bills Ltd* [1992] 1 NZLR 655 (CA); *ABC Shipbrokers v The ship “Offi Gloria”* [1993] 3 NZLR 576 (HC); *Fournier v The ship “Margaret Z”* [1999] 3 NZLR 111 (HC) at 115–116.

¹² Admiralty Act 1973, s 2, definition of “maritime lien”; Maritime Transport Act 1994, ss 28-29.

¹³ [Explanation given in original questionnaire] The term 'ships register' means a specialist register only for ships.

The Shipping Registers are not registers of legal title. Ownership of a ship (or shares in a ship) does not depend upon registration. Registration does not confer or confirm title.¹⁴

New Zealand

No. Registration under the Ship Registration Act 1992 does not confer or confirm legal title, but it can be used as evidence of it.

- 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').

Australia

A ship may not be registered on either Shipping Register if it is registered under the law of a foreign country (s 17). If the ship must otherwise be registered under Australian law, this compels the shipowner to take steps to ensure the ship is registered solely in Australia.

If not registered under the law of a foreign country, ships that are on demise charter to Australian-based operators may be registered on the General Shipping Register (s 14(d)), and trading ships that are on demise charter to Australian-based operators may be registered on the International Shipping Register (s 15B(d)).

New Zealand

Yes. It provides for the possibility of registering the vessel itself on the New Zealand register if the vessel is on demise charter to a New Zealand-based operator.¹⁵ A vessel cannot be registered on the New Zealand register if it is already registered in a foreign country, but the New Zealand register will accept a suspension of that vessel's foreign registration.¹⁶

- 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?

Australia

No. Security interests in ships are registered on the Personal Property Securities Register (governed by the *Personal Property Securities Act 2009* (Cth)).

¹⁴ However, the entry of a person's name in the Register as owner of a ship will give that person good title if they are a bona fide purchaser for value from the person last named in the Register as the owner: *Shipping Registration Act 1981* (Cth) s 45.

¹⁵ Ship Registration Act 1992, ss 4 and 8(1)(b).

¹⁶ Ship Registration Act 1992, s 9.

New Zealand

This is not specifically provided for, but could be achieved through the mortgage registration provisions.¹⁷

- 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?

Australia

As noted in the answer to 2.2, a ship may not be registered on either Shipping Register if it is registered under the law of a foreign country (s 17). If the ship must otherwise be registered under Australian law, this compels the shipowner to take steps to ensure the ship is registered solely in Australia.

New Zealand

Yes, but the vessel's owner may be exempted from the requirement to register in New Zealand in such cases.¹⁸ The Ship Registration Act does not prevent such registration where the vessel is subject to a New Zealand mortgage, but under s 41(1)(d) the mortgagee may vary or add covenants to a registered mortgage, which could include consent to an overseas demise charter.

- 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.

Australia

All Australian-owned ships may be registered in the General Shipping Register, whereas the International Shipping Register is restricted to Australian-owned commercial ships that engage in international trade (ss 14, 15B). Subject to certain exceptions, every Australian-owned¹⁹ ship must be registered in Australia (ss 12, 13). A ship may not be registered on both Shipping Registers (s 17).

Ships that may be registered on the General Shipping Register are (s 14):

1. Australian-owned ships (including ships otherwise exempt from the obligation to register);

¹⁷ Ship Registration Act 1992, s 39(3)(a).

¹⁸ Ship Registration Act 1992, s 6(3).

¹⁹ Defined in s 8.

2. small craft that are wholly owned by Australian residents, or by Australian residents and Australian nationals;
3. small craft that are operated solely by Australian residents, or by Australian nationals, or by both;
4. ships that are on demise charter to Australian-based operators.

Ships that may be registered on the International Shipping Register are (s 15B):

1. trading ships that are Australian-owned ships (including ships otherwise exempt from the obligation to register);
2. trading ships that are wholly owned by Australian residents, or by Australian residents and Australian nationals;
3. trading ships that are operated solely by Australian residents, or by Australian nationals, or by both;
4. trading ships that are on demise charter to Australian-based operators.

Whether assets employed in offshore oil and gas exploration, production, processing and storage can be registered depends on whether they meet the definition of “ship”. It is defined to mean any kind of vessel capable of navigating the high seas and includes (s 3):

1. a barge, lighter or other floating vessel;
2. a structure that is able to float or be floated and is able to move or be moved as an entity from one place to another; and
3. an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water.

However, it does not include a vessel, structure, vehicle or craft declared by the regulations not to be a ship for the purposes of the definition.

New Zealand

In general, to be eligible for registration, a vessel must be New Zealand-owned. This essentially means that New Zealand nationals own either the whole vessel or a majority share.²⁰ The following New Zealand-owned ships must register:²¹

- Ships over 24 metres in length
- Ships under 24 metres in length that proceed on overseas voyages

²⁰ Ship Registration Act 1992, s 2(1), definition of “New Zealand national” and s 3.

²¹ Ship Registration Act 1992, s 6(1) and (2). For evidence required see s 14.

- Pleasure vessels that proceed on overseas voyages

Exempted from mandatory registration are all other pleasure vessels and ships under 24 metres in length, all ships engaged solely on inland lakes and rivers, and barges that do not venture beyond New Zealand’s exclusive economic zone.²² However, in each case these vessels are entitled to be registered if the owners so choose.²³

Ships on demise charter to New Zealand-based operators (other than pleasure vessels and New Zealand-owned ships) are also entitled to be registered.²⁴

The New Zealand legislation defines “ship” as “every description of boat or craft used in navigation, whether or not it has any means of propulsion”, but does not otherwise specifically apply to offshore exploration assets (compare for example the Australian response to this question).

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?

Australia

Security interests in ships now fall within the purview of the *Personal Property Securities Act 2009* (Cth), and are registered on the Personal Property Securities Register. The ship is referred to as the ‘collateral’ (secured property).

In order to register a security interest such as a mortgage the secured party is only required to submit a ‘financing statement’, and not a copy of the instrument (ie the mortgage or loan agreement) that itself creates the security (s 150). The financing statement must contain prescribed information about (s 153):

1. the secured party;
2. the grantor;
3. giving of notices;
4. the collateral and proceeds;
5. the end time for registration;
6. subordination;
7. security interest;

²² Ship Registration Act 1992, s 6(1) and (2).

²³ Ship Registration Act 1992, s 8.

²⁴ Ship Registration Act 1992, s 8(1)(b)

8. any matter prescribed by the regulations.

A person must not apply to register a financing statement that describes collateral unless the person believes on reasonable grounds that the person described in the statement as the secured party is, or will become, a secured party in relation to the property (s 151).

New Zealand

Yes. There is a short prescribed form, which requires the applicants to attach evidence of their loan agreement, but the details of the agreement are not entered in the register.²⁵

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

Australia

See the answer to 3.1(a) above.

New Zealand

No it does not.

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

Australia

The mortgage must be (s 20):

1. signed by the mortgagor; or
2. adopted or accepted by the grantor by an act, or omission, that reasonably appears to be done with the intention of adopting or accepting the writing.

Unlike mortgages over real estate, there is no express requirement that a mortgage over personal property be notarised, legalised or witnessed.

New Zealand

The prescribed form requires the signatures to be witnessed by an independent person who is known to the person executing the document.²⁶

²⁵ Ship Registration Act 1992, s 39; see s 93(3)(b) for foreign registered ships being registered on the New Zealand Register; New Zealand Shipping Register prescribed form SR16.

²⁶ Section 39(2); see New Zealand Shipping Register prescribed form SR16.

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

Australia

The following are the fees for registering a financing statement:²⁷

Duration of registration period	Cost of registration
Seven years or less	AUD \$6.80
More than seven years but less than 25 years	AUD \$34.00
No stated end time	AUD \$119.00

New Zealand

NZ\$436.00

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

Australia

Where the ship is classified as ‘consumer property’,²⁸ the registering party can choose a registration period of up to 7 years (s 153). Where the ship is ‘commercial property’,²⁹ the registering party can choose an indefinite registration or a period of up to 25 years (s 153).

New Zealand

Registration for the purposes of security interest is indefinite,³⁰ but any variations in ownership or the nature of the vessel require the registration to be updated.

- 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.

Australia

A mortgage of a vessel is only required to be registered on the Personal Property Securities Register.

²⁷ These are set by the *Personal Property Securities (Fees) Determination 2015* (Cth).

²⁸ Defined in s 10 to mean personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated.

²⁹ Defined in s 10 to mean property that is not consumer property.

³⁰ Ship Registration Act 1992, s 20. Registration on Part B of the Register, which is primarily for pleasure vessels, lapses after five years.

New Zealand

Only on the ships register. Security interests in vessels under 24 metres will be registered under the Personal Property Security Act 1999.

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.

Australia

The Personal Property Securities Register provides for registration against the grantor's details or against the serial number of the collateral or, in certain circumstances, both. Item 4 in the list of details set out in the answer to 3.1(a) provides for the serial number of the collateral to be set out in the financing statement. Ships must be described by a serial number when they are consumer property, and may be described by a serial number when they are commercial property.³¹

Consequently, members of the public are able to search the Register:

1. by grantor's details; or
2. by serial number of the ship.

New Zealand

The register is available for public inspection (though not searchable online).³²

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

Australia

A person may apply to search the Register (s 170) if the search is authorised under ss 171 or 172. The authorisation of the vessel owner is not required. However, the search will only produce the details required to be recorded in the financing statement (see the answer to 3.1(a) above). If the searcher wants further details, they will have to apply to the secured party named in the statement under s 275. Section 275(9) limits the people who can make such a request to:

1. the grantor in relation to the collateral in which the security interest is granted;
2. a person with another security interest in the collateral mentioned in paragraph 1;

³¹ Pursuant to clause 2.2 of Schedule 1 of the *Personal Property Securities Regulations 2010* (Cth).

³² Ship Registration Act 1992, s 65.

3. an auditor of a grantor mentioned in paragraph 1, if the grantor is a body corporate;
4. an execution creditor with an interest in the collateral;
5. an authorised representative of any of the above.

New Zealand

No.

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

Australia

No.

New Zealand

The Registrar will provide a certified transcript of a ships register entry.

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

Australia

Where a request is made under s 275 for further details of a security, the secured party must reply within 10 business days (s 277).

New Zealand

Same-day service is generally available.

- 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.

Australia

Yes (subject to the terms of the instrument creating the security interest), but the vessel will still be encumbered with the security interest. Ordinarily the purchaser will require that the security interest be released before sale.

New Zealand

The owner has the power to dispose of a vessel, but this is subject to “any rights and powers appearing from the Register to be vested in any other person” (which would include a registered mortgagee’s rights under a loan agreement).³³

³³ Ship Registration Act 1992, s 46.

5 ARREST OF A CHARTERED VESSEL

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

Australia

Section 18 of the *Admiralty Act 1988* (Cth) allows an action *in rem* to be commenced (after which the party can apply for arrest) against a chartered vessel for liabilities of the demise charterer. The action *in rem* will be allowed where it is on a 'general maritime claim' or 'proprietary maritime claim', and a 'relevant person':

1. was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; and
2. is, when the proceeding is commenced, the *demise charterer* of the ship.

A ship under a time charter may not be arrested for liabilities of the time charterer.

New Zealand

Assuming the claim is in respect of their mortgage then the mortgagee could arrest the vessel in a proceeding *in rem* despite the fact that vessel was under charter at the time of arrest.³⁴

- 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)?

Australia

Section 34 of the *Admiralty Act 1988* (Cth) provides that where:

1. a party unreasonably and without good cause:
 - a. demands excessive security in relation to the proceeding; or
 - b. obtains the arrest of a ship or other property under the *Admiralty Act 1988* (Cth); or
2. a party or other person unreasonably and without good cause fails to give a consent required under the *Admiralty Act 1988* (Cth) for the release from arrest of a ship or other property;

the party or person is liable in damages to any person who has an interest in the ship (or a party to the proceeding) and has suffered loss or damage as a direct result.

³⁴ Admiralty Act 1973, ss 4(1)(c) and 5(2)(a).

Therefore, the mortgagee will only incur liability to charterers or cargo interests for an arrest if:

1. the arrest is obtained unreasonably and without good cause; and
2. the charterer or cargo interest suffers loss or damage as a direct result of the arrest.

New Zealand

Such liability is unlikely to arise in ordinary commercial dealings. New Zealand law recognises an action in wrongful arrest in the English tradition for instances of gross negligence or bad faith.³⁵

- 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?

Australia

The Admiralty Marshal is reluctant to arrest a ship with cargo on board and will sometimes wait until cargo is discharged before arresting a vessel. If there is an order for the judicial sale of the ship the Marshal would seek an order from the Court to discharge the cargo at the port of arrest. As this expense is a cost of the arrest the Marshal would seek the costs from the Plaintiff's solicitor and rely on the solicitor's undertaking to the Court to pay the Marshal's Cost and expenses of the arrest pursuant to paragraph 41(1)(b) of the Admiralty Rules 1988.

New Zealand

Persons interested in cargo on board a ship under arrest may request that the High Court Registrar apply to the Court for directions in respect of that cargo. The requesting party must provide an undertaking in respect of the Registrar's (and any agent's) fees and expenses in discharging and storing the cargo.³⁶

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?

Australia

Because the *Personal Property Securities Act 2009* (Cth) provides for a notice filing system (as opposed to a document filing system), it is possible to register a financing statement before the actual security agreement has been concluded (s 161). However,

³⁵ *Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721 (CA).

³⁶ High Court Rules, r 25.47.

as noted in the answer to 3.1(a), in such circumstances a person must not apply to register a financing statement that describes collateral unless the person believes on reasonable grounds that the person described in the statement as the secured party will become a secured party in relation to the property (s 151).

New Zealand

No.

- 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?

In both New Zealand and Australia, yes, subject to the terms of the first mortgage.

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

Australia

The priority rules differ depending on whether the security interest has *attached* to the collateral, and on whether the security interest has been *perfected*.

Pursuant to s 19, a security interest *attaches* when:

1. the grantor has rights in the collateral, or the power to transfer rights in the collateral to the secured party; and
2. either:
 - a. value is given for the security interest; or
 - b. the grantor does an act by which the security interest arises.

Pursuant to s 21, a security interest is *perfected* when:

1. it has attached to the collateral;
2. certain writing requirements have been met (see s 20);
3. the secured party has done one of the following things:
 - a. registered the security interest;
 - b. taken possession of the collateral; or
 - c. assumed control over the collateral.

Assuming the mortgages are perfected, priority will be governed by the order in which the ‘priority time’ for each mortgage occurs (s 55(4)). The priority time for a security interest is the earliest of the following times to occur in relation to the security interest (s 55(5)):

1. the registration time for the collateral;

2. the time the secured party, or another person on behalf of the secured party, first perfects the security interest by taking possession or control of the collateral;
3. the time the security interest is temporarily perfected, or otherwise perfected, by force of the Act.

New Zealand

Priority is determined by time of registration. Parties may also agree to vary the priority of mortgages.³⁷

- 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?

No, not in either New Zealand or Australia.

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

Australia

Nothing in the *Admiralty Act 1988* (Cth) or the *Shipping Registration Act 1981* (Cth) requires a second mortgagee to obtain the consent of the first mortgagee before taking enforcement action against a ship.

However, if the second mortgagee sought to take possession, it is likely the first mortgagee could object and enforce its superior rights. If court action were taken by a second mortgagee, the court would likely require the second mortgagee to notify the first mortgagee.

Further, if the ship were to be subjected to judicial sale, the proceeds would be apportioned in accordance with usual priority rules, under which the first mortgagee would in the ordinary course take priority over the second.

New Zealand

Only if the subsequent mortgagee secures an order of the High Court.³⁸

- 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.

Australia

The Personal Property Securities Act 2009 (Cth) applies to 'security interests'. A security interest is defined to mean 'an interest in personal property provided for by a

³⁷ Ship Registration Act 1992, ss 40, 42.

³⁸ Ship Registration Act 1992, s 48.

transaction that, in substance, secures payment or performance of an obligation' (s 12). This will cover most consensual maritime security interests.

However, the Act does not apply to 'a lien, charge, or any other interest in personal property, that is created, arises or is provided for by operation of the general law' (s 8(1)(c)). As such, the Act does not allow the registration of non-consensual maritime liens. Other excluded interests are listed in s 8.

New Zealand

Liens, charges and security interests arise outside the register. The New Zealand Register of Ships allows for quasi-registration of security or liens other than mortgages by way of caveats on the Register.³⁹ So long as the caveat is in force the Register may not be altered, and no other mortgage may be perfected.⁴⁰ This does not prevent other liens from arising. The registered owner(s) of the ship will be notified when a caveat is placed on the register and it can only be removed with consent of the lodger, or on application to the High Court.⁴¹

Where smaller vessels are concerned, there can be a difficult interaction between mortgages registered under the Ship Registration Act 1992, and securities registered under the Personal Property Securities Act 1999.⁴²

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, not in either New Zealand or Australia.

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?

In both Australia and New Zealand, subject to the terms of the mortgage, the mortgagee may ordinarily take possession and sell the property to realise the security. If there are disputes between the mortgagor and mortgagee, court proceedings may be required.

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?

³⁹ Ship Registration Act 1992, s 54.

⁴⁰ Ship Registration Act 1992, s 55.

⁴¹ Ship Registration Act 1992, s 53.

⁴² See for example *Keybank National Assoc v The ship "Blaze"* [2007] 2 NZLR 271 (HC).

Australia

In any arrest, considering the expense to both sides of holding and maintaining the vessel and the inconvenience to the crew, the Court gives this a high priority and would determine a matter very quickly. For example, a few years ago, with a contested arrest the Full Court with the Chief Justice presiding sat for a hearing on a Saturday and delivered an *ex tempore* judgment which had the effect of releasing a ship under arrest.

New Zealand

Similar considerations apply as in Australia, but assuming an application for summary judgment is made on the grounds the defendant has no defence to the cause of action, the usual High Court rules apply requiring appropriate notice to the defendant. Property under arrest can be sold before judgment where the costs of maintaining the property under arrest are significant, and will, by reason of the high priority accorded to such fees and expenses, significantly reduce the amount available to other claimants. See also answers to 8.2 and 8.3 below.

- 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?

Australia

Australia is not a party to the 1952 Convention, and there is no exact equivalent of Art 7 in the Admiralty Act 1988. Note that s 29 gives power to the court to stay *in rem* proceedings (holding the ship as security) on the ground that the claim on the merits should be determined by arbitration (whether in Australia or elsewhere) or by a court of a foreign country. Given the general nature of an action *in rem*, therefore, an action on the merits could follow on from an action *in rem*, but subject to the application of ordinary principles of private international law (eg the application of a foreign jurisdiction clause).⁴³

New Zealand

While not party to the Convention, the New Zealand courts will accept jurisdiction on the merits of a mortgage claim as the *lexi fori* following the commencement of proceedings *in rem*, subject to private international law considerations (such as the existence of a choice of law clause in the loan agreement).

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?

⁴³ See eg *Bank of China Limited v The Ship " Hai Shi " (No 2)* [2013] FCA 225. See also the answer to 14.3, below.

Australia

Jurisdiction in respect of actions *in rem* is conferred by s 10 of the *Admiralty Act 1988* (Cth) on:

1. the Federal Court of Australia;
2. each of the State Supreme Courts; and
3. each of the Territory Supreme Courts.

Those Courts may, by virtue of r 69 of the *Admiralty Rules 1988* (Cth), sell unencumbered title to vessels.

New Zealand

Only the High Court, which has admiralty jurisdiction *in rem* under the Admiralty Act 1973. The District Court of New Zealand, which is a court of limited statutory jurisdiction has an Admiralty jurisdiction but only with regards to *in personam* claims and for limited monetary amounts.⁴⁴

- 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?

Australia

A party can apply to the Court (either before or after final judgment) for an order that the ship under arrest be valued and sold, or be sold without valuation (r 50). Such an application must be in the proper form (Form 26) which requires the following details:

1. Name of the ship/property;
2. Name of the applicant;
3. Indication as to whether the applicant applies for the ship to be valued before sale; and
4. That the applicant undertakes to pay on demand to the Marshal an amount equal to the costs and expenses involved.

New Zealand

The judicial sale of a ship free of liens and prior claims is possible either before or after final judgment in an admiralty proceeding, and requires parties to file an application in a short prescribed form. The vessel may be sold immediately if it is deteriorating in value.⁴⁵ Evidence of claim is dealt with in the procedural steps leading up to this point. For example, if judgment is to be given by default the Court must be

⁴⁴ Admiralty Act 1973, s 3(1)(b).

⁴⁵ High Court Rules, r 25.51. See eg *Bank of Nakhodka v The Ship "Abruka"* (1996) 10 PRNZ 326

satisfied that the plaintiff's action is "well founded".⁴⁶ Notice to other interested parties (in addition to those who have already joined the proceedings following various earlier notice/service requirements) is given by the Registrar via newspaper advertisements after the sale.⁴⁷

- 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?

Australia

If the ship is deteriorating in value, the court may, *at any stage of the proceeding*, either with or without application, order that it be sold (r 69(5)).

New Zealand

There are no specific rules on sale of vessels in this situation, the position in 8.2 above would apply.

9 SALE PROCEDURE

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

Australia

If the mortgagee has a power of sale under the mortgage, they may of course exercise that power without applying to the court. If an application of the type referred to in the answer to 8.2 is made, the court may direct that the sale be by auction, public tender or any other method (Admiralty Rules 1988 (Cth), r 70). The sale must be conducted by the Marshal (r 70).

New Zealand

Yes. If the mortgagee chose to proceed by way of court proceeding in admiralty (as opposed to relying on a right of sale under the mortgage) then it would be possible for a judicial sale to occur just as in any other admiralty proceeding as outlined above. There are also provisions on judicial sale in the ordinary civil context which the mortgagee could rely on if they preferred not to take advantage of the admiralty jurisdiction.⁴⁸

- 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?

⁴⁶ High Court Rules, r 25.33.

⁴⁷ High Court Rules, r 25.52.

⁴⁸ High Court Rules, rr 11.22(c), rr 17.74(1)(a).

Australia

The *Admiralty Act 1988* (Cth) and *Admiralty Rules 1988* (Cth) provide only general requirements about judicial sales. Further guidance is to be found in the *Marshals' Manual*, which is applicable to Marshals in the Federal Court of Australia.

As to the criteria for an application for judicial sale, see the answers to 8.2 and 9.3.

Assuming the court makes an order for the valuation and sale of the ship, the Marshal will notify the broker and ensure that a valuation is received. The valuation is confidential and will not be disclosed to anyone without a court order.

The sale will then be advertised. The court order may specify the wording of the advertisement and the publications in which it is to be placed. The broker may make recommendations as to the advertising strategy and length of the advertising campaign.

After bidding closes, the Marshal, the Marshal's solicitor and the District Registrar will meet to open and record each bid. After all the bids have been opened the Marshal will open the valuation from the broker. Where the highest bid (or a number of bids) are above the valuation, the Marshal will generally accept the highest bid. If all bids are below the valuation the Marshal will prepare a short minutes of order seeking an order to accept the highest bid.

Assuming the highest bidder will proceed to buy the ship, a bill of sale will be executed and title thereby transferred.

New Zealand

In the admiralty context the sale can be by way of public auction or private contract, with or without appraisal, at the Court's discretion.⁴⁹ The Registrar will arrange the practicalities of the sale.

In the ordinary civil context sale can be by public auction on terms and conditions approved by the Registrar,⁵⁰ by a person with or without an auctioneers licence, with or without a reserve, and as often as necessary until sold.⁵¹

- 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?

Australia

As noted in the answer to 8.3, a court may order that a vessel under arrest be sold if it is deteriorating in value (r 69(5)). The court will only order the judicial sale of a vessel *pendente lite* if there is a 'good reason' for doing so.⁵²

⁴⁹ High Court Rules, r 25.51.

⁵⁰ High Court Rules, r 17.74(1)(a).

⁵¹ High Court Rules, r 17.75.

New Zealand

Yes, see 8.2 above.

- 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?

Australia

See the answer to 9.2. The valuation will operate as a *de facto* reserve price. The valuation remains confidential. If the highest bid is lower than the valuation, the Marshal will seek an order of the court authorising him or her to accept the highest bid.

New Zealand

Information not available. The New Zealand legislation does not go to this level of detail, so it is a matter for the Court and Registrar to determine on a case by case basis. There are rules in Part 17 of the High Court Rules on the sale of chattels by the Court, but these are unlikely to be suitable for the sale of a large vessel in the international context. The Australian response to this question will provide a useful point of reference as a similar procedure is likely to be followed in New Zealand.

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

Australia

See the answer to 9.2. The valuation will be completed by the broker and will be kept confidential.

New Zealand

Information not available.

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

Australia

See the answer to 9.2 above. The court order may specify the wording of the advertisement and the publications in which it is to be placed.

New Zealand

Information not available.

⁵² *Marinis Ship Suppliers (Pty) Ltd v Ship Ionian Mariner* (1995) 59 FCR 245, applying *The Myrto* [1977] 2 Lloyd's Rep 243 (EWHC).

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

Australia

The Federal Court has a procedure to follow for a judicial sale under the rules referred to in 9.2, above, and the Marshal's manual. Every sale throws up different problems, so if anyone wanted to vary that procedure they would be heard by the Court. It seems unlikely that they would influence the procedure by much.

New Zealand

Information not available.

- 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?

Australia

If the mortgagee has a power of sale under the mortgage, it may exercise it and sell the vessel to a buyer it has located (insofar as it is not inconsistent with the procedure regulating such sales, as specified in the property law acts of the Australian States and Territories). However, such a sale would not confer unencumbered title in the same way that a judicial sale would.

If the mortgagee applies to the court to have the vessel sold, the Marshal must ordinarily appraise the vessel and advertise and invite offers for its sale. A court will only order the Marshal to sell to a purchaser found by the arresting party in special circumstances.⁵³ This is so even if the proposed price is at or around the vessel's market value. To do otherwise would tend to undermine the impartiality of the Marshal, who is an officer of the Court.

New Zealand

There is no separate procedure for a court approved private sale of a vessel by a mortgagee.

- 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?

Australia

⁵³ Assuming that Australian courts would follow *Bank of Scotland Plc v "Union Gold", The Owners of the M/V* [2013] EWHC 1696 at [20].

This issue arose in the sale of the “Beluga Notification” (file NSD432/2011) and the Court in effect made the mortgagee bank (which was the successful bidder for the vessel) pay full value for it.

New Zealand

Information not available.

10 SALE PROCEEDS

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

Australia

As soon as practicable after the sale, the Marshal must pay into court the proceeds of sale (Admiralty Rules 1988 (Cth), r 71). Whether the money is held in an interest bearing account, and what form it is held in, will ultimately depend on the rules of court of the relevant court.

For example, in the Federal Court of Australia, money paid into court must be paid into the Litigants’ Fund (r 2.42 of the *Federal Court Rules 2011* (Cth)). The Court has an Australian Currency Account. In order to open a foreign currency and investment account, the Marshal needs to obtain an order of the court. However, the court has a dedicated US Currency Account.

New Zealand

The proceeds are paid into court, but no further requirement is specified.⁵⁴

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

Australia

See above.

New Zealand

Information not available

- (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?

⁵⁴ High Court Rules, r 25.51.

Australia

Once settlement is complete and all the funds on the sale are received, and there is no dispute for the settlement money from another party, the Marshal will seek an order from the Court for payment out of the money. The Marshal will estimate his expenses for the sale which will be retained. The money will be paid into the account directed by the legal practitioner for the plaintiff. There is no “poundage fee” for the sale of a vessel by the Court.

New Zealand

New Zealand does not operate exchange controls.

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?

Australia

Priorities are determined by the *lex fori*.⁵⁵

In Australian law, with the exception of the changes made by the *Personal Property Securities Act 2009* (Cth), there is no codified list of priorities for claims to the fund arising from the judicial sale of a ship. Nonetheless, there is a well-recognised order of ranking which is subject to modification by reference to equitable principles and doctrines, and considerations of public policy, commercial expediency and justice.⁵⁶

The *prima facie* order of ranking is:

1. Admiralty Marshal’s charges and expenses;
2. Costs of:
 - a. the arresting party of his or her action up to and including the arrest; and
 - b. the party who obtained the order for appraisal and sale up to and including the date of that order;
3. Maritime liens;
4. Mortgages;

⁵⁵ *The Ship “Sam Hawk” v Reiter Petroleum Inc* [2016] FCAFC 26, considering *Bankers Trust International Ltd v Todd Shipyards Corporation (The ‘Halcyon Isle’)* [1981] AC 221 (UKPC).

⁵⁶ *Patrick Stevedores No. 2 Pty Ltd v The proceeds of sale of vessel MV ‘Skulptor Konenkov’* (1997) 75 FCR 47 at 50-1; *The ‘Ruta’* [2000] 1 Lloyd’s Rep 359 (UK); *Bajpayee v The Ship “Estancia”* [2003] FCA 1640; *The Ship “Sam Hawk” v Reiter Petroleum Inc* [2016] FCAFC 26 at [79].

5. Statutory actions *in rem*;

6. *In personam* claims.

The owner of the ship will be entitled to the balance (if any).

As explained in the answer to 6.6, liens, charges or interests that are created, arise or are provided for by operation of law are excluded from the operation of the PPSA. The effect of this is that the PPSA only affects ship mortgages. Importantly, it does not affect the priority of mortgages as set out in the above list, but only the priorities of mortgages *inter se*. Those priorities were discussed in the answer to 6.3. The PPSA also recognises the priority of maritime liens (s 73).

New Zealand

Lex fori.⁵⁷

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?

Australia

See the answer to 11.1. The ranking of a mortgage vis-à-vis those claims which rank ahead of it will not depend on whether the subject vessel is registered under the laws of Australia or under the laws of a different jurisdiction. It may affect the ranking of several mortgages *inter se*.

New Zealand

No.

There is no fixed list of priorities – these remain at the discretion of the court. However, in general the ranking of mortgages will come after the court's and other statutory expenses and the expenses of the party that produced the funds by arresting the vessel, as well as maritime liens and any possessory liens. Mortgages generally rank ahead of other statutory *in rem* claims under s 4(1) of the Admiralty Act 1973.⁵⁸

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

⁵⁷ Admiralty Act 1973, s 5(3); see *Fournier v The ship "Margaret Z"* [1999] 3 NZLR 111 (HC).

⁵⁸ *Fournier v The ship "Margaret Z"* [1999] 3 NZLR 111 (HC).

There are no special rules on priority for local creditors in either Australia or New Zealand.

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

Australia

A person who has obtained a judgment in a court (whether a local court or an Australian court) against a ship (or the fund resulting from its judicial sale), assuming the judgment is enforceable in a court of Australia, may apply for determination of the order of priority of claims against the ship (r 73(1) *Admiralty Rules 1988* (Cth)). Such an application may be made before or after the judicial sale of the ship.

The court can then order that notice of the application in the proper form (Form 28) be published in a particular way. That notice will specify the period within which claims may be notified (r 73(2) *Admiralty Rules 1988* (Cth)). The determination of priorities may not occur until the specified period has expired (r 73(3) *Admiralty Rules 1988* (Cth)).

New Zealand

A party who obtains judgment against the ship or the proceeds of sale of the ship may, on obtaining judgment, apply to the court for an order determining the order of priority of the claims against the proceeds of sale of the ship.

The court sets a time period of any length for the determination of the distribution, with 65 working days as the default, although parties can apply to have the period extended. Parties must introduce their claims within this time period.⁵⁹

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

See the answer to 11.4 above. The timetable will be set by the court in both New Zealand and Australia.

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

Yes in both New Zealand and Australia.

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

Yes in both New Zealand and Australia.

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?

⁵⁹ High Court Rules, r 25.52

- (a) to take possession of the vessel;

Australia

If the secured party has a perfected security interest and the mortgagor is in default under the security agreement, the secured party may seize the vessel by any method permitted by law (s 123 PPSA). It is not necessary for the secured party to obtain a Court order before seizing the vessel.

For example, subject to the terms of the mortgage, a mortgagee may generally take possession of the mortgaged ship in two circumstances:

1. Where the mortgagor defaults in the repayment of the capital or the repayment of interest; or
2. Where the mortgagor deals with the ship in such a way that the security is, or will become, materially impaired.

A secured party which has seized possession of a vessel pursuant to s 123 PPSA are must (s 125 PPSA):

1. dispose of the collateral in accordance with Division 3 PPSA; or
2. take action to retain the collateral in accordance with Division 4 PPSA.

Section 128(2) PPSA (which is in Division 3) lists the methods by which a secured party may dispose of collateral after seizing the property (whether pursuant to s 123 or otherwise). The relevant methods of disposal are:

1. by private or public sale (including auction or closed tender); or
2. by lease, if the security agreement so provides.

Again, it is not necessary for the secured party to obtain a Court order before selling the vessel as mortgagee.

Section 128(1) also provides that a secured party may dispose of a seized vessel by purchase. The process for disposing of seized property is set out in s 129 PPSA. That section provides, inter alia, that:

1. the secured party must give notice under s 130 PPSA;
2. there can be no disposal by purchase if the secured party receives a notice of objection in accordance with s 137(2) PPSA;
3. a secured party may only purchase secured collateral if the purchase is part of a public sale; and
4. a secured party purchasing collateral pays at least market value for the collateral at the time of the purchase.

The above rights, and all other rights of a secured party to deal with a vessel, are limited to the extent that the grantor/mortgagor would be entitled to deal with the vessel (s 112(1) PPSA).

New Zealand

Yes, if the loan agreement provides for this.⁶⁰

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

Australia

The PPSA does not expressly provide or prohibit the appointment of receivers and/or managers over secured property. However, as the approach to ships mortgages is now more or less in line with the approach to other security interests, there does not appear to be any reason why a Court order would be required to appoint a receiver or manager to operate a vessel. The right of a secured party to make such an appointment will be limited only by the terms of the security agreement. The position appears to be the same with respect to a secured party selling the vessel as attorney in fact.

New Zealand

Yes, once in possession the power of management of the mortgaged property is granted.⁶¹ Receiverships are governed by the Receiverships Act 1993.

(c) to sell the vessel as mortgagee;

Australia

See the answer to 12.1(a) above. Subject to the terms of the mortgage, the mortgagee may generally (after having taken possession) sell the ship to realise their security.

New Zealand

Yes, if the loan agreement provides for this.

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

Australia

See the answer to 12.1(b) above.

New Zealand

Yes, if the loan agreement provides for this.

⁶⁰ Property Law Act 2007, ss 137-138; see also Ship Registration Act 1992, s 48.

⁶¹ Property Law Act 2007, ss 148; see also Ship Registration Act 1992, s 48.

- 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?

Australia

Australian law will recognise the interests of a secured party in a vessel even where the relevant security agreement is governed by the law of a foreign jurisdiction.

Pursuant to s 238(4) PPSA, the perfection, and the effect of perfection or non-perfection, of a security interest in a vessel will be governed by the law of a country if:

1. the vessel is entered in a register of ships maintain by the particular country; and
2. in proceedings in that country, the law of that country governs title to the goods.

That is, if, in proceedings in the country in which the security interest is registered on the register of ships, the law of another country (for example, the country of the flag of the vessel) governs title to the vessel, the law of the first country will not apply. Australian law will apply so as to determine the validity and effect of the security interest. However, if a foreign law applies, the Australian courts will recognise the rights of the secured party to take enforcement action in accordance with the laws of that country and the terms of the security agreement.

However, regardless of the law determining the validity or effect of a security interest, Australian law will recognise but not protect the interest indefinitely. Relevantly, section 39(1) PPSA provides that a security interest in collateral that has been located in a foreign jurisdiction, and is relocated to Australia, is taken to have been continuously perfected for the period covered by subsection (2) if, immediately before the collateral became located in Australia, and at the time it became so located:

1. the security interest was effective; and
2. the security agreement providing for the security interest was enforceable against third parties.

The 'period covered by subsection (2)' relates to the perfection or registration of the relevant security interest in accordance with the law of the foreign jurisdiction. Assuming the interest is enforceable, Australian law will recognise the priority enforceability (ie. temporary perfection) of the security interest for the period from when the vessel becomes located in Australia until the earlier of:

1. the end of 56 days after the vessel enters Australia; or
2. the end of 5 business days after the day the secured party has actual knowledge that the collateral has become located in Australia,

(the *Temporary Perfection Period*: s 39(3) PPSA).

In order to maintain a priority security interest, the secured party must register its interest on the PPSA. Otherwise, any other party may register an interest which would then take priority to the first secured party.

A subordinate secured party is not prevented, per se, from taking enforcement action, for example, by seizing and selling a vessel. However, any such enforcement action is likely to be challenged by the higher ranked creditor.

Similarly, a secured party with an unperfected or unregistered security interest is not prevented from enforcing, but may simply be challenged in the process.

New Zealand

There is no specific New Zealand law on this situation, so the self-help options outlined above are neither recognised nor prohibited. New Zealand law will recognise the interests of a secured party in a vessel even where the relevant security agreement is governed by the law of a foreign jurisdiction. However, if it will do so in accordance with its private international law rules, so if the secured party has to move beyond the self-help options it will need to assert the validity of its claim in the normal way.

- 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?

Australia

N/A

New Zealand

Yes, but only to the extent that the secured party could then approach the matter as the enforcement of a foreign judgment.

13 INSOLVENCY PROCESSES⁶²

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

Australia

Yes. It is given effect through the *Cross-Border Insolvency Act 2008* (Cth).

⁶² [Explanation given in original questionnaire] 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.

New Zealand

Yes, New Zealand enacted the Model Law domestically through the Insolvency (Cross-border) Act 2006.

- 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)

Australia

By s 6 of the *Cross-Border Insolvency Act 2008* (Cth), the Model Law has the force of law in Australia. Recognition of foreign insolvency proceedings occurs only in accordance with the Model Law.

New Zealand

Not in addition to the Model Law.

- 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?

Australia

In Australian law, companies in financial difficulty may enter liquidation (voluntary or compulsory) or voluntary administration. Where a company enters voluntary liquidation or voluntary administration, there is a mandatory stay on proceedings against the company or its property (ss 440D, 500 *Corporations Act 2001* (Cth)). There is no exception for secured creditors.

Where a company enters compulsory liquidation, there is also a stay on proceedings (s 471B *Corporations Act 2001* (Cth)). However, there is an exception to this stay for secured creditors (s 471C *Corporations Act 2001* (Cth)).

New Zealand

Yes, the Companies Act 1993 deals with the liquidation of companies, and following an application to appoint a liquidator, the company, a creditor or shareholder may apply to the relevant court for the stay of any proceeding against the company. Once the liquidation commences a person cannot commence or continue a proceeding without the court's or the liquidator's consent.⁶³ When a company enters voluntary administration no proceeding may be commenced or continued against it in court without the court's or the administrator's consent.⁶⁴ No specific provision is made for secured creditors in this context.

⁶³ Companies Act 1993, ss 247 and 248(1)(c).

⁶⁴ Companies Act 1993, s 239ABE.

- 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)?

Australia

If foreign insolvency proceedings are recognised under the provisions of the Model Law, the stay in Article 20(1) will apply. Section 16 of the *Cross-Border Insolvency Act 2008* (Cth) provides that for the purposes of the exceptions in Article 20(2), the scope and the modification or termination of the stay or suspension is the same as if the stay arose under various parts of the *Corporations Act 2001* (Cth) or *Bankruptcy Act 1966* (Cth). As such, in the application to recognise the foreign insolvency proceedings, the court must identify which Parts of the *Corporations Act 2001* (Cth) would apply to the foreign proceedings if they were taking place under that Act.⁶⁵ The relevant provisions will then determine whether a stay (and an exception to that stay) will apply.

New Zealand

If foreign insolvency proceedings are recognised under the provisions of the Model Law, the stay in art 20(1) will apply. Section 8 of the *Insolvency (Cross-Border) Act 2006* allows the High Court to exercise powers that it could exercise as if the matter had arisen in New Zealand.

- 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?

Australia

A mortgagee is a ‘secured creditor’. As such, where the company that owns the ship is in compulsory liquidation, the exception to the stay referred to in the answer to 13.3 will apply, and the mortgagee will be able to proceed against the ship regardless of the insolvency proceedings. Where it is in voluntary liquidation or voluntary administration, there is no exception to the stay for secured creditors and the mortgagee will not be able to proceed, and the insolvency proceedings will take precedence.

New Zealand

As per 13.3 above, the court will have a discretion to permit the admiralty proceeding to continue.

- 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)?

⁶⁵ *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404.

Australia

On the application to recognise the foreign insolvency proceedings the court will have to characterise the foreign proceedings by reference to the *Corporations Act 2001* (Cth) (as explained in the answer to 13.4). After the precise type is identified, the same consequences as identified in the answer to 13.5 will follow.

New Zealand

As per 13.4 above, the court will have a discretion to permit the admiralty proceeding to continue. The outcome to this can depend on some very fine distinctions of timing, as in a case where a New Zealand admiralty proceeding was commenced just prior to the recognition of a Korean insolvency proceeding, and permitted to continue under art 20.⁶⁶

- 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?

Australia

Potentially, although the amount at risk is likely not to be the sale proceeds, but any amounts paid by the mortgagor to the mortgagee that are subsequently found, in the event the mortgagor enters liquidation, to be recoverable "preference" payments.

New Zealand

A party could attempt to use the claw-back rules under the Companies Act 1993.⁶⁷

- 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)?

Australia

Potentially. There are too many variables to provide a meaningful answer to this question.

New Zealand

The position is uncertain.

- 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?

⁶⁶ See for example *Kim v STX Pan Ocean Co Ltd* [2014] NZHC 845.

⁶⁷ Companies Act 1993, s 292-293.

Australia

Yes. Australian insolvency law claims jurisdiction over all of the debtor's assets, regardless of their location. This is a result of the Model Law adopting a 'universalist' approach (cf 'territorial' approach).

New Zealand

Yes, New Zealand insolvency law does not distinguish between a debtor's assets based on their location.

14 LEASING⁶⁸

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

Australia

Leasing, in the sense described in the footnote, is a known financing technique in Australia. As to whether it is "common", we do not have sufficient information.

New Zealand

No information available.

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)?

Australia

The *Personal Property Securities Act 2009* (Cth) adopts a functional approach, and will characterise the lessor's interest under certain leases as a security interest. The Act applies to:

1. the interest under a lease of goods if the transaction in substance secures payment or performance of an obligation; and
2. the interest of a lessor under a "PPS lease" (s 12(3)(c)).

A PPS lease is defined as a lease or bailment of goods (if a bailment, where the bailee provides value) (s 13(1)):

1. for a term of more than one year; or

⁶⁸ [Explanation given in original questionnaire] 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.

2. for an indefinite term (even if determinable by any party within a year); or
3. for a term of up to one year that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed one year; or
4. for a term of up to one year, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than one year after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than one year).

However, a PPS lease does not include (s 13(2)):

1. a lease by a lessor who is not regularly engaged in the business of leasing goods; or
2. a bailment by a bailor who is not regularly engaged in the business of bailing goods; or
3. a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land; or
4. a lease or bailment of personal property prescribed by the regulations.

The definition of PPS lease would likely catch a demise charter. A time charter of less than one year would not meet the requirement of 'uninterrupted (or substantially uninterrupted) possession', as ownership and possession of the ship remain with the owner under a time charter.

New Zealand

A lease for a term of more than one year can be deemed a security interest under the Personal Property Securities Act 1999 (PPSA), as this takes a functional approach.⁶⁹ If the lessor did not register their interest under the PPSA, then their interest could rank behind that of other parties in an insolvency situation, despite having title to the vessel. The PPSA is not a regime aimed at vessel financing, and the parties may therefore prefer to register a mortgage under the Ship Registration Act 1992 using the lease as evidence of their agreement.

- 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.

⁶⁹ Personal Property Securities Act 1999, ss 16 (definition of lease), 17, 23(e)(xi).

Australia

As to how the functional approach is applied, see the answer to 14.2 above.

Where foreign law is concerned, it is important to distinguish between:

1. the law governing the lease and the contractual rights and obligations thereunder; and
2. the law governing the validity of the security interests.

The *former* is governed by Australian rules of private international law (conflict of laws). Applying those rules, Australian courts will generally give effect to an express or implied contractual choice of law; in the absence of such a choice, they will identify and apply the law which has the closest and most real connection with the contract.⁷⁰ The PPSA does not affect the governing law of the contract (s 234(2)).

Whether Australian law or a foreign law will govern the *latter* depends on two questions. First, a court will determine whether the PPSA applies. It applies to a security interest in goods if (s 6):

1. the grantor is an Australian entity; or
2. the goods are located in Australia.

If the PPSA does not apply, the court will apply the Australian rules of private international law to determine the applicable law. If it does apply, the court will then apply the choice of law provisions in the PPSA to determine the applicable law (ss 233-241). Most relevantly for present purposes, s 238(4) provides that where a ship is registered on a foreign register of ships and the foreign law governs title to the ship, the 'perfection, and the effect of perfection or non-perfection' of the security interest will be governed by the foreign law. As such, if that law adopts a formal approach, that will be applied.

New Zealand

The New Zealand PPSA regime would apply where the vessel is situated in New Zealand (or will soon move to New Zealand) when the lessee gains rights in the vessel, or where New Zealand law is stated as applicable to the agreement.⁷¹

- 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?

Australia

⁷⁰ *Akai Pty Ltd v The People's Insurance Company Pty Ltd* (1996) 188 CLR 418.

⁷¹ Personal Property Securities Act 1999, s 26.

Yes. As a general principle, Australian law recognises ‘freedom of contract’ and allows parties to expand their contractual rights and remedies.

New Zealand

As a general principle, New Zealand law recognises “freedom of contract” and allows parties to expand their contractual rights and remedies.⁷² However, the PPSA is more prescriptive with limited contracting out where security interests are concerned.⁷³

- 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?

Australia

The terms of the lease may give the lessor the right to terminate the lease and re-take possession on default of the lessee without court assistance.

New Zealand

The terms of the lease could provide for this.

- 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?

Australia

The vessel under a lease is an asset of the lessor. The lessor has ownership of the vessel, while the lessee only has use and possession.

New Zealand

The vessel would be an asset of the lessor.

- 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?

Australia

If the lessor’s security interest is unperfected (ie unregistered) at the time of the commencement of the insolvency proceedings, the security interest vests in the grantor (s 267). In the case of a lease where the lessor’s ‘security interest’ is their title to the property, the effect of s 267 is that full title to the property is vested in the lessee upon the lessee’s insolvency.⁷⁴

⁷² Contractual Remedies Act 1979, s 5.

⁷³ Personal Property Securities Act 1999, s 107.

⁷⁴ See, eg, *In the matter of OneSteel Manufacturing Pty Limited (administrators appointed)* [2017] NSWSC 21.

The lessor is then given a claim for damages, provable in the lessee's insolvency proceedings, for the market value of the leased property (s 269).

New Zealand

New Zealand law does not contain an equivalent of Australia's s 267 on the property law consequences of security interests interacting with insolvency situations. Instead of the "vesting" approach, a lessor with an unperfected security interest still has a valid and enforceable security interest after the lessee has become insolvent, dealt with under the ordinary PPSA priority rules (see Barry Allan, *The Law of Secured Credit* (Thomson Reuters, 2016 at [12.2.02]). Their claim will still rank behind parties with perfected security interests in the vessel, so this may not be of assistance to them in practice (PPSA, s 66). The type and terms of the lease do not affect this beyond the ordinary requirement that the lease be for a term of over one year to be counted as a security interest, or to otherwise amount to a security interest (see 14.2 above).

- 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?

Australia

That depends on the particular type of claim advanced by the lessor. If it falls within the definition of 'proprietary maritime claim' in s 4(2) of the *Admiralty Act 1988* (Cth), the lessor is able to commence proceedings *in rem* against the leased vessel and then apply for an arrest (as explained in the answer to 1.2).

An example of this would be where the lessor claims delivery up of a vessel after the exercise of a contractual right under the lease. This would be a 'claim relating to possession of a ship' within the meaning of s 4(2), and therefore a proprietary maritime claim capable of supporting an action *in rem*.⁷⁵

New Zealand

Yes, the lessor could arrest the vessel under ss 4 and 5 of the *Admiralty Act 1973* as a claim relating to possession or ownership of a vessel (as outlined in part 1 above). It could also join proceedings as a third party with an interest in the ship.

- 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?

Australia

In the *prima facie* order of priorities set out in the answer to 11.1, the claim of a lessor would fall within item 5 (statutory actions *in rem*).

⁷⁵ See, eg, *Wilmington Trust Company (Trustee) v The Ship "Houston"* [2016] FCA 1349.

New Zealand

See 11.1 above, where the lessor would rank alongside other statutory claims *in rem* under s 4 of the Admiralty 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.

Australia

If the PPSA applies to the particular transaction in question (as outlined in the answer to 14.3), a security interest in a vessel registered in a different jurisdiction can be registered and recognised.

New Zealand

Not expressly. However, a lease registered in another jurisdiction might still be subject to the PPSA provisions, particularly if the vessel were located in New Zealand at the time the lease was entered into.

- 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.

Australia

No information available.

New Zealand

No. In general this area of law is poorly developed in New Zealand. There is a lot of potential confusion in the interaction between the Ship Registration Act 1992 and the PPSA. The situation can be compared with Australia where the PPSA regime has been used to comprehensively deal with both ship related and non-ship related security interests.

15 RESERVATION OF TITLE⁷⁶

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

Australia

Yes. Reservation of title arrangements are treated as 'purchase money security interests' under the *Personal Property Securities Act 2009* (Cth) (s 14).

New Zealand

⁷⁶ [Explanation given in original questionnaire] 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.

Yes. These clauses are security interests under s 17 of the PPSA.

- 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.

Australia

No. Purchase money security interests are registered on the Personal Property Securities Register.

New Zealand

No, this form of interest could only be registered as a security interest under the PPSA. A party with such an interest could attempt to use it to support a caveat against dealings with the vessel.

- 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?

N/A⁷⁷

- 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.

Australia

The answer is the same as for 15.2.

New Zealand

A party with such an interest could attempt to use it to support a caveat against dealings with the vessel.

⁷⁷ We assume that the references in this and the subsequent question were to Q15.2, not 14.2.