

CMI INTERNATIONAL WORKING GROUP

Ship Financing Security Practices – Questionnaire

1. MARITIME AND OTHER CONVENTIONS

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

ANSWER: No

- 1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest¹ of a vessel?

Federal Courts Act, RSC 1985, chap.F-7 as amended, at s.22 (1) Any claim for relief may be sought under “Canadian Maritime Law”

The **Act**, supra, defines “Canadian Maritime Law” in s.2 as:

“*Canadian maritime law* means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the *Admiralty Act*, chapter A-1 of the Revised Statutes of Canada, 1970, or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, as that law has been altered by this Act or any other Act of Parliament;

Examples of relief are provided in s.22 (2) of the **Act**, of which, for the purposes of this Questionnaire, (c) is the most relevant:

“(a) any claim with respect to title, possession or ownership of a ship or any part interest therein or with respect to the proceeds of sale of a ship or any part interest therein;

(b) any question arising between co-owners of a ship with respect to possession, employment or earnings of a ship;

(c) any claim in respect of a mortgage or hypothecation of, or charge on, a ship or any part interest therein or any charge in the nature of bottomry or respondentia for which a ship or part interest therein or cargo was made security;

(d) any claim for damage or for loss of life or personal injury caused by a ship either in collision or otherwise;

¹ The term ‘arrest’ is used throughout for convenience but 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.

(e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;

(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

(g) any claim for loss of life or personal injury occurring in connection with the operation of a ship including, without restricting the generality of the foregoing, any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or of the wrongful act, neglect or default of the owners, charterers or persons in possession or control of a ship or of the master or crew thereof or of any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of the ship are responsible, being an act, neglect or default in the management of the ship, in the loading, carriage or discharge of goods on, in or from the ship or in the embarkation, carriage or disembarkation of persons on, in or from the ship;

(h) any claim for loss of or damage to goods carried in or on a ship including, without restricting the generality of the foregoing, loss of or damage to passengers' baggage or personal effects;

(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

(j) any claim for salvage including, without restricting the generality of the foregoing, claims for salvage of life, cargo, equipment or other property of, from or by an aircraft to the same extent and in the same manner as if the aircraft were a ship;

(k) any claim for towage in respect of a ship or of an aircraft while the aircraft is water-borne;

(l) any claim for pilotage in respect of a ship or of an aircraft while the aircraft is water-borne;

(m) any claim in respect of goods, materials or services wherever supplied to a ship for the operation or maintenance of the ship, including, without restricting the generality of the foregoing, claims in respect of stevedoring and lighterage;

(n) any claim arising out of a contract relating to the construction, repair or equipping of a ship;

(o) any claim by a master, officer or member of the crew of a ship for wages, money, property or other remuneration or benefits arising out of his or her employment;

(p) any claim by a master, charterer or agent of a ship or shipowner in respect of disbursements, or by a shipper in respect of advances, made on account of a ship;

(q) any claim in respect of general average contribution;

(r) any claim arising out of or in connection with a contract of marine insurance; and

(s) any claim for dock charges, harbour dues or canal tolls including, without restricting the generality of the foregoing, charges for the use of facilities supplied in connection therewith.

Jurisdiction applicable

(3) For greater certainty, the jurisdiction conferred on the Federal Court by this section applies

(a), (b) and (c)...

(d) in relation to all mortgages or hypothecations of, or charges by way of security on, a ship, whether registered or not, or whether legal or equitable, and whether created under foreign law or not.

The right of arrest may be restricted in s.43 of the **Act** as follows:

Jurisdiction *in rem*

(2) Subject to subsection (3), the jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against the ship, aircraft or other property that is the subject of the action, or against any proceeds from its sale that have been paid into court.

Exception

(3) Despite subsection (2), the jurisdiction conferred on the Federal Court by section 22 shall not be exercised *in rem* with respect to a claim mentioned in paragraph 22(2)(e), (f), (g), (h), (i), (k), (m), (n), (p) or (r) unless, at the time of the commencement of the action, the ship, aircraft or other property that is the subject of the action is beneficially owned by the person who was the beneficial owner at the time when the cause of action arose.

For the purposes of this Questionnaire, subject matter that falls within s.22(2)(c) re mortgages and charges on ships, would not be subject to the restriction in s.43(3).

1.3 In particular, can arrest be made:

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

ANSWER: Yes

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

ANSWER: Yes

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

ANSWER: No, neither convention

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

ANSWER: Any maritime lien that is created for the benefit of creditors under a foreign law will be recognized and enforced by a Canadian court, even though Canadian Maritime Law does not recognize a similar right. The only restriction is where the foreign maritime lien is against public policy. *Todd Shipyards Corp. v. Altema Compania Maritima S.A.*, [1974] SCR 1248, 1972 CanLII 193 (SCC)

- 1.6** Does the law of your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalization of Foreign Public Documents? ("Apostille Convention")

ANSWER: No – "Legalization of Foreign Public Documents" was never required. Foreign Public Documents have to be proven in court in accordance with common law and local statutory rules of evidence.

2. NATURE OF SHIPS' REGISTER

- 2.1** Is the ships' register² in your jurisdiction a register of legal title?

ANSWER: Yes. Legal title holders are registered as owner in the Canadian Register of Vessel. However, legal title continues to exist without registration, but may not be opposable to third parties who believe that they have obtained legal title without notice. Registration may be prima facie evidence of title, but no more.

² The term 'ships register' means a specialist register only for ships.

Example: Ballantrae Holdings v M.V."Phoenix Sun" 2016 FC 570 (CanLII) – an unpaid mortgage creditor whose title was not registered, was recognized as a legal mortgage holder ranking ahead of any equitable mortgagees or beneficiaries of an equitable charges.

- 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').

ANSWER: Pursuant to the **Canada Shipping Act, 2001**, S.C. 2001, c.26 ("CSA 2001"), s.48, a ship can be listed (but not registered) as a bareboat chartered vessel in the Canadian Register of Vessels, provided the right to fly the flag of the underlying register is suspended

- 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?

ANSWER: No. Pursuant to the CSA 2001, s.65, mortgages can only be registered against ships that are registered or recorded (as a ship being built). Therefore, one cannot register a mortgage on a ship "listed" in Canada as bareboat chartered. Although the consent of a mortgagee on the underlying register is required to proceed with the listing of a bareboat chartered vessel, unlike some other jurisdictions, no mention or notation of that mortgagee's interest can be made in the Canadian register.

- 2.4** Does your jurisdiction allow a vessel registered in the ships' register in the name of the holder of legal title also to be registered in another jurisdiction in the name of a demise charterer? If so is such registration 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?

ANSWER: Yes to the first question - On application, the Chief Registrar may suspend the registration of a Canadian vessel in respect of the right to fly the Canadian flag for the duration of the bareboat registration elsewhere, also that there is some requirement that the other jurisdiction will only be accepted if it reciprocate and allows its ships to be bareboat registered in Canada. The registration of the vessel, however, will remain effective to record transactions on the title of the ship, such as sale or mortgaging of the ship or of a share thereof.

As to the second question, for bareboat registration in a non-Canadian jurisdiction the Canadian registrar requires the consent of any holder of a mortgage on the Canadian registry as a matter of registry policy.

- 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.

ANSWER: Pursuant to the CSA 2001, a vessel means: "a boat, ship or craft designed, used or capable of being used solely or partly for navigation in, on, through or immediately above water, without regard to method or lack of propulsion, and includes such a vessel that is under construction. It does not include a floating object of a prescribed class." It follows that most floating structures used in the off-shore industry, other than those meant to be permanently connected to the sea bottom, including semi-submersible floating platforms or mobile off-shore drilling units and floating production, storage and offloading units ("**FPSO**"), would qualify as a 'vessel' and could therefore be registered in the Canadian Register of Vessel. As a matter of fact, currently, there are a number of FPSO's registered in the Canadian Register of Vessels. Other floating structures, like floating fueling stations may also qualify as a 'vessel' if their characteristics meet the definition.

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?

ANSWER: No

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

ANSWER: No

It is the almost invariable commercial practice that the lender and the shipowner enter into a deed of covenants stipulating the obligations of the parties including the payment schedule, loan covenants events of default and rights of enforcement. The deed of covenants itself is not registered with the ship Registry. The registerable form of ship mortgage generally refers to the date of the deed of covenants, the rate of interest and the principal amount of money secured,

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

ANSWER: No

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

ANSWER: Canadian \$150.00 as per Vessels Registry Fees Tariff (SOR/2002-172)

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

ANSWER: The registration of a mortgage is indefinite. However, registration of the vessel is generally five years with provision for renewal. If the registration of a vessel lapses, any ship mortgages registered on title continue. It is a usual practice for ship mortgage deed of covenants to require the ship owner to keep the ship registered in good standing and for a breach of that covenant to be an event of default.

- 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.

ANSWER: If the ship is registered in the Canadian Register of Vessels, then registration of the mortgage in the said Register suffices in order to set up the rights of the mortgagee against third-parties.

That said, Canadian provinces and territories also possess a local regime for security interests. Many of those jurisdictions, such as the Province of Quebec specifically prohibit the registration of security interests in ships that are registered pursuant to the CSA 2001 or under an equivalent foreign law. Others, however, do not, or are silent, which has led, from time to time, to conflicts of priority with marine mortgages registered pursuant to the CSA 2001's predecessors. There is also the concern that certain movables on a ship may not be covered by the definition of "ship and its appurtenances" and registration under the provincial law may be advisable. So far, the case law has systematically recognized the priority of the mortgages registered in the Canadian Register of Vessels, irrespective of its date of creation or of registration. Because of recent developments in Canadian constitutional law that a security interest in personal property can be a matter of both provincial and federal jurisdiction, some mortgagees take the precaution of registering ship mortgages under provincial personal property security legislation (where it is not prohibited and where there is a connection with either the location of the ship or the residence of the owner), as well as under the Canada Shipping Act, 2001 for the purpose of facilitating notice to creditors and others interested in the ship of the existence of the mortgage. However,

as long as the ship mortgage is registered under the Canada Shipping Act, 2001, registration under provincial personal property security legislation, even if permitted by the applicable provinces law, is not compulsory.

4. INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS

Assumption: For the purposes of answering questions under Canadian law, it is assumed that “security interests” are those interests which attach to the vessel, like a mortgage, but which are not a mortgage. Furthermore, under federal law the only “security interests” that can be registered against a ship is a mortgage pursuant to the *CSA 2001* and, if the ship is owned by a fisherman or an aquaculturists, a security interest pursuant to s. 427 of the *Bank Act*. However, there is provision under the various provincial laws for the registrations of “personal property security interests”.

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?

ANSWER: The information is publicly available and one needs not the authorization of the vessel owner to access same. No

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

ANSWER: No

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

ANSWER: Generally, the information is available online; however, where no online service is available, then attendance at the registration office is necessary

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?

ANSWER: Yes – the governing principle is that a subsequent owner is subject to “Buyer Beware” principle and, as a minimum exercise of its due diligence, should examine the Canadian Register of Vessels. It may also be prudent to search the provincial personal property securities register(s) where the debtor’s principal place of business is located and where the ship may be located at the time of registration. Also, a search of the

Federal Court and British Columbia Supreme Court registries is advisable, as these two courts purport to exercise "in rem" jurisdiction.

5. ARREST OF A CHARTERED VESSEL

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

ANSWER: Yes, the fact that the mortgaged vessel is on bareboat or time charter is not an impediment to the arrest of the vessel, providing that the underlying liability is NOT that of the demise or time charterer. The assumption is that the mortgage was granted by an owner with legal title to the vessel and there has been a default under the mortgage contract by the owner or its successors in title.

- 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)?

ANSWER: No

- 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?

ANSWER: There is no rule. In practice, it is recommended that an order be obtained by the Marshall (or Sheriff) to have the cargo discharged at the expense of the cargo owners, and that any deficiency be a first ranking charge against the proceeds of sale the cargo as the case may be.

ANSWER: Generally yes, at the risk of the cargo being also the subject of the ship sale. If no one from the cargo interests comes forward to assume the risk and cost of discharge, then the moving party for the sale of the ship would likely be obliged to discharge the cargo in order to obtain an order for the sale of the ship or obtain the agreement of the court to sell the ship laden with her cargo.

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?

ANSWER: 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?

ANSWER: Yes. There is no statutory or regulatory impediment to the subsequent mortgage being registered without the consent of the prior registered mortgagee. However, the deed of covenants between the ship owner and a prior registered mortgagee may stipulate for the prohibition or restriction on the making or registration of any subsequent mortgage. This is a private contractual stipulation between the shipowner and the prior registered mortgagee.

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

ANSWER: Priority is determined in accordance with the time when each mortgage is registered, same and except when the first registered mortgage holder in time has agreed to subordinate its interests to a subsequent registered mortgage holder in time.

- 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?

ANSWER: The Court in the exercise of its equitable jurisdiction would have the power to remedy any unfairness that might exist given the appropriate circumstances and that it would not be just to favour the registered mortgagee over an unregistered mortgagee.

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

ANSWER: Yes, but only with the consent of the Court. Under s. 69(2) of the Canada Shipping Act 2001, "If there is more than one registered mortgage of the same vessel or share, a subsequent mortgagee may not, except under an order of the Federal Court or of a court of competent jurisdiction whose rules provide for in rem procedure in respect of vessels, sell the vessel or share without the agreement of every prior mortgagee."

- 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.

ANSWER: There are provincial registries for personal property security interests that may have been registered under provincial law. There is no federal registry whereby a maritime lien holder can give notice of its

maritime lien. As per our answer to 4.2, a search of court registries, eg Federal Court and British Columbia Supreme Court, which purport to exercise “in rem” jurisdiction is advisable. There are no federal or provincial registries for nonconsensual maritime liens such as maritime death or personal injury claims, or collision claims. As a matter of constitutional law, it is uncertain whether a storer’s or repairer’s lien granted under provincial law is applicable to registered vessels, at least where the provincial law gives remedies or proprietary rights to the lien claimant which are inconsistent with Canadian Maritime Law: *Finning Ltd. v. F.B.D.B.*, 1989 CanLii 2678 (BC SC)

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?

ANSWER: No

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

ANSWER: No, but it is highly recommendable; the mortgagee's statutory power of sale does not depend on judgment being obtained - subject to deed of Covenants' impact on that right.

- 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?

ANSWER: Two years to have the case set down for trial; then possibly trial will take place in six to eight month time. Unless there are exceptional circumstances, the court will not expedite the case; rather, it might order the owner to continue supporting the costs of maintaining the ship as a condition for its contestation. If the ship is a deteriorating asset, or there are other exceptional circumstances, the Court could be persuaded to order it sold *pendente lite* and hold the sale proceeds in trust pending resolution of the case.

- 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?

ANSWER: Yes under the **Federal Courts Act**, supra, s.22 (2)(c), reproduced in the Answer to 1.2

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?

ANSWER: No, only the Admiralty Court (the “Federal Court”) has the power to sell vessels “free and clear of all encumbrances”; the other courts can only sell whatever rights the owner has in the vessel and pay, pro rata, known claimants. The British Columbia Supreme Court purports to exercise admiralty jurisdiction as part of its historical reception of law. Because the provincial superior courts of the provinces exercise plenary jurisdiction over federal as well as provincial law except where jurisdiction is statutorily excluded, a provincial superior court administering Canadian maritime law may grant a vesting order selling a vessel under judicial sale free and clear of all encumbrances. This has been done in certain instances by provincial superior courts exercising insolvency jurisdiction. There is legal uncertainty whether such orders have the same effect as a judicial sale order by the Federal Court unless the provincial superior court follows similar procedural steps as in a Federal Court judicial sale with an advertisement for sale, public notice to creditors of the ship and provision a claims bar date. In other courts an execution judgment purchaser only obtains the title the judgment debtor had in the ship and no more. A sale under execution is subject to any liens, mortgages, encumbrances or claims against the ship.

- 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?

ANSWER: In the Federal Court, the vessel must be arrested, and thus placed under the Court’s “in rem” jurisdiction; a warrant of arrest cannot be issued without the issuance of a statement of claim “in rem” which asks that if the judgment debt is not paid, then that the court direct the sale of the vessel and a procedure for payment of all claims in which the court has been given notice of, pro rata, in accordance with the order of priorities. As a general practice, the court will require advertisement, even world-wide for valuable vessels depending on the circumstances, of the sale, the eventual distribution of proceeds and the delay to all creditors to file claims.

- 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?

ANSWER: The rule is that an appeal from a judgment “in rem” of the Federal Court does not suspend the Court’s process; there is provision for an owner to ask either the Federal Court or the Federal Court of Appeal to

suspend the judgment, with or without provision of security that the judgment will be paid.

9. SALE PROCEDURE

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

ANSWER: Yes

- 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?

ANSWER: The criteria are set out in Rule 490 which can be adjusted, revised, dispensed with by the Court, depending on the circumstances. Rule 490 reads as follows:

490 (1) On motion, the Court may order, in respect of property under arrest, that

(a) the property be appraised and sold, or sold without appraisal, by public auction or private contract;

(b) the property be advertised for sale in accordance with such directions as may be set out in the order, which may include a direction that

(i) offers to purchase be under seal and addressed to the sheriff,

(ii) offers to purchase all be opened at the same time in open court, that the parties be notified of that time and that the sale be made pursuant to an order of the Court made at that time or after the parties have had an opportunity to be heard,

(iii) the sale not necessarily be to the highest or any other bidder, or

(iv) after the opening of the offers and after hearing from the parties, if it is doubtful that a fair price has been offered, the amount of the highest offer be communicated to the other persons who made offers or to some other class of persons or that other steps be taken to obtain a higher offer;

(c) the property be sold without advertisement;

(d) an agent be employed to sell the property, subject to such conditions as are stipulated in the order or subject to subsequent approval by the Court, on such terms as to compensation of the agent as may be stipulated in the order;

(e) any steps be taken for the safety and preservation of the property;

(f) where the property is deteriorating in value, it be sold forthwith;

(g) where the property is on board a ship, it be removed or discharged;

(h) where the property is perishable, it be disposed of on such terms as the Court may order; or

(i) the property be inspected in accordance with rule 249.

(2) The appraisal or sale of property under arrest shall be effected under the authority of a commission addressed to the sheriff in Form 490.

(3) Property sold under subsection (1) is free of any liens under Canadian maritime law.

(4) As soon as possible after the execution of a commission referred to in subsection (2), the sheriff shall

(a) file the commission with a return setting out the manner in which it was executed;

(b) pay into court the proceeds of the sale; and

(c) file the sheriff's accounts and vouchers in support thereof.

(5) An assessment officer shall assess the sheriff's accounts and report the amount that the assessment officer considers should be allowed.

(6) Any party or caveator who is interested in the proceeds of sale referred to in subsection (4) may be heard on an assessment under subsection (5).

(7) On motion, the Court may review an assessment done under subsection (5).

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

ANSWER: This is a matter for the discretion of the court which takes into account the following factors:

- a) Is the owner supporting the costs of maintaining the vessel and is the vessel being maintained;
- b) Has the crew abandoned the vessel, and, if not, are the crew's needs (eg groceries, supplies, wages) being provided for;
- c) Is the vessel moored in a safe place, and if so, is the vessel being provided with electricity, drinking water and garbage disposal services;

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?

ANSWER: The Court has the power and discretion to set a reserve price under Rule 490; moreover, the Court has the power and discretion not only to refuse to award the vessel to the highest bidder, but to ask bidders to continue submitting bids until the highest bid is not being exceeded by any further bidding. The Court may order a valuation survey to be conducted and kept sealed until the bid prices are reviewed. The bid prices will be reviewed and compared to the valuation survey to determine the reasonableness of the offers.

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

ANSWER: Yes.

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

ANSWER: Usually, the Order of Sale – the contents of which contain the representations of the various party creditors moving for such order – will direct the Marshall (or Sheriff) of the Sale to place one or more advertisements in specific publications, normally trade publications which are consulted by the trade – to obtain the greatest exposure among all likely interested purchasers. The extent of advertising will largely depend on the nature of vessel, its age, its future likely use.

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

ANSWER: There are often different interests as between the owner and the creditors. The owner may be desirous to obtain the longest time possible to secure financing to prevent the sale of the ship, while the creditors will want the shortest time possible, bearing in mind that the sale must be publicized to targeted markets, and time must be given for possible inspections

- 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?

ANSWER: Yes, but usually the burden is on such mortgagor (or any creditor who has effected an arrest) to show that the net proceeds of sale from a private sale will likely exceed any return from a public auction.

- 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?

ANSWER: It is possible given the right circumstances. All maritime lien holders and any other interest which ranks before the mortgage will have to be secured/ paid off, such that no creditor, including the Marshall, will be put into a disadvantageous position as a result of the set-off.

10. SALE PROCEEDS

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

ANSWER: The normal rule is that the proceeds of sale are paid into Court which in turn deposits the funds into the Consolidated Revenue Fund controlled by the Minister of Revenue. Interest is paid at a lower rate than that paid on bonds and is compounded semi-annually. It is possible if unanimous agreement can be achieved among all parties who have appeared at the sale and filed claims that the proceeds of sale should be deposited into a private interest bearing trust account in Canada and the holder of such account is subject to the jurisdiction of the Court. In Canada, only Canadian funds can be deposited into Court, and if the proceeds of sale are in another currency and the parties do not wish to convert that currency into Canadian funds, then an unanimous agreement is necessary.

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

ANSWER: The Federal Court in Canada can only receive Canadian currency and by law can only order the sale in Canadian dollars. Thus if the vessel is sold in a foreign currency, then the amount to be deposited will be subject to the rate of exchange on the date of the order of sale. However, the parties could agree (with court approval) that the sale proceeds be kept in a private interest bearing trust account denominated in foreign currency in appropriate situations.

- (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?

ANSWER: No.

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?

ANSWER: The priorities are decided by *lex fori* but whether the claim has the status of a maritime lien is established by the *lex causae*. The local law (*lex fori*), absent abnormal circumstances justifying deviation, the normal ranking of admiralty priorities in Canada is as follows:

- (i) Marshall's expenses
- (ii) Legal costs including the costs and disbursements of selling the ship
- (iii) Possessory liens arising earlier in time than maritime liens
- (iv) Maritime liens, both traditional and statutory
- (v) Possessory liens arising later in time than maritime liens
- (vi) Mortgages in order of their registration
- (vii) Unregistered legal mortgages
- (viii) Equitable mortgages and charges
- (ix) Statutory rights in rem – those claims in which a creditor has the right to arrest, but is otherwise not secured.
- (x) Other maritime and non-maritime claims

- 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?

ANSWER: See the answer in 11.1

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?

ANSWER: No

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

ANSWER: No

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

ANSWER: Yes, s.139 of the Marine Liability Act grants a maritime lien to ship suppliers and repairers of non-Canadian vessels whose ranking as a result is in priority to the mortgage holder. Furthermore, the

St. Lawrence Seaway Authority and the major Port Authorities established under the Canada Marine Act have the benefit of a maritime lien for unpaid charges which rank over that of the mortgage holder. A maritime lien has been recognized by the Courts in favour of the pilotage authorities pursuant to the *Pilotage Act*. Various federal statutes such as the Fishing and Recreational Harbours Act and the Department of Transport Act gives minor ports, smaller canals and other governmental authorities priority for their claims over those of ship mortgagee. The Arctic Waters Pollution Prevention Act and the Canada Shipping Act, 2001 give priority over ship mortgagees to governmental expenses for the cost of abating or remediating pollution and the removal of wreck. *The Marine Liability Act* provide for a similar right to secure the claims of the Ship-source Oil Pollution Fund against vessels having caused pollution damage. Where a ship is seized or deemed forfeit for contraventions under the Customs Act, the onus is on the ship mortgagee to apply to the Canadian Border Services Agency for recognition of its interest and demonstrate that it was not in privity with the activities of the ship owner if the mortgagee wishes to recover the vessel from seizure or forfeiture. Similarly under s. 233(5) of the Canadian Environmental Protection Act if a ship is seized or forfeited for a pollution offense, the ship mortgagee must take the initiative to make an application for the recognition of its interest. The onus is on the mortgagee to demonstrate that it was innocent of any complicity with the offense and “exercised all reasonable care in respect of the persons permitted to obtain possession and use of the [ship] so as to be satisfied that it was not likely to be used contrary to the provisions of this Act or, in the case of a mortgagee or lien holder, other than the holder of a maritime lien or statutory right in rem, that the applicant or intervenor exercised such care with respect to the mortgagor or the lien giver”.

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

ANSWER: Normally, in an Order of Sale of the ship, provision is made for a Notice to Creditors and the filing of claims at a specific date and time prior to the conduct of the sale itself. Only under special circumstances, will the delay for filing claims be extended.

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

ANSWER: Unless the Court orders otherwise due to special circumstances, once the proceeds of sale of the ship are deposited into court, there is a time delay to allow for the examination of the various claimants, then a delay for the contestation of the various claims, if any, and once the discovery examinations and expert reports, if any, are completed and filed, then to apply to the Court for a hearing to adjudicate

on the claims, establish their priorities and pay out the funds in accordance with the priorities established.

11.6 Is the distribution order decided by the court?

ANSWER: Yes

11.7 Is that order subject to a right of appeal?

ANSWER: Yes, but in order to prevent the payment out, an Order must be sought from the Court suspending the execution of the judgment ordering the payment out.

12. MORTGAGEE'S SELF-HELP REMEDIES

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

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

ANSWER: Yes to all, although it is not recommended, as any other creditor who seeks the Court's intervention can obstruct the exercise of these rights, and, moreover, only the Admiralty Court can sell a ship "free and clear of all claims and encumbrances". Remedies (a), (b) and (d) would normally arise in contract or to extent that the deed of covenants so provides.

12.2 If, under the laws of the ships' register (where that is different law from the law of your jurisdiction) a mortgagee is given the right to take the enforcement steps referred to as (a) – (d) of 11.1 without a court order would its right to do so be recognized or prohibited in each case in respect of a vessel physically located in your jurisdiction?

ANSWER: Yes, but the effect of the Court's intervention and exercise of its jurisdiction would be difficult to predict, which is the reasons why any creditor wishing to exercise its rights under the agreement should immediately seek the Court's assistance.

- 12.3** Where answers to the questions in 13.2 are negative, would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?

ANSWER: No

13. INSOLVENCY PROCESSES³

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

ANSWER: Yes

- 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)

ANSWER: Yes

- 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?

ANSWER: Yes, for up to 75 days under the Bankruptcy and Insolvency Act, s.69.3(2)(a) and indefinitely under the Company Creditors Arrangement Act.

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

ANSWER: No

- 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?

ANSWER: Where the ship is subject to insolvency proceedings in the nature of a bankruptcy where the assets of the bankrupt are being liquidated, the claims of secured creditors, such as a ship mortgagee or a maritime lien holder, before the admiralty court take precedence over the insolvency proceedings: *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 SCR 907, 2001 SCC 90 (CanLII)

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.

Where the ship is subject to insolvency proceedings in the nature of a reorganization such as the Companies Creditors Arrangement Act, the insolvency court has and generally exercises the power to suspend all enforcement proceedings by secured creditors including ship mortgagees until the plan of arrangement by the ship owner is voted on by the classes of creditors or approved by the court: *Sargeant v. Worldspan Marine Inc.* 2011 BCSC 787. Where the plan of arrangement is rejected by creditors or not approved by the court, the estate of the ship owner is deemed bankrupt and the ship mortgagee then has the same rights to enforce a security as in a regular bankruptcy liquidation.

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

ANSWER: No, provided that a recognition order has been granted by a Canadian insolvency Court

- 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?

ANSWER: Yes, although arguably a Trustee in Bankruptcy or creditors of the bankrupt ship owner would be bound by the claims bar date in a Federal Court judicial sale if the insolvency proceedings had been commenced before the claims bar date. We are not aware of any Canadian authority in which a bankruptcy trustee or creditors of an insolvent ship owner attempted to challenge the validity of ship mortgage as a preference where the mortgage already had been enforced under a concluded Federal Court judicial sale.

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

ANSWER: No, the decision of the Admiralty Court does not interfere with any legitimate exercise of jurisdiction by "Insolvency Court" provided that a recognition order has been granted by a Canadian insolvency Court

- 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?

ANSWER: No, the Canadian insolvency courts only have territorial jurisdiction, and must seek the assistance of foreign courts to recognize

and enforce their judgments. Canadian Insolvency courts have commented on the desirability of international comity in insolvency proceedings affecting debtors with worldwide assets such as ship operators.

14. LEASING⁴

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

ANSWER: Yes

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)?

ANSWER: In Canada, the nature of the contract will be determined in accordance with its terms, and there is a risk that what appears to be a demise charter will be characterized as a time charter or some other form of service agreement, if all five of the essential requirements of a demise charter are not met. The personal property security legislation of all common law provinces provides for an overriding functional test as to whether a set of contractual stipulations creates a security interest. While there is no equivalent federal legislative provision, recent authorities suggest that the Federal Court would be receptive to a functional test.

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.

ANSWER: Canadian courts will recognize and enforce "in rem" rights created under foreign law, regardless of whether the foreign law follows either approach.

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?

ANSWER: Yes. Freedom of contract prevails subject to public policy

⁴ 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.

- 14.5** 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?

ANSWER: Re-taking possession is possible with the express or implied consent of the possessor; where there is contestation, recourse to the court is necessary. The right to retake possession without consent of the possessor in the event of a default may be included in the contractual agreements between the parties, but again, any contestation will have to be adjudicated by the court.

- 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?

ANSWER: A demise charter only gives the lessee a right to possession and control subject to the terms of the contract; ownership and the right to the equity remains with the owner.

- 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?

ANSWER: A demise charter by itself and even if registered does not give the lessee the status of a secured creditor; therefore in any insolvency process, whether in a bankruptcy, or reorganization or a liquidation, a demise lessee is considered an unsecured creditor and shares pro-rata with other unsecured creditors.

- 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?

ANSWER: Yes, an action for possession of the vessel to be arrested is available to anyone who can show that it has a right to possession of the vessel, regardless of whether the lessor is the owner or not. S.22 (2)(a) and s.43(2) of the Federal Courts Act

- 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?

ANSWER: The lessor is not a secured creditor unless it holds a mortgage from the registered owner securing the performance of the obligations under the demise charter; therefore, it will rank as an unsecured creditor after maritime lien and mortgage holders.

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

ANSWER: Yes. If the proper law governing an obligation respecting a vessel is foreign law, the foreign law generally will be given effect: *World Fuel Services Corporation v. The Ship Nordems*, 2011 FCA 73 (CanLII)

- 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.

ANSWER: The position of The Canadian Maritime Law Association is that federal law should be reformed to include the recognition of other security interests in a federal registry.

15. RESERVATION OF TITLES⁵

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

ANSWER: No, unless pursuant to the Canada Shipping Act, 2001, s. 47(c) and 53 (3) (vessels subject to financing agreements) are registered.

- 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.

ANSWER: No

- 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?

ANSWER: With respect to a seller which has retained title, a purchaser has all the rights and recourses available at law. As a seller cannot register its retention of title, it cannot oppose its rights to title against third parties who relied on the register without any notice, subject to sections 47(c) and 53(3) of the Canada Shipping Act, 2001

- 15.4** Do the laws of your jurisdiction recognize 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 recognized.

⁵ 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.

ANSWER: Yes, Canadian admiralty courts will recognize “in rem” rights created under foreign law and will give full force and effect to them, even though the same “in rem” rights are not available in Canada.

NEW QUESTION

16. Does a mortgage registered in your jurisdiction extend by law to vessel's insurance policies in the event of a casualty affecting the vessel?

ANSWER: No. The ship mortgagee would have to stipulate for mortgagee's interest insurance in the deed of covenants or make its own arrangements to insure its interest.

END