

CMI International Working Group

Ship Financing Security Practices – Questionnaire

**Association Française du Droit Maritime –
December 2016**

1 MARITIME AND OTHER CONVENTIONS

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

France has ratified the 1952 Arrest Convention but is not one of the 10 Nations having ratified the 1999 Arrest Convention.

- 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?

Not applicable.

- 1.3** In particular, can arrest be made:

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

Arrest may be made both by a maritime hypothecary creditor of a vessel registered under the laws of France and by a maritime hypothecary creditor of a vessel registered under the laws of a different jurisdiction.

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

France has ratified the 1926 Maritime Liens and Mortgages Convention but is not one of the 18 Nations that have ratified the 1993 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?

Not applicable.

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

France has ratified the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents.

2 NATURE OF THE SHIPS' REGISTER

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

The French Register is presently regulated by art. L 5114-1 ff. Code des transports. It is indeed a register of legal title. Any act, operation or deed having the effect to create, convey or void the property over a vessel shall be registered; the register can be accessed by the public.

- 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').

The ownership of a ship under the French flag is recorded in all cases, be it under the main register or under the RIF (See chapter IX of decree 67-967).

- 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?

The maritime hypothecation registered in the underlying register of a ship that has been bareboat chartered in under the French flag may be recorded in the file of the ship (*fiche matricule*) and on its registration certificate, if it is so requested. This recording is only for information and has no legal effect of its own. Recording a maritime hypothecation under French law is not allowed in such case (see article 219.III and 219 bis.II bis of the *Code des douanes* (French customs code)).

- 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?

Yes, a French flag vessel may be bareboat chartered out in another jurisdiction in the name of a demise charterer, even when a maritime hypothecation is registered under French jurisdiction. The consent of the maritime hypothecary creditor is required.

- 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.

According to Art. L 5111-1 *Code des transports* a vessel is identified by her name, her home-port, her nationality and her tonnage. So as to fly the French flag, the vessel shall meet the criteria of art. 219 *Code des douanes* (that fully conforms EU Law). The most significant requirements are :

- Compliance with safety rules ;
- Regular building or regular importation within the EU customs territory ;
- Present EU ownership as defined, or future EU ownership through the exercise of an option at the end of a leasing operation ;
- Bareboat chartering by EU Charterers ;
- Effective nautical management from France or from EU.

French Law has not created a unique category for the registration of assets employed in off-shore oil and gas exploration, production, processing and storage. Either the asset meets the criteria of the French Register and she shall be registered accordingly, i.e. drilling vessels or supply vessels ; or it meets the criteria of Statute 68- 1181 (Loi n° 68-1181 du 30 décembre 1968 relative à l'exploration du plateau continental et à l'exploitation de ses ressources naturelles), e.g. a fixed platform. However, these assets that are not vessels may be assimilated to a vessel for matters of liability or, in the scope of this questionnaire for mortgages and liens (Statute 68- 1181, art 8, opening the possibility for a lien or an hypothecation).

3 FORMALITIES FOR MORTGAGE REGISTRATION

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

The information that is required under French Law is related to the vessel and her ownership, so as to secure creditors. It is not needed to evidence the obligations secured nor to set out in details the circumstances giving rise to a right of enforcement. In a Civil law system, it belongs to the creditor to safeguard the required evidence as to the origin of his contractual rights. Legal publicity is simply there to make known that a maritime hypothecation has been registered over the vessel to the benefit of a certain creditor. For entry in the register, one must deliver to the *Conservateur des hypothèques* an original of the mortgage agreement with a form entitled "*bordereau d'inscription maritime*" which contains the information listed in Art. 17 of the 1967 Decree, namely date and form of the maritime hypothecation agreement, amount secured by the maritime hypothecation, details of the vessel.

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

In a Civil law perspective, and strictly understood, a *maritime hypothecation* (This wording is highly preferable to that of *mortgage* that refers to a purely Common Law concept) neither needs to be legalised nor notarised. At least, it shall be in writing, executed by Parties and established in as many originals as parties or legal publicity reasons. However, it is frequently notarised.

Once it has been concluded, the maritime hypothecation shall be published so as to be opposable to third parties. In civil law jurisdictions, such as France, legal publicity is a distinct step from that of the making of the deed.

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

According to the article 254 *Code des douanes* (French Customs Code), the registry fees in order to have a mortgage registered against a vessel is 0,05% of the debt giving rise to mortgage.

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

The registration of the maritime hypothecation shall not be done in a given period of time, let alone the unfortunate consequences of the death of the shipowner or its insolvency. Once registration has been performed, it is not indefinite. After ten years, according to art. 248 *Code des douanes*, it does not have anymore effect.

- 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.

According to the articles 15 and 18 of 1967 Decree (*Décret n°67-967 du 27 octobre 1967 relatif au statut des navires et autres bâtiments de mer*) the mortgage of a vessel has to be registered in the ship register and in a special register hold by the mortgage registrar.

4 INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS

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

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

No. Any person having an interest in knowing the situation of the vessel may file such a request to the Homeport Customs office. Some practical difficulties may however arise when the request is not filed by a legal professional.

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

Not directly. However, according to Art. 253 *Code des douanes* recently modified by *Statute 2016-816 on Blue Economy*, the State is liable for any damage resulting from a fault committed by the administration in charge of maritime hypothecation.

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

A few days

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

There is no obstacle to the sale unless the maritime hypothecation has been published.

5 ARREST OF A CHARTERED VESSEL

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

Yes

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

The maritime hypothecary creditor may incur liability under the legal regime of abusive arrest. As far as the C/P is concerned, it only produces effects between the shipowner and the charterer under Privity of contract. The maritime hypothecary creditor is not bound by the C/P provisions.

- 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?

Frequently, Cargo interests quickly unload the vessel once they have been informed by the Captain about the perspective of a judicial sale of the Vessel. However, the discharge of the cargo is not required by Statutes.

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?

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?

Once a maritime hypothecation is registered, the consent of the first maritime hypothecary creditor is not required so as to allow a new registration.

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

In a legal publicity system such as the French one, it is the order of registration that determines the priority between maritime hypothecary creditors (Art. 247 *Code des douanes*).

- 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. In a legal publicity system, there is no such thing as a doctrine of notice relying on private notification. It is the registration of hypothecation that gives it effect to the third parties.

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

Yes. However, in a legal publicity system, a second rank maritime hypothecary creditor cannot bypass a first rank maritime hypothecary creditor. Although a second rank maritime hypothecary creditor may trigger first enforcement remedies, he will have to comply with *droit de preference* to the benefit of the first rank maritime hypothecary creditor that will be paid first at the end of the day.

- 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.

There is no system of registration of *privilèges maritimes* (so called liens) that are created by statute to the benefit of specified creditors. It must also be underlined that under French Law, liens may not be created under contract.

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?

French law makes no distinction, as regards enforcement, between the possibility to enforce a maritime hypothecation registered under French law and a maritime hypothecation or mortgage registered under a foreign law. Article 2147 (newly revised) Civil Code (that requires hypothecation contracts over properties located in France to be made in France) is not applicable to maritime hypothecation.

- 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?

So as to be able to enforce its rights, the maritime hypothecary creditor shall have an enforcement title, prior to the delivery of summons to pay. The usual option for the creditor is a Court decision on the merits of its claim (*Navire Biladi*). But it could well be any other enforcement title under the laws of France, e. g. an arbitral award or a mediation settlement thereafter controlled by the Court. Another possibility for the creditor could be to get a *European Enforcement Order* under Regulation EC 805/2004. This is a certificate which enables judgments, court settlements and authentic instruments on uncontested claims to be recognised and enforced automatically in another Member State, without any intermediate proceedings.

- 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?

Not applicable.

- 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?

According to art. 7 of the *1952 Arrest Convention*, the French Courts accept jurisdiction over the merits of the claim that has triggered the arrest, unless a jurisdiction clause has elected another forum. As far as domestic case law is concerned, there are more nuances. In principle, such jurisdiction shall not be established (*Navire Ganvié*) as there is *no forum arresti*. However, jurisdiction could be established if the action is an action on validity.

8 JUDICIAL DECISIONS AND APPEALS

Presently, the restatement of the Code des transports is being carried out as regards decrees. It therefore will be made reference to older decrees that shall be soon consolidated

- 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?

For the arrest of vessels, there is no such thing as specialized admiralty courts. Traditionally, according to art. 36 of 1967 Decree (*Décret n°67-967 du 27 octobre 1967 relatif au statut des navires et autres bâtiments de mer*), such jurisdiction belonged to the President of the *Tribunal de grande instance* vested with territorial jurisdiction, that is, practically, the Tribunal of the port.

- 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?

So as to affect the sale of a vessel, 8 stages have to be followed :

Delivery of a summons to pay to the debtor
 Report of seizure ;
 Notification of the Report of seizure to the services of the port and to the flag State consul
 Mention of the Report of Seizure in the Register
 Issuance by Conservateur des hypothèques maritimes of a state of registrations
 Notification to registered creditors
 Auction
 Contestations
 Payment, and distribution of the price among creditors.

- 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?

According to article L5114-24 Code des transports, the sale is ordered by a judgement that defines the conditions for the auction.

9 SALE PROCEDURE

Presently, the consolidation of the *Code des transports* is being carried out as regards decrees. It therefore will be made reference to older decrees that shall be soon restated.

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

The Arrest (*saisie conservatoire*) being usually efficient, it is very rare that a *saisie-vente* is asked for. Nevertheless, as a first step, a maritime hypothecary creditor shall apply for a judicial sale by auction, after having issued a summons to pay (*commandement de payer*).

- 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?

The criterium is that the creditor has a title. Formalities shall be followed. A *procès-verbal de saisie* shall be issued containing 8 compulsory mentions among which the summons to pay, the identity of the hypothecary creditor, the designation of the Tribunal that shall organise the sale by auction, the identity of the shipowners, the name and registration of the vessel... Two judgements shall be delivered in a succession, the first on setting the criteria of the sale by auction to be organized and the second one auctioning the vessel.

- 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?

- 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?

Yes a minimum bid price is defined by the Court. If the maximum amount bid for the vessel is lower than the reserve price, then a new sale is organized with a lower bid price.

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

There is a contradictory debate on the amount of the reserve price before the judgment is delivered

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

Article 42 & 43 of the former 1967 Decree required publicity to be given to the auction through the display of posters upon the mast of the vessel, upon the main door of the Court, upon the place where the vessel is berthed, upon the "Chambre de commerce" and the Customs office. Advertisement may also be published in newspapers

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

The best way to influence the timetable is to obtain a title as soon as possible, for example a European Enforcement Order or an interlocutory injunction. Article 45 & 46 of the former 1967 Decree also define the stages that influence the timetable. Claimant, and then Defendant have, each, a 3 days delay to set forth their arguments. Once the auction has been organized, objections are barred after a 3 days delay.

- 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?

Out-of-court sales might be asked for. However, they are not private sales.

- 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?

The general provisions of the Civil Code (Art. 1347 newly revised Civil Code) regulating set-off are not applicable.

10 SALE PROCEEDS

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

The proceeds of the sale will be held in an account at the *Caisse des dépôts et Consignation*.

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

The sale proceeds are held in the currency of the sale, i.e. in Euros.

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

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?

The French case law decides that, although the existence of the maritime hypothecation or that of the privilege shall be verified under the *lex contractus*, the priority shall be determined *lege fori*. (*Navire Nobility*).

11.2 If local law, where does the mortgagee rank amongst other maritime claims in the order of priority and which are those claims which rank prior to the mortgagee. Do the claims which rank ahead of a mortgage in your jurisdiction vary depending on whether the mortgage is:

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

According to the French domestic legal regime, *Privilèges maritimes* (So called *liens*) have priority over *Hypothèques maritimes* (Maritime Hypothecations). This order of priorities is defined by legislation and implemented by Courts (*Navire Belostrov*). There is no rule establishing *per se* any discrimination depending whether the hypothecation was registered in France or abroad.

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

Being a founding Member of the EU, the French Republic has not established any special rules giving priority to local creditors due to their nationality.

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

The auctioneer of the vessel shall summon the creditors to appear before the Court. They then have three days to object the transfer of the proceeds of the sale (*Navire Partner*). If an agreement has not been found between creditors, creditors have a supplementary delay of 3 days to submit their title of claim.

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

In case of disagreement between creditors, the Tribunal decides the order of priorities (*Navire Stainless Lord*). This decision, which might take several months, may be appealed within 8 days. The order of priorities and the amount due to each creditor is definitively set either after the expiry of the delay to appeal or after the appeal decision.

11.6 Is the distribution order decided by the court?

The distribution order is decided by Court as explained.

11.7 Is that order subject to a right of appeal?

The decision is subject to a right of appeal (*Navire Biladi*).

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.

Maritime Hypothecation is, in essence, different from Mortgage since it does not vest the maritime hypothecary creditor with self-help remedies. The maritime hypothecary creditor is no mortgagee and shall not, from its own move, take possession of the vessel, nor appoint a receiver, nor sell the vessel as mortgagee or as attorney in fact of the owner.

Having said that, some Court decisions have admitted that the mortgagee under English Law could take possession of the vessel exerting the prerogatives of a mortgagee. (*Navire Heavenly Daze*).

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?

It is well established that enforcement procedures are exclusively regulated by the *lex loci executionis*. It is equally well established that the jurisdictions of the *forum loci executionis* have exclusive power (Art. 24 § 5 Brussels I regulation recast). As a result, if a vessel registered in a legal system recognising Mortgage, happens to be located in France, the mortgagee shall not use its prerogatives.

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?

The answer would be no different since in the EU, the jurisdictions of the place of enforcement are vested with exclusive jurisdiction, thus barring enforcement of any putative foreign judgement.

13 INSOLVENCY PROCESSES

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

Regulation (EU) 2015/848 on insolvency recast may be considered as an advanced enactment of the UNCITRAL Model law on Cross-Border Insolvency since it coordinates main insolvency proceedings and secondary insolvency proceedings.

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)

Art. 19 of the Regulation states that « *Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings* ».

Conflict of Laws Rules also give effect to extra EU insolvency proceedings.

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

Art. 8 § 1 of the Regulation states that : « *The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings* ». Nevertheless, article 14 of the Regulation states that « *The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept* ». The general view of French Law might be thus summarized : Insolvency proceedings are an obstacle to enforcement measures the effect of which has not been fully and timely realized since the collective interest shall prevail over individual interests.

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)?

The answer shall be no different within the EU. Outside of the EU, the foreign judgement would produce effect subject to *exequatur*. It could then retroact.

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?

If insolvency proceedings have been opened against the shipowner, the ship of which is one of the main assets allowing the pursuit of activity and business, it is highly probable that the shipowner himself (if not divested) or agencies of the bankruptcy will oppose judicial sale, insolvency proceedings taking precedence over a putative judicial sale. As far as "*procédure de sauvegarde*", which is the first step without any divestment of the CEO, no payment shall be made to creditors for claim arisen before the insolvency judgement (Art. L 622-7-I al. 1er *Code de commerce*). Moreover, article

L622-13 tries to favour continuation of contracts. Art. L 622-30 al. 1 *Code de commerce* further prohibits new hypothecations after the "*jugement de sauvegarde*". As far as the second step, which is known as "*redressement judiciaire*", the CEO's power are more regulated. On top of that, art. L 632-I, § 7 holds for voidable any hypothecation contracted during the period coming just before "*redressement judiciaire*". Finally, the vessel shall be auctioned in the perspective of a failure of "*redressement judiciaire*", when the shipowner is liquidated.

- 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)?

The answer shall be no different within the EU.

- 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?

French insolvency law contains claw-back rules for transactions prior to insolvency, for example art. L 622-21 *Code de commerce* that interrupts or prohibits any individual claim that would order the debtor to pay any sum of money. This is a mandatory rule that is applicable *sua sponte*.

- 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)?
- 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?

According to article 2 § 9 iv of the Regulation, « *the Member State in which assets are situated* » means, in the case of: « *property and rights, ownership of or entitlement to which is entered in a public register other than those referred to in point (i), the Member State under the authority of which the register is kept* ». This means that a vessel registered in France could be deemed to be located in France, whatever her actual location is.

14 LEASING

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

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

Yes, finance leasing ("*credit-bail*") is a very standard way of financing vessels.

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

The two approaches are combined : the formalism of the contract (*contrat de credit-bail*) as well as the security interests are determining the characterization. Indeed, the leasing is part of the law and not subject to rulings but there are strict rules in terms of repartition of costs and charges which qualifies a finance lease vs. an operational lease.

- 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.

- 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?

Rights and remedies can indeed be expanded by contracts.

- 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?

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.

- 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?

Both. For the Lessor: it is a legal ownership as the Lessor holds a title on the asset. For the Lessee, this is an economical ownership so that the accounting rules impose a consolidation of the asset into the balance sheet.

- 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?

Insolvency process is a case of default (*cas de déchéance du Terme*) and would allow the Lessor to Terminate the Lease or substitute the defaulting lessee.

- 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?

Theoretically the Lessor may arrest a vessel but usually it will be done through the Long term lenders to the Lessor, which are usually the same banks which have arranged the lease.

- 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?

It depends the way the Lessor's interest are secured. Usually its debt (Tax allowance) is secured within a First Priority Mortgage together with the Long Term Lenders. The lessor will then rank *pari passu* with the mortgagee banks.

- 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.

Registered Leases are recognized as long term debts by our Jurisdiction.

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

No.

15 RESERVATION OF TITLES

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

Once a creation of practitioners, the "clause de reserve de propriété" is now explicitly recognized by *Code civil* over moveable assets (Art. 2367 Code civil). Reservation of title clauses are thus frequently stipulated for the sale of propelling systems or other moveable equipment to be later integrated into the vessel. But, the reservation of titles was also extended beyond moveable assets to real estate (Art. 2273 al 2 Code civil). The person benefiting from the reservation of title is deemed to be in a better position than the ordinary holder of a security interest.

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

It should be noted that under French Law, the reservation of title has effect on third parties even in the absence of legal publicity ("publicité légale") or registration. Indeed, reservation of title is not mentioned as compulsory in Art. R313-10 *Code monétaire et financier* that only deals with leasing. However, in theory, there is no obstacle to optional registration.

- 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?

- 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 recognized.

A foreign reservation of title arrangement shall be recognized in France provided it was validly set up in its country of origin and provided its implementation is carried out conforming French Law. This cumulative application of the law of the country where the arrangement was made and the law of the country where the asset is located, which frequently is the *lex concursus* in case of insolvency, gives full effect to the *lex concursus*.