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SHIP FINANCING SECURITY PRACTICES

RESPONSES OF THE ITALIAN MARITIME LAW ASSOCIATION TO THE QUESTIONNAIRE ON SHIP FINANCING SECURITY PRACTICES¹

1 MARITIME AND OTHER CONVENTIONS

1-1 Has your jurisdiction ratified the 1952 and/or the 1999 Arrest Convention or neither?

Italy is a signatory of the 1952 Brussels Convention (“1952 Convention”), ratified in 1979 with the reservation to: (i) apply the national law and not the 1952 Convention to the maritime claims under article 1 (o) (disputes as to the title to or ownership of any ship) and (p) (disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship); and (ii) not to apply first paragraph of article 3 to the arrest granted in its territory for the maritime claims secured by mortgages or hypothecation .

The 1999 Arrest Convention has not been ratified yet.

1-2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest of a vessel?

Italy is a signatory of the 1952 Convention according to which a vessel can be arrested for any of the maritime claims provided by art.1 of said Convention, while made the reservations mentioned above.

In addition to the above, a vessel may be arrested in Italy to satisfy any other credit or claim for debt of a contractual or non - contractual nature whether the vessel is owned by the debtor. However, in these cases, the applicant must prove the “*periculum in mora*” (i.e. the risk of the irreparable damage to the applicant in case the arrest is not granted). For instance, a vessel may be arrested in Italy for claims arising from insurance premium even if insurance premium are not included into the “maritime claim” list under 1952 Convention.

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Italy is a signatory of the 1952 Brussels Convention (“**1952 Convention**”), ratified in 1979 with the reservation to: (i) apply the national law and not the 1952 Convention to the maritime claims under article 1 (o) and (p); and (ii) not to apply first paragraph of article 3 to the arrest granted in its territory for the maritime claims under article 1 (q).

The 1999 Arrest Convention has not been ratified yet.

1-3 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest of a vessel?

Italy is a signatory of the 1952 Convention according to which a vessel can be arrested for any of the following maritime claim:

- (a) damage caused by any ship either in collision or otherwise;
- (b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- (c) salvage;
- (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
- (f) loss of or damage to goods including baggage carried in any ship;
- (g) general average;
- (h) bottomry;
- (i) towage;
- (j) pilotage;
- (k) goods or materials wherever supplied to a ship for her operation or maintenance;
- (l) construction, repair or equipment of any ship or dock charges and dues;
- (m) wages of Masters, Officers, or crew;
- (n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- (o) disputes as to the title to or ownership of any ship;
- (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.

In addition to the above, a vessel may be arrested in Italy to satisfy any other credit or claim for debt of a contractual or non - contractual nature whether the vessel is owned by the debtor. However, in these cases, the applicant must prove the “*periculum in mora*” (i.e. the risk of the irreparable damage to the applicant in case the arrest is not granted).

For instance, a vessel may be arrested in Italy for claims arising from insurance premium even if insurance premium are not included into the “maritime claim” list under 1952 Convention.

1-4 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?

Yes, under Italian law a mortgagee of a vessel may secure its action by arresting the vessel within Italian Jurisdiction irrespectively of her flag. Indeed, a mortgage legally constituted according to the flag of ship and duly registered in a public register, or central compartment, it is recognized for all purposes also in the other Contracting States of the 1926 Convention on Maritime Liens and Mortgages (“**1926 Convention**”) and takes rank in the after the special privileges of the ship and freight.

1-5 Has your jurisdiction ratified the 1926 and/or the 1993 Maritime Liens and Mortgages Convention or neither?

Italy is a signatory of the 1926 Convention. Conversely, the 1993 Convention has not been ratified yet.

1-6 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 recognized as maritime liens?

Italy ratified the 1926 Convention and Italian Jurisdiction recognize foreign maritime liens. Indeed, the existence of a lien over a ship is determined by the law of the flag, pursuant to Article 6 of the Italian Navigation Code (“CN”).

1-7 Does your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents?

Yes, Italy authorized the ratification of the 1961 Hague Convention which it's in force since August 1978.

2 NATURE OF THE SHIPS' REGISTER**2-1 Is the ships' register in your jurisdiction a register of legal title?**

Yes, it is a register of legal title as provided by Article 250 CN.

In Italy there are three types of Registers:

1. the International Register (*Registro Internazionale*) kept by a *Direzione Marittima* (there is one approximately for each Italian Region boarding the sea),
2. the ordinary Register for vessels allowed to sail on the high seas (*Navi Maggiori*), called “*Matricola*” which are also kept by each *Direzione Marittima*, and
3. the Register for vessels allowed to sail coastwise or intended for harbour services (*Navi Minori*) as well as for barges (*Galleggianti*), called “*Registro*”,

kept by each *Compartimento Marittimo* (there are several within each *Direzione Marittima*) or by the authorized “*Circondari*” (there are several within each *Compartimento Marittimo*).

The International Register was established by Decree-Law 30 December 1997, No. 457 (“**DL 457/1997**”) converted, with certain amendments, into Law 27 February 1998, No. 30 (“**L 30/1998**”).

2-2 Does the ships' register in your jurisdiction (whether or not a register of legal title) provide for registration of the interest of a demise charterer in circumstances where legal title is registered in another jurisdiction (the 'underlying register').

Yes. Temporary flagging in is allowed by article 28 of Decree of the President of the Republic 14 June 1989, No. 234 (“**DPR 234/1989**”) as implemented by the Decree of the President of the Republic 21 February 1990, no. 66 (“**DPR 66/1990**”) for a maximum period of 2 years, which may be extended for further 2 years.

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?

Registration of securities in respect of vessels temporarily registered in Italy is not permitted. Securities must be registered in the underlying register and only a notice thereof is mentioned in the Italian Register.

2-4 Does your jurisdiction allow a vessel registered in the ships register in the name of the holder of legal title also to be registered in another jurisdiction in the name of a demise charterer? If so is such registrations permitted when the vessel is subject to a mortgage registered in the ships' register in your jurisdiction and is the consent of the mortgagee required?

Yes. Temporary flagging out is allowed by article 29 of DPR 234/1989 as implemented by DPR 66/1990. The flagging out is also permitted when the vessel is subject to a mortgage but in such a case the authorization of the mortgagee is required and the signature of the mortgagor shall be certified by a Notary Public.

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.

2-5.1 International Register

Pursuant to Article 1(2) of L 30/1998 three categories of vessels are eligible for registration in the International Register:

- (a) Vessels belonging to Italians or to persons of other EU countries in compliance with the provisions of Article 143 (a) CN;

- (b) Vessels belonging to non EU persons who are entitled to own Italian vessels in compliance with Article 143 (b) CN;
- (c) Vessels belonging to EU or non EU persons registered in a foreign EU or non EU Register under temporary flag suspension following a bareboat charter to an Italian person.

2-5.2 Matricola

Vessels eligible for registration in the *Matricola* are those capable of sailing on the high seas. Pursuant to article 302 of Regulation of Maritime Navigation (“RNM”) such vessels must have characteristics, equipment and crew quarters such as to be suitable to sailing on the high seas; pursuant to Article 303 RNM for the purposes of registration the necessary documentary evidence (plans, certificates, etc.) must be provided to the Port Authority in charge of the relevant *Matricola*.

2-5.3 Registro

Vessels eligible for registration in a *Registro* require also some evidence of their sailing capabilities. With particular reference to the registration of craft employed in offshore oil and gas exploration, production, processing and storage, there are no specific rules under Italian law and it is debatable whether these assets can be considered as Vessel. However offshore rigs are capable to be registered in the *Registro*.

3 FORMALITIES FOR MORTGAGE REGISTRATION

- 3-1 Does a mortgage² in respect of a vessel registered in your jurisdiction need to:**
- (a) attach documents, such as a loan agreement, evidencing the obligations secured?**

No.

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

No. There is no form prescribed by or approved under registration regulations in Italy but the hypothec must, pursuant to art. 565 CN, identify the vessel on which the hypothèque is granted. Additional elements consist in the name of the owner of the vessel, his domicile or his principal place of business, the name of the person in whose favour the hypothèque is granted (the “creditor”) as well as his domicile or principal place of business, the amount secured, the interest thereon, the date or dates of repayment. These elements, in fact, must, pursuant to Art. 569 CN, be mentioned in the application for registration (“Nota di Trascrizione” which is a summary of the hypothèque) and this implies that they must be mentioned in the hypothèque itself.

² In Italian law, as in most civil law countries, security corresponding to the mortgage is the hypothèque

3-2 Does a mortgage in respect of a vessel registered in your jurisdiction need to be notarised and/or legalised?

Art. 565 CN provides that the hypothèque must be granted, under penalty of nullity, by a Notarial deed (“*atto pubblico*”) or simply in writing (“*scrittura privata*”), the signature(s) being certified by a Notary Public (both to be referred to as “Deed of Hypothecation”).

3-3 What are the registry fees in order to have a mortgage registered against a vessel registered in your jurisdiction?

The only document to be produced to the registering authority is a certified copy of the deed accompanied by the “*Nota di Trascrizione*” in two originals one of which is retained by the Ship Registrar and the second one is returned to the applicant with mention of the number of the registration repertory, the date and time of registration.

The costs involved in the execution of a Deed of Hypothecation are the following:

- (a) Notarial fees and costs;
- (b) registration tax on the Deed, such tax being for a fixed amount, at present of € 200.
- (c) stamp duty on the document (€ 16 each four pages).

3-4 Is registration indefinite or is there any requirement for re-registration after a certain period?

According to Art.2847 Civil Code (“CC”) the registration of a hypothec is valid for 20 years and in order to maintain the hypothec in existence for a longer period the registration should be renewed before the lapse of the 20 years period.

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.

No, there are no such registers as far as the hypothèque is concerned, which can only be registered in the Italian ship register. However the hypothèque for vessels allowed to sail on the high seas (*Navi Maggiori*) is to be endorsed also in the “*Atto di Nazionalità*” (Certificate of Registry) which is on board the vessel. It must be noted however that prior to the registration the hypothec as well as any other charges if created or executed in Italy should be registered at the tax office.

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.

Yes, it may be possible to ask an abstract of the vessel's registry with all data relating to the vessel, her ownership, date of registration, registration number as well as the registration of mortgages with all the *Nota di Trascrizione* and/or other recordable encumbrances (such as arrests).

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

No, the registry is public and any person can ask for an abstract

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

No

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

About a week

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.

Pursuant to art. 2889 CC, the provision of which apply also to hypothèques on vessels if not in conflict with the specific provisions of the CN, the buyer of a vessel on which the hypothèque is registered who has endorsed the purchase on the ships register and is not personally bound to settle the claim of the holder of the hypothèque is entitled to release the vessel from the hypothèque by making available to him or to them the amount of the purchase price in accordance with the procedure set out in the subsequent articles or, if the amount of the claim secured by the hypothèque is less than the purchase price, such amount. If instead such amount is greater, the holder of the hypothèque may apply for the forced sale of the vessel.

However recourse to such procedure is rare and what is normally done, in particular where there is only one hypothèque, is to agree with the seller and the holder of the hypothèque that the purchaser pays to the holder of the hypothèque a part of the purchase price equal to the amount due by the seller to the holder of the hypothèque and concurrently with such payment the vessel is released from the security and title to the vessel is transferred by the seller to the buyer against payment to him of the balance of the agreed purchase price.

5 ARREST OF A CHARTERED VESSEL

5-1 Does your jurisdiction allow a mortgagee to arrest a vessel on bareboat charter or time charter?

Yes, under Italian law a mortgagee may secure its action by arresting a vessel regardless the vessel is under bareboat charter and time charter.

- 5-2 Under the Law of your Jurisdiction, could the mortgagee incur any liability in tort, delict (or similar) to charterers or cargo interest if the mortgagee arrest the Vessel when it is subject to charter and/or carrying cargo (on the grounds of interfering with the contractual relations ship between owner and charter or bill of lading holder)?**

No, provided that such arrest is lawful.

- 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 cost and risk of such discharge.**

Under Italian law there are no specific procedures or requirements applicable to cargo on board of the vessel subject to judicial sale. Normally the cargo on board does not belong to the owner and, most likely, it will be discharged before sale of the ship by the cargo holders and at their expense.

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, it is impossible for creditors to “anticipate” the effect of the hypothèque before its actual registration by filing the Deed of Hypothecation together with the Nota di Trascrizione with the relevant Ship Registrar (see above §3.3).

- 6-2 Once a mortgage is registered in your jurisdiction is it possible for a subsequent mortgage to be registered without the consent of the first registered mortgagee?**

Yes, a subsequent hypothèque can be registered without the consent of the first mortgagee but the second hypothèque will rank after the first hypothèque.

- 6-3 When there are two or more registered mortgages what determines their priority?**

The date and hours of registration on the register by the Ship Registrar (as opposed to the date of issuance of hypothèque/mortgage) renders the hypothèque/mortgage opposable to any third party and determines the priority; art. 567 and art. 574 CN so state; the CN mentions also the registration on the Atto di Nazionalità (the document attesting the nationality of the vessel), but scholars consider it as secondary.

Art. 2853 CC provides an exception for the case when two persons appear at the same time for registering hypothèque against the same person and the same

immovable; in such a case the two credits get the same priority and the proceeds of sale are distributed proportionally. This principle should apply also for ship mortgages/hypothèque.

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, the principles mentioned above apply.

6-5 Can a second registered mortgagee exercise enforcement remedies without the consent of the first registered mortgagee?

Yes, however the second hypothèque is postponed to the first hypothèque.

6-6 Does your jurisdiction have a system for registration of security or liens other than mortgages, whether consensual or non-consensual? If so, please describe.

No, other securities, liens or maritime claims cannot be registered.

The fundamental principle governing debtors' liability under Italian law is provided by art. 2740 CC, states that all the debtor's property, present or future, is disposable to meet liability for non-performance of obligations; presently Art. 2447 *bis* CC provides a sort of security in connection to the goods destined to a specific business; in fact only the creditors of that specific business can attach said goods.

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?

Yes. Italian jurisdiction recognizes only the creation of a civil law hypothèque, which is regulated by the CN and the CC. In particular, under Article 2808 CC the civil law hypothèque, which can be granted only voluntary by the debtor, differs from the common law mortgage, particularly that it confers on the secured creditor no immediate right to possession of the property, but only a right against the proceeds of sale of the property after enforcement of the right in judicial proceedings. With regard to the difference in procedure if the vessel to be sold by way of judicial sale is a foreign vessel for instance, reference is only made in Article 653 CN, pursuant to which the request for the sale must be notified to the Consul of the State the flag of which the vessel is flying.

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?

Yes. Under Article 474 of the Italian Code of Civil Procedure ("CCP"), to start the enforcement procedure it is necessary for the mortgagee to obtain an enforceable

title, such being either a judgment, a decision or a deed that is enforceable pursuant to the law or a promissory note, or another credit instrument to which the law confers the same value or a notarial deed evidencing the obligation to pay a sum of money (i.e. an acknowledgment of debt) (see also under §8.2).

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?

If the claim is contested, it will likely take approximately 3 to 5 years to obtain a first instance judgment. It is possible that a second instance and appeal before the court of cassation will follow, and it will take other 5 years for each instance, for a total of 15 years of trial approximately. During this time the local court will do have regard to the ongoing costs of maintaining the vessel and will be inclined to expedite the proceedings.

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?

The court in the Italian jurisdiction will accept jurisdiction for the mortgage claim under article 7 1952 Convention if the vessel has the nationality of one of the Convention States parties.

8 JUDICIAL DECISION 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?

Article 643 CN provides that an enforcement shall be commenced before the court of the district where the relevant vessel lies. There are no special courts in Italy such as the admiralty courts.

8-2 What formalities, including evidence of claim, or evidence of notice, are required to effect the sale of a vessel free of liens and prior claims?

Assuming that the relevant creditor does not hold an immediately enforceable title and assuming that Italian courts are those competent to issue a judgment on the merit of the claim, the creditor in order to promptly start the enforcement proceeding, should meet the requirements set out in Article 474 CCP which requires that the relevant claim is constituted by an indisputable, due and payable receivable and is based on an enforceable title (“*titolo esecutivo*”) such as, *inter alia*, judgements or other measures which the law expressly considers as promptly enforceable or a deed executed before an Italian Notary Public provided that certain requirements are fulfilled (see also under §7.2). For instance, a ship mortgage executed before an Italian Notary Public providing for, *inter alia*, an acknowledgment of the underlying secured debt and bearing the enforcement

formula (“*formula esecutiva*”) is an immediately enforceable title for the purposes of Article 474 CCP. Otherwise, the relevant creditor should, upon the occurrence of an event of default, apply for and obtain an order for payment (“*decreto ingiuntivo*”), pursuant to Article 633 CCP, to be then declared final and binding. Upon obtaining an enforceable title as per above, the relevant creditor must serve a formal demand of payment to the debtor (“*precetto*”). If the debtor fails to pay all the sums specified in the demand within 24 hours of receipt thereof, the relevant creditor is entitled to request (within 30 days of the service of the demand) the attachment of the vessel (“*pignoramento*”). The attachment consists of a service upon the debtor and the vessel’s master whereby the shipowner is ordered by the competent judge to refrain from selling and disposing of the vessel and the vessel’s master is ordered to stop the vessel at the port where she is located when service is received.

8-3 If the owner presents an appeal against judgment, will the court make an order for sale of the vessel before that appeal has been heard and decided?

If the owner presents (i) an appeal against the judgment (prior to the judgment becoming final and binding) or (ii) files an opposition against the order for payment (“*decreto ingiuntivo*”) pursuant to Article 645 CCP within 40 days of the notification thereof, providing for, *inter alia*, the request to suspend the enforcement pending the appeal or, as the case may be, the opposition, the competent court cannot issue any order for sale until a judgment on the appeal or, as the case may be, the opposition has been issued.

9 SALE PROCEDURE

9-1 Can a mortgagee enforce his mortgage in your jurisdiction by applying for a judicial sale by auction?

Yes, a mortgagee can enforce its mortgage by applying for a judicial sale by auction before the competent court.

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?

Provided that the relevant vessel has been attached (“*pignorata*”) as per §8.2 above, in the period commencing 30 days after the service of the attachment and ending 90 days thereafter, the application for the public sale of the vessel can be filed with the court of the district where the vessel lies.

If the application for the public sale of the vessel is duly filed, the court appoints a judge in charge of the proceedings and an expert who appraises the vessel. The expert is granted with a time limit of up to thirty days in order to file the appraisal with the competent court. Once a five-day period of the filing of the appraisal with the competent court has elapsed, such appraisal is reviewed before the judge at a hearing. At the end of such hearing, the judge sets the date for the public sale of the vessel by way of an order of sale. The public sale is made by way of an auction directed by the judge who awards the vessel to the best bidder. In case there are no

bids, the judge may reduce the reserve price by up to 40%; if there are still no bids the judge orders the sale without auction determining the terms and conditions thereof.

Pursuant to Article 664 CN, when the purchase price is paid by the winning bidder, the judge issues a decree whereby title to the vessel is transferred to the purchaser and the competent ships' registry is ordered to delete all mortgages and other registered encumbrances. The purchaser therefore acquires title to the vessel free from any registered encumbrances.

The mortgagee will be paid upon distribution of the proceeds of the sale subject to the full satisfaction of any Italian statutory maritime lien on the relevant vessel having priority over the mortgage, provided that the relevant vessel permanently fly Italian flag. It should be noted in this respect that creditors secured by Italian statutory maritime liens, whose claim is not time barred and that have not intervened in the auction proceeding, can still enforce their claim against the vessel once the relevant property is transferred to the new owner.

The time involved from the application until the sale of the vessel by auction should not exceed one year. However, the time involved may also be affected by, *inter alia*, the type of vessel to be sold at auction and the prevailing market conditions at the time of the sale.

9-3 Will the court in your jurisdiction order a sale of the vessel pending judgment (*pendente lite*), recognising that the vessel is a wasting asset?

A sale of the vessel *pendente lite* has been authorised in few instances where the claimant successfully proved that the value of the vessel under arrest was dramatically deteriorating and the costs (e.g. custody, berth and port dues, maintenance of the vessel and so forth) were much higher than the likely sale value. The proceeds of the sale are of course in this case frozen until the claimant obtains a final and binding judgment.

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?

In the order of sale, providing for, *inter alia*, the description of the vessel, the judge sets the reserve price as provided under the expert's appraisal. Such order of sale is notified to the persons who have not taken part to the hearing, provided under article 655 CN, during which the expert's appraisal is reviewed. Such persons are the debtor owner, the creditor/applicant, the mortgagee(s), other intervening creditors and the consul of the flag state (if the vessel is a non-Italian flagged vessel).

The public sale is made by way of an auction directed by the judge who awards the vessel to the best bidder. A price lower than the reserve price will not be taken into consideration. Therefore, if there are no bids or these are lower than the reserve price, the judge may reduce the reserve price of up to 20% from time to time. Once the reserve price has been reduced of 40% and provided that there are still no bids or these are lower than the reserve price, the judge can order the sale without auction determining the terms and conditions thereof.

9-5 Can the owner or other creditors influence the amount of the reserve price?

The debtor owner and the creditors may try to influence the amount of the reserve price at the hearing, provided under Article 655 CN, during which the expert's appraisal is reviewed.

9-6 What arrangements will be made for public advertisement of the sale?

Article 657 of the Italian Navigation Code provides, *inter alia*, that the order of sale shall be recorded on the attachment ("*pignoramento*") and published on the legal announcements' sheet. A copy of the order is also advertised, at least ten days prior to the sale, in a special register held at the chancellor's office of the competent court. The judge in charge of the enforcement may also order other arrangements for public advertisement of the sale that he deems appropriate (e.g. a notice on Italian and foreign shipping press).

9-7 To what extent is it possible for the owner or other creditors to influence the timetable or procedure for sale?

Articles 667, 668 and 669 CN provide the possibility to influence the timetable or procedure for sale by, respectively, (i) allowing the debtor to challenge the right of the claimant to enforce its claims over, or to attach ("*pignorare*"), the vessel (or any of the relevant shares ("*carati*")); (ii) allowing the debtor to challenge the formal validity and notification of the enforceable title ("*titolo esecutivo*"), the formal demand of payment ("*preccetto*") and each single act of the enforcement; and (iii) allowing any third party to challenge the enforcement provided that (a) the sale of the relevant vessel still has to take place and (b) such third party claims to be the owner of, or the holder of a right in rem over, the relevant vessel.

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?

No, a mortgagee cannot enforce its mortgage in our jurisdiction by applying for a court approved private sale. The only recourse for the mortgagee in our jurisdiction is to arrest the vessel and apply for a foreclosure sale at public auction in pursuance of the claim.

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 buyers) have to pay the full price in cash?

A judgment of the court of Naples excluded the possibility for any creditor (including the mortgagee(s)) to request to the competent court the assignment of the vessel in satisfaction of the relevant claim as enforcement proceedings concerning vessels, according to such court, are governed exclusively by the provisions of the CN and/or the provision of the CCP expressly referred to in the CN. Indeed, the provisions of CCP providing for the assignment of an asset in satisfaction of the claim of the applicable creditor are not expressly referred to in the CN. Therefore, a mortgagee (or its preferred bidder or buyers) has to pay the full price in cash.

10 WILL THE SALE PROCEEDS BE HELD IN AN INTEREST BEARING ACCOUNT?

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

Article 656 CN allows the competent court to discretionally set out terms and modalities of the payment of the sale price. Therefore, it is not possible to exactly predict what such terms and modalities of payment will be. However, it has happened in practice that the competent court has ordered the transfer of the sale proceeds into an interest-bearing bank saving book (“*libretto di deposito bancario*”). Furthermore, please note that the sale proceeds shall always be converted into local currency (i.e. Euro).

Moreover, pursuant to Article 656 CN, the estimated amount of the expenses relating to the auction and the registration of the decree whereby, *inter alia*, title to the vessel is transferred to the purchaser shall be transferred on top of the deposit to be paid by each bidder in order to participate to the auction sale. Therefore, such expenses shall not be deducted from the sale proceeds once these are paid out.

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

The proceeds of sale shall not be subject to any exchange control or similar restrictions. Payments to the creditors are made on the basis of payment orders issued by the competent court at the request of the interested party/ies. It is not possible to predict the likely timetable for obtaining permission to remove the funds as this may vary depending on the court involved and the relevant workload.

11 PRIORITIES GENERALLY

11-1 Are priorities determined under local law (*lex fori*), or the law of the jurisdiction in which the claim arose (*lex causae*), or the law of the flag of the vessel?

Priorities are determined by 1926 Convention; in other cases art. 6 CN provides that the law of the flag of the vessels applies.

11-2 If local law, where does the mortgage rank amongst other maritime claims in the order of priority and which are those claims which rank prior to the mortgage? 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?**

If the Italian law applies, the maritime claims mentioned by Article 552 CN only have priority over the mortgage. Maritime claims under Article 552 CN are mainly the same as those listed by the 1926 Convention on maritime liens and mortgages:

- 1) judicial expenses of the State or made in favour of all creditors for arresting/conserving the vessel, anchorage / lights / harbour dues and similar dues, pilotage expenses and costs for conserving the ship at the last port;
- 2) crew and master's wages;
- 3) expenses anticipated by the State for victualling and repatriating the crew, credits for compulsory contribution to pension system;
- 4) salvage rewards and sums due by the vessel as contribution to general average;
- 5) sums due to collisions, hits, casualties occurred during the navigation, damages to ports, yards and navigable ways, indemnities due to passengers and crew for death or personal injuries, loss or damage to cargo and baggage;
- 6) claims resulting from contracts entered to by the master for conserving the ship or continuing its voyage.

If a foreign law applies, the priority depends on what the law of the different jurisdictions provides.

11-3 Are there any special rules on priority for local creditors?

No, local creditors are subject to the same rules applying to foreign creditors

11-4 Is it necessary for claimants to introduce their claims prior to the date of sale or within some specified period thereafter?

As per 566 CCP claimants assisted by *hypothéque*/mortgage participate to the distribution of the proceeds of judicial sale provided they intervene in the enforcement procedure before the hearing that under art. 596 CCP takes place for the approval of the plan for distribution of proceeds.

11-5 What is the timetable leading up to the distribution of the proceeds of sale?

For vessel's judicial sales Article 649 CN and following articles provide that the attaching creditor (after 30 days from the attachment of the vessel and within 90 days) can demand the sale of the vessel.

Upon filing before the Court of the dossier the Judge schedules a deadline for filing the expert valuation; this has to be done within 30 days from the Judge's order. Within 5 days from the filing of said evaluation the Judge orders the sale of the vessel.

In case the first sale at auction does not succeed several further auctions shall take place reducing the price of 20% each up to a price amounting to 40% of the evaluation price. In such a case the Judge orders for a sale without auction (ie by private treaty).

Obviously the time of the sale depends a lot from the commercial issues at stake.

The first sale at auction - if no complications occur - takes place some 6 months after the sale is demanded.

11-6 Is the distribution order decided by the court?

Yes, if the judicial sale procedure is supervised directly by the Judge. As per art. 591 *bis* CCP the judicial sale procedure can be delegated to an expert (a notary, a lawyer or an accountant) appointed by the Tribunal, in such a case the distribution order is prepared by the expert and approved or amended by the Judge.

11-7 Is that order subject to a right of appeal?

Yes, Article 512 CCP refers to the Judge in charge of the judicial sale procedure the decision of any dispute arisen in respect on the distribution of proceeds. Said decision can be appealed before the Tribunal.

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.

As a general principle, under the Italian law self-help remedies are not allowed, and therefore in case of non-cooperation of the counterparty, a judicial proceedings is

required. None of the self-remedies listed above are consequently allowed within the Italian jurisdiction.

12-2 If, under the law of the ships' register (where that is a different law from the law of your jurisdiction) a mortgage is given the right to take the enforcement steps referred at a) – d) of 12.1 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?

Such right is prohibited in case the vessel is physically located in Italy. Article 643 Code of Navigation, in fact, provides that the expropriation (or “forced execution”) must be conducted before the Court sitting in the district where the ship is located. Italian law and procedure will be applicable therefore.

12-3 Where answers to the questions in 12.2 are negative would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?

Any foreign judgment relating to the mortgage must be declared enforceable by the relevant Italian Court of Appeal, upon specific petition filed by the mortgagee. If declared enforceable by the relevant Italian Court of Appeal, enforcement proceedings under the Italian Code of Civil Procedure and Italian Navigation Code should be commenced. Also in this case, therefore, the above listed self-help remedies will not be recognized.

13 INSOLVENCY PROCESSES

13-1 Has your jurisdiction adopted the UNCITRAL Model Law on Cross-Border Insolvency?

No. In Italian jurisdiction is applicable either the EU Council Reg. 1346/2000 on insolvency proceedings (“**Reg. 1346/2000**”), or the general conflicts of law rules.

13-2 Do the laws of your jurisdiction provide for recognition of foreign insolvency proceedings? (if the UNCITRAL Model Law has been adopted, in addition to its provisions).

Yes; the recognition is automatic for decisions related to insolvency proceedings of other EU Member States (Article 16, Reg. 1346/2000).

13-3 Do the laws of your jurisdiction provide that the enforcement of rights of secured creditors (such as the mortgage of a vessel) can be stayed or suspended during applicable insolvency proceedings?

Yes. The enforcement must be suspended in case an insolvency process is commenced during the enforcement and must be stayed when the insolvency process is commenced (Article 51 Bankruptcy Law).

13-4 Is the answer to 13.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Yes. It could be different according to the applicable law provisions of Article 4 Reg. 1346/2000.

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 a vessel is subject to insolvency proceedings in your jurisdiction, do the maritime court sale proceedings take precedence over insolvency proceedings, or vice versa?

Viceversa. The insolvency proceeding in Italian jurisdiction take precedence (Article 4.1 Reg. 1346/2001).

13-6 Is the answer to 13.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

If the insolvency proceedings originate in one of EU Member State under Reg. 1346/2000 it is subject to the law applicable of the state in which the proceedings has been opened. However, according to Article 5 Reg. 1346/2000 the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another member State at the time of the opening of the proceedings. In any case, according to Article 26 of Reg. 1346/2000, a member state may refuse to recognise insolvency proceedings opened in another Member State or to execute e judgement where a recognition or enforcement would be manifestly contrary to that State's public policy.

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?

Yes if it is so provided by the law of the State of the opening of the proceedings (Article 4 and Article 18 Reg. 1346/2000). Yes in case of application of Italian law (Article 67 Bankruptcy Law par, 3-4).

13-8 Is the answer to 13.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Yes, It could be different in case of insolvency proceeding opened in a NON- EU Member State.

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?

Yes according to Article 4-5 of Reg. 1346/2000.

14 LEASING

14-1 In your jurisdiction is leasing of vessels common as a method of financing?

Yes it is.

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)?

No, is not characterised as security interests.

14-3 If the of your jurisdiction adopt a functional approach 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.

It depends on the interpretation of the contract i.e. which was the real intention of the parties in the agreement : a financing operation or a sale operation (passage of property).

14-4 Do the Law of your jurisdiction permit the parties to the lease of a vessel governed by that law to expand by contract the rights and remedies of the lessor on default by the lessee? Or are such rights and remedies provided for exclusively by law?

The rights (usually the ones of the lessor) might be expanded by contract; this is not for the e remedies because they are only the ones provided by the law.

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?

No self help remedies are not admitted. It is possible with the assistance of the Court , i.e. through by remedies provided by the law only.

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?

It is an asset of the lessor.

14-7 Under the laws of your jurisdiction what impact would an insolvency process (or different processes) in respect of the lessee have on the rights and remedies of the lessor of a vessel? Is this affected by the type and terms of the lease?

According to Article 72-quater Bankruptcy Law, in case of declarations of insolvency of the lessee, the leasing contract is terminated in advance. The lessor must join the insolvency proceeding for its credits against the 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 third party?

Yes.

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 ?

Maritime liens prevail.

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.

Yes.

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 law of your jurisdiction treat the holder of title under reservation of title as the 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.

The questions must be treated jointly and the answer is No. According to Italian Law, the reservation of title falls within the provisions of the civil code relating to the sale with reserved ownership, which is ruled within the contest of the Sale Contract and the various different models therein included (Articles 1520, 1521, 1527, 1531 CC). In this respect Article 1523 CC named “Passage of ownership and risks”, provides that: “*In instalment sales in which ownership is retained by the vendor, the buyer acquires ownership of the thing upon payment of the last instalment of the price, but he assumes the risks for the time of delivery*”. According to the subs art. 1524 CC, reservation of ownership by the seller can be set up

against creditors of the buyer only by a written document bearing a certain date (par.1) ; the provisions relating to movables registered in public registers are unaffected (par.3)

Article 1963 CC named “prohibition of foreclosure agreement” provides that “*Any agreement is void, even one subsequent to the making of the contract, which provides that the ownership of the immovable shall pass to the creditor in case of default in the payment of the debt*”. Moreover the same provisions can be found in the Article 2744 CC where any agreement which provides that ownership of the asset with mortgage/pledge shall pass to the creditor is void even if is done after the creation of the mortgage /pledge.

Sale with reserved ownership is a contract of sale, a security interest if provided in the agreement is void according to Article 1963 (and 2744) CC

15-3 If the laws of your jurisdiction do provide for reservation of title arrangements to be registered as referred to in 15.2, What rights and remedies are given to the holder of title?

If the reservation of title arrangement is valid, the risks on the vessel pass on to the buyer, but the seller is still the owner until the full payment of the sale price. In case of Buyers’ default the Seller can either seek the full payment, or terminate the agreement (returning the partial payments received and subject to special conditions – see art. 1525 and 1526 cod. Civ.)

15-4 Do the laws of your jurisdiction recognise foreign reservation of title arrangements of a type referred to in 15.2? If so please give brief details of how these arrangements would be recognised.

Italian law recognises foreign reservation of title arrangement, provided that they are not considered contrary to public policy; however there is a decision of Italian Supreme Court for which a foreign foreclosure agreement which is regulated by foreign law (i.e. English law) cannot be considered contrary to the international public policy in the light of art. 16 of Law 218/1995 on international private law (Supreme Court of Cassation 5.7.2011 n. 1460).

16 DOES A MORTGAGE REGISTERED IN YOUR JURISDICTION EXTEND BY LAW TO THE INSURANCE POLICIES IN THE EVENT OF A CASUALTY AFFECTING THE VESSEL?

Article 572 CN provides that in case the vessel is lost or damaged the insurance indemnities should be paid to the mortgagee unless used for repairing the damages suffered by the vessel.

Therefore if said indemnities are not used for that purpose, they are due to the mortgagee, while if they are used for repairing the vessel, they are due to the shipowner/mortgagor.

The mortgagee should step into the owners/mortgagor rights for having his status recognized; the loss payable clause (that is always agreed as between insurers and shipowner assured when there is an hypotheque/mortgage on the vessel) deals with this.