

## Japan Maritime Law Association

### Responses to the Questionnaire by CMI International Working Group on Ship Financing Security Practices

Disclaimer: This document is provided for informational purposes only and should not be construed as legal advice on any subject matter.

#### 1 MARITIME AND OTHER CONVENTIONS

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

[A] Japan has ratified neither.

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

[A] Any claim can.

1.3 In particular, can arrest be made:

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

[A] Yes.

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

[A] If the existence of the mortgage is affirmed under the governing law (to be determined by the private international law of Japan), yes.

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

[A] Japan has ratified neither.

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?

[A] Yes, Japan recognises foreign maritime liens subject to the private international law of Japan. Courts tend to apply Japanese law as *lex fori* to determine whether a type of maritime claim is secured by a maritime lien. (Tokyo District Court, 19 August 1991, *Hanrei Jihô* no.1402, p.91; Tokyo District Court, 15 December 1992, *Hanrei Times* no.811, p.229. see also the unreported case of Hakodate District Court in 2011, cited in Y. Takase, *Kin'yu Hômu Jijyô* no.1941, p.116).

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

[A] Yes. Japan ratified the Convention in 1970.

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<sup>1</sup> The term 'arrest' is used throughout for convenience but it is acknowledged that this may not be a concept known to the laws of all jurisdictions. If in your jurisdiction the equivalent concept is attachment or something else, please briefly explain.

## 2 NATURE OF THE SHIPS' REGISTER

2.1 Is the ships' register<sup>2</sup> in your jurisdiction a register of legal title?

[A] There are two registers for ships under the Japanese law. One is administered by the Ministry of Land, Infrastructure, Transport and Tourism and is a register for certifying the Japanese nationality. The other is administered by the Ministry of Justice and is a register of legal title. (In the following answers, the "ships register" refers to the second type of register (that of legal title) unless remarked otherwise.)

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').

[A] No. The register (of legal title) only accepts registration for ships having the Japanese nationality.

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?

[A] N/A.

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?

[A] No.

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.

[A] This is not defined in statutes. The prevailing view is that the ship subject to registration is what is generally considered as a ship. A dredger is not a ship, as it has no propeller. (Art.2, Ministerial order to implement the Law on Ships.) Offshore drilling equipment or floating unit for exploration, production, processing and storage is not generally considered as a ship.

## 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?

[A] While the agreement to create a mortgage is required, the loan agreement is not necessary for registering a mortgage in respect of a vessel.

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

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

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<sup>2</sup> The term 'ships register' means a specialist register only for ships.

[A] No.

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

[A] The registration fee is 0,4% of the amount of the secured claim. (No.1 (5) of Annex 1 to the Act on Registration Fees.)

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

[A] The registration is valid indefinitely.

- 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.

[A] Registration only in the ship's register (of legal title) suffices.

#### **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?

[A] No. Anyone can have access to the information in the ship's register and acquire a certificate of registered information. A fee is applicable. (art.33 (1), the Ministerial Order for Ship Registry.)

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

[A] It is certified that the information accurately reflects the registration made. Whether the registered information is true or not is not checked or certified.

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

[A] A certificate is issued on the spot, as long as the procedure is duly complied with.

- 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.

[A] Yes. The purchaser acquires the ownership of the vessel subject to registered security interests.

#### **5 ARREST OF A CHARTERED VESSEL**

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

[A] Yes, unless the bareboat charterer is registered prior to the registration of mortgage. (Cf. Art.174 (2), the Supreme Court Rules on Civil Enforcement.)

**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)?

[A] 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?

[A] There is no statutory requirement or procedure to discharge the cargo. The assumption may be that the purchaser will discharge any cargo after taking possession of the ship. The existence of the cargo on board may be reflected in the discount of the purchase price. In order to avoid such a discount, the creditor applying for the judicial sale (or shipowner, as the case may be) may have to discharge the cargo at their own cost prior to the judicial sale.

## **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?

[A] A prospective mortgagee may apply for a "provisional register" If a mortgage is registered afterwards, the register is regarded to have been made at the time when the provisional register is made.

**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?

[A] Yes.

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

[A] The priority is determined according to the order of registration.

**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?

[A] No.

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

[A] Yes.

**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.

[A] No. It must be noted, however, that when a title transfer is used for the purpose of secured transaction (transfer by way of security), the transferred ownership can be registered.

## 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?

[A] 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?

[A] No. A mortgage can be enforced upon production of a notarised mortgage or a certificate of registration for a mortgage (besides a judgment affirming the existence of a mortgage). Artt.181 (1) and 189, Civil Enforcement Act.

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?

[A] N/A.

7.4 Will the court in your jurisdiction accept jurisdiction for the mortgage claim under Article 7 1952 Arrest Convention, or equivalent domestic legislation in your jurisdiction?

[A] Under the Japanese law, arrest of a vessel as such does not give rise to international jurisdiction for merits of the mortgage claim. It being said, the Japanese court accepts jurisdiction on a case over a claim secured by a vessel when the vessel is within the territory of Japan. (Art.3-3, Civil Procedure Code).

## 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?

[A] Yes, they do. There is no specialised admiralty court in Japan.

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?

[A] The judicial sale of a vessel can be made in one of the two procedures.

One is the enforcement of a mortgage or lien. To commence enforcement of a mortgage, the mortgagee needs to produce a judgment affirming the existence of a mortgage, a notarised mortgage or a certificate of registration for a mortgage (see the answer to 7.2 above). To commence enforcement of a maritime lien, an instrument to prove the existence of a lien is required. (Artt.181 & 189 of the Civil Enforcement Act.)

The second type of procedure is the enforcement of a claim. In order to commence this procedure, a claimant is required to produce a certificate of enforceability (*Vollstreckungstitel*), which is one of the following:

- a final judgment;
- an enforceable arbitral award;

- a court decision (other than a judgment);
- a court order with provisional enforcement warrant;
- a notarised deed of s monetary claim with the debtor's statement of subjecting itself to immediate enforcement;
- a foreign court's judgment with final enforcement decision of a Japanese court;
- an arbitral award with final enforcement decision of a Japanese court; or
- other instrument equivalent to a final judgment.

(Art.22, Civil Enforcement Act.)

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

[A] The decision of the court to sell a vessel is appealable on very limited grounds, such as grave procedural error. (Artt.74, 121 & 189 of the Civil Enforcement Act.) If an appeal is made on one of those grounds, the court may, at its discretion, order suspension of the procedure with or without ordering the appellant to provide security, or order the claimant to provide security as a condition to proceed with the procedure. (Art.10 (6) of the Civil Enforcement Act.)

## 9 SALE PROCEDURE

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

[A] 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?

[A] Unless the debtor discharges the claim secured by the mortgage, the court will proceed to sale of the vessel. The judicial sale is made by either a bidding on a specified day, bidding with a certain period of time or public auction, as the court finds appropriate. (Artt.64, 121 & 189 of the Civil Enforcement Act.) In case the bidding or auction is not successful, the court may find a purchaser by other means (i.e. private sale), if agreeable with the mortgagee. (Artt.51, 83 & 174 (5) of the Supreme Court Rules on Civil Enforcement.)

The timetable depends on the case, and a general statement is difficult due to the scarcity of the cases ending up in a judicial sale of the vessel. In a recent unreported case at Hakodate District Court, it took five months from the arrest of the vessel to the court's decision, and the purchaser paid the purchase price in full within a month and a half from the judicial sale decision. (See Takase, *supra*, answer to Question 1.5.)

- 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?

[A] No. But note that a judgment is not necessary for the mortgagee to enforce its mortgage and apply for a judicial sale of the vessel.

- 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?

[A] The court determines the “reference price for bids.” The reference price is disclosed and constitutes a condition of the auction. If the highest bid is lower than 80 percent of the reference price, the bid is void. (Artt. 60, 121 & 189 of the Civil Enforcement Act.)

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

[A] No. The reference price is determined on the basis of an expert examiner’s opinion.

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

[A] The bidding and public auction is posted on the bulletin board within the court presiding the sale procedure and the court of the place where the ship is registered (in case of a ship of Japanese nationality) as well as on the bulletin board of the local municipality where the ship is located. (Artt.36, 49, 50(4), 82, 83 & 174 (5) of the Supreme Court Rules on Civil Enforcement.)

There is no equivalent statutory provision for judicial sale of a foreign vessel. There is an anecdote (from 1970s) that the court put advertisement in open markets of London and New York. (See H.Ogawa, *Hanrei Times* no.345, p.70.)

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

[A] It is not anticipated that the owner or other claimant (or the applying claimant) affects the timetable. It is the court’s power to decide it.

**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?

[A] No.

**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.

[A] If the mortgagee is the highest bidder, such an arrangement is possible. (Art.78 (4) of the Civil Enforcement Act.)

## **10 SALE PROCEEDS**

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

[A] No. Once the vessel is sold, the court proceeds to distributing the proceeds immediately.

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

[A] The proceeds needs to be paid in Japanese yen (local currency).

(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?

[A] The proceeds are subject to ordinary procedure of foreign exchange transactions. There is no general limitation on conversion into a foreign currency or transfer abroad of Japanese currency under the Japanese law.

## 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?

[A] In court practice, priorities tend to be determined by the Japanese law as *lex fori* (though views of commentators are divided).

**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?

[A] All the maritime liens under the Japanese Commercial Code have priority over a mortgage. They are:

1. Law costs incurred for the forced sale of the vessel;
2. Costs incurred for the preservation of the vessel in the last port;
3. Dues and taxes imposed on the vessel;
4. Pilotage dues and the charge for tugs;
5. Remuneration for assistance and contribution of the ship in general average;
6. Claims resulting from contracts or acts that were necessary for the continuation of the voyage;
7. Claims arising out of employment of the Master and the crew;
8. Claims arising from the sale, building or equipment of the vessel that has not commenced voyage as well as claims arising from equipment of, or supply of food and fuels to, the vessel arising from last voyage;
9. Claims for damages to the goods if the damages are caused by the carrier that is a charterer of the vessel;
10. Claims subject to limitation; and
11. Claims arising from oil pollution that are subject to limitation proceedings under the Act on Ships' Civil Liability and Compensation for Oil Pollution

As long as the mortgage registered under the law of a different jurisdiction is accepted as equivalent to mortgage under the Japanese law, the priority is the same.

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

[A] No.

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

[A] In order to be entitled to distribution from the sale proceeds, all the claimants (except the arresting claimant and the claimant who has a security interest not assumed by the purchaser in the vessel) need to make a demand prior to the date



determined by the court. The date is set before the sale of the vessel. (See Art.52 of the Civil Enforcement Act.)

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

[A] Once the purchase price is paid in full, the court sets the date of distributing the proceeds. The date shall be within a month from the payment of purchase price. (Artt.59 (1), 83 & 174 (5) of the Supreme Court Rules on Civil Enforcement.) All the claimants, including mortgagees, and the debtor are summoned to appear before the court on that date. (Artt.85 (3), 121 & 189 of the Civil Enforcement Act.) Claimants and mortgagees are required to report to the court the amount of their claims with interests accrued. The report shall be made within a week from the date of the summons. (Artt.60, 83 & 174 (5) of the Supreme Court Rules on Civil Enforcement.)

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

[A] Yes.

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

[A] Yes.

## **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.

[A] No. A mortgage under the Japanese law is rather an *hypothèque* of the civil law than a mortgage under the common law. Therefore, its enforcement must be made through the court procedure.

**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 12.1 without a court order would its right to do so be recognised or prohibited in each case in respect of a vessel physically located in your jurisdiction?

[A] The practice is unclear. It is not guaranteed that the remedies that the law of the ship's register grants to a mortgagee will be recognised by the court in Japan.

**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?

[A] The answer to this question is also unclear.

## 13 INSOLVENCY PROCESSES<sup>3</sup>

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

UNCITRAL

[A] Yes, the Act on Recognition of and Assistance to Foreign Insolvency Procedures of 2000 (hereinafter the "2000 Act") basically adopts the rules of the UNCITRAL Model Law.

**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)

[A] The recognition of foreign insolvency proceedings is made only through the 2000 Act.

**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?

[A] In case of a bankruptcy procedure (whose aim is liquidation), no. In civil rehabilitation procedure (whose aim is reorganisation), the court may issue an order to suspend the enforcement of the mortgage. In case of a corporate reorganisation procedure, all the enforcement procedure is suspended upon commencement of corporate reorganisation. (Art.31 of the Civil Rehabilitation Act, Art.50 of the Corporate Reorganisation Act.)

Furthermore, there is a system to apply for cancellation of a security interest by the court order in exchange for a tender of the actual amount of the secured object. The cancellation is ordered by the court (a) if it is in the general interest of creditors and (b-1) if it does not give undue harm to the secured claimant (in case of a bankruptcy procedure), (b-2) if the secured asset is indispensable for continuation of the insolvent debtor's business (in case of a civil rehabilitation), or (b-3) if the secured asset is indispensable for reconstruction of the insolvent debtor's business (in case of a corporate reorganisation procedure). (Art.186 of the Bankruptcy Act, Art.148 of the Civil Rehabilitation Act, Art.104 of the Corporate Reorganisation 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 recognised in your jurisdiction by whatever means)?

[A] When foreign insolvency proceedings is recognised by a Japanese court, the court may order stay of the enforcement of a security interest if it is in the general interest of creditors and does not give undue harm to the secured claimant that applied for enforcement. (Art.27 of the 2000 Act.)

**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?

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<sup>3</sup> 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.

[A] As long as the enforcement of a mortgage or other security interest is not stayed, the court sale proceedings take precedence. As to when the enforcement is stayed, see the answer to Question 13.3 above.

- 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)?

[A] The general principle is the same as Question 13.5. Unless the enforcement of a security interest is stayed, the court sale proceedings take precedence. As to when the enforcement is stayed, see the answer to Question 13.4.

- 13.7** If a vessel is sold in your jurisdiction through a maritime court sale is the mortgagee's claim to the sale proceeds subject to the risk of the mortgage being challenged or set-aside by applicable insolvency claw-back rules for transactions prior to insolvency?

[A] Yes. If, for example, the right of avoidance is successfully exercised against the grant of a mortgage, the mortgagee will lose its claim to the proceeds.

- 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)?

[A] The answer could be different. Under this hypothesis, the insolvency proceedings, including the conditions of avoidance, is governed by the law of the originating jurisdiction.

- 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?

[A] Yes. When the 2000 Act was enacted, provisions that limited the effect of an insolvency proceedings to the territory of Japan was deleted from the relevant statutes. This is understood as affirming the extraterritorial jurisdiction of an insolvency proceedings in Japan.

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

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

[A] 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)?

[A] The status of a lessor varies from issue to issue. With regards to the lessor's right in insolvency, the court treats a lessor of a finance lease of the "full-payout" type as holder of a security interest (i.e. functional approach).

- 14.3** If the laws of your jurisdiction adopt a functional approach (14.2) please describe briefly how this is applied; also, please say whether your courts would adopt a

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<sup>4</sup> By 'leasing' is meant a demise chartering of a vessel where the holder of legal title ('lessor') is a financier rather than a commercial shipping company and the vessel is demise chartered to a shipping company ('lessee'). It might or might not involve the lessee having an option to purchase for a pre-agreed price or title automatically passing to the lessee at the end of the lease term. It covers both finance leases, where the lessee by one means or another has substantially the whole economic interest in the vessel and operating leases where the lessor retains some economic risk and interest in the vessel.

functional approach even where the governing law of the lease follows the formal approach.

[A] As already mentioned above (answer to Question 14.2), if the lease is a finance lease of the “full-payout” type, the lessor is treated as holder of a security interest in an insolvency procedure. (Tokyo District Court, 22 December 2003, *Hanrei Times* no.1141, p.279.)

Due to the absence of a published case, it is not clear whether the court will take the same approach when the governing law of lease is a foreign law.

- 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?

[A] Yes, rights and remedies of the lessor may be determined by the lease agreement.

- 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?

[A] If the lease agreement so provides, the self-help remedy is available.

- 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?

[A] Legally a leased vessel is a property owned by the lessor. The accounting rules are different.

- 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?

[A] As mentioned above (in the answer to question 14.2), if the lease is a finance lease of the “full-payout” type, the lessor is treated as holder of a security interest in an insolvency procedure. Other leases are treated as executory contract and is subject to the trustee’s power to perform the contract or terminate it. (On executory contracts, see art.53 of the Bankruptcy Act, art.49 of the Civil Rehabilitation Act, art.61 of the Corporate Reorganisation Act.)

- 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?

[A] No. A lessor is the owner of the leased vessel. One cannot arrest an asset of its own under the Japanese law. Nor can a lessor join in the procedure to arrest a vessel that it owns.

- 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?

[A] Under the Japanese law, a lessor is the owner of the leased vessel subject to maritime liens. Its claim against a lessee (such as unpaid lease payments) may be enforced over other assets of the lessee, but not on the vessel.

- 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.

[A] It is difficult to give a clear answer to this question. Because the lessor's status varies from one issue to another, the court will first examine the governing law of the issue in the case. It may not necessarily coincide with the governing law of the lease agreement or the law of the state in which the lease is registered.

- 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.

[A] The leasing industry in Japan is positive about facilitating the lease transactions of vessels. However, no reform of law is anticipated. The bill to amend the Civil Code (so-called contract law reform bill) has been pending before the Diet since a couple of years, but the bill has not adopted a proposal by a group of academics to add "finance leasing" to the list of typical contracts.

## **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?

[A] The reservation of title is treated as a security interest on some issues, such as the duty of the owner (creditor) to pay the balance or status in insolvency procedures. On other issues, the title is treated as ownership.

In Japan, co-ownership has been used to finance building of vessels by Japan Railway Construction, Transport and Technology Agency (JRJT), which is a public financing body. JRJT owns a certain portion of the vessel, depending on the amount of loan that it advances, and another co-owner (debtor) charters the JRJT's portion by demise and operates the vessel. When the total of the hire for the chartered portion reaches the amount equal to the loan and accrued interest, the co-ownership is terminated and the vessel is fully in the hands of the true owner. While technically the JRJT is a party to the co-ownership agreement with the debtor, the actual effect of such co-ownership is almost equivalent to reservation of title in terms of giving security to JRJT as financier.

- 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.

[A] No, reservation of title cannot be registered in the ship's register. However, the co-ownership may be registered.

- 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?

[A] As stated above in the answer to Question 15.2, the reservation of title per se may not be registered.

A registered co-owner is in the status of an owner of the vessel, and may terminate the demise charter and repossesses its share of the co-owned vessel when the other co-owner (debtor) fails to make due payments.

- 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.

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<sup>5</sup> References to 'reservation of title' are intended to include arrangements where a seller retains title to the vessel until the buyer pays the full price in circumstances where the buyer's obligation to pay the full price is deferred over time.

[A] It is difficult to give a clear answer to this question. Because the status of the seller reserving the title varies from one issue to another, the court will first consider the governing law of the issue in the case. It may not necessarily coincide with the governing law of the reservation of title agreement.

The Committee on Ship Financing of the Japanese Maritime Law Association

Chair, Prof. Kenjiro Egashira

Reporter, Prof. Souichirou Kozuka

23 November 2016