

Replies from the Malta Maritime Law Association to the CMI International Working Group Ship Finance Security Practices – Questionnaire

1 MARITIME AND OTHER CONVENTIONS

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

Malta is not a signatory to either of the 1952 and 1999 Arrest Conventions.

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?

Article 742B of the Maltese Code of Organisation and Civil Procedure Maltese lists a total of 25 maritime claims giving the Maltese Courts jurisdiction *in rem* against vessels on basis of which a vessel may be arrested. These grounds incorporate both the Arrest Conventions of 1952 and 1999. The claims may be summarized as follows:

- (a) claims to possession, ownership or title to a ship to or of a ship or to the ownership of any share therein;
- (b) questions arising between co-owners as to the ownership, possession, employment or earnings of a ship;
- (c) claims in respect of a mortgage or hypothec or charge on a ship or on any share therein;
- (d) claims arising out of a contract of sale for the ship;
- (e) claims for damages received by a ship;
- (f) claims for damage done or caused by a ship, either in collision or otherwise;
- (g) claims for loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship or sustained in consequence of any defect in a ship or in her apparel or equipment or in consequence of the wrongful act, neglect or default of -
 - (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods in, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;
- (h) claims for loss or damage to goods carried in a ship;
- (i) claims arising out of an agreement for the carriage of goods or use or hire of a ship whether by charter party or otherwise;
- (j) claims for salvage or any salvage agreement including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;

¹ 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.

- (k) claims for damage to environment by a ship;
- (l) claims relating to wrecks;
- (m) claims for towage;
- (n) claims for pilotage;
- (o) claims for supplies or services rendered to a ship;
- (p) claims for construction, repair, conversion or equipping of a ship;
- (q) claims for port, dock or harbour dues;
- (r) claims by crew for wages or repatriation;
- (s) claims for disbursements made;
- (t) claims for commissions, brokerage or agency fees;
- (u) claims arising out of an act of general average;
- (v) claims arising out of bottomry;
- (w) claims for forfeiture of a ship;
- (x) claims for insurance premiums; and
- (y) claims for fees due to the registrar or tonnage dues.

In cases concerning any one of the maritime claims listed in (a), (b) and (c) above, an action *in rem* may only be brought against that ship in connection with which the claim arises.

In all other cases concerning the remaining maritime claims listed in (d) to (y), an action *in rem* may be brought against that ship, where the person who would be liable on the claim for an action *in personam* (the relevant person) is, when the cause of action arose, an owner or charterer of, or is in possession or in control of, the ship and if, at the time when the action is brought, the relevant person is either an owner or beneficial owner of that ship or the bareboat charterer of it. In such cases, an *action in rem* may also be brought against any other ship of which, at the time when the action is brought, the relevant person is the owner or beneficial owner as respects all shares in it.

1.3 In particular, can arrest be made:

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

Yes

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

Yes – a foreign mortgage is recognised with the status and rights and powers of a Maltese mortgage upon the foreign mortgage satisfying certain conditions, namely:

- (a) such mortgage has been validly recorded in the registry of ships of the country under whose laws the ship is documented;
- (b) such registry is a public registry;
- (c) such mortgage appears upon a search of the registry and
- (d) such mortgage is granted a preferential and generally equivalent status as a Maltese mortgage under the laws of the country where the mortgage is registered.

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

Malta is not a signatory to the 1926 or the 1993 International Conventions on Maritime Liens and Mortgages

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?

Although the concept of a maritime lien is not recognised as such under Maltese law, yet the Merchant Shipping Act recognises a number of special privileges on vessels. These survive for one year following the voluntary sale of the vessel concerned (thereby assuming the character of maritime liens), and are also relevant in the context of ranking of creditors.

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

The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents is in force in Malta.

2 NATURE OF THE SHIPS' REGISTER

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

The Maltese Ship Registry is a register of legal title to the vessel in the sense that the Maltese Registrar of Ships records ownership of Maltese flagged vessels. However, since our Merchant Shipping practice is based on the British tradition, we would follow the principle that the register of Maltese ships is merely *prima facie* evidence of ownership.

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').

It is possible for a vessel to be bareboat chartered under the Maltese flag with the legal title being registered in another jurisdiction (in an underlying registry) upon certain conditions being satisfied.

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?

In case of a vessel bareboat chartered under the Maltese flag, the Maltese register of the vessel would not indicate the mortgagee registered in the underlying registry.

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

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

subject to a mortgage registered in the ships' register in your jurisdiction and is the consent of the mortgagee required?

Yes, it is possible for a Maltese vessel to be bareboat registered in a foreign registry upon certain conditions being satisfied. When the vessel to be bareboat registered out is subject to a Maltese mortgage, the Maltese Registrar of Ships requires the written notarised and apostilled consent of the mortgagee for the bareboat registration out of the vessel (and for any eventual change of name in the vessel's bareboat register) before the Maltese Registrar of Ships issues his consent for the bareboat registration out.

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.

Pleasure boats, commercial yachts, merchant ships, pontoons, barges, floating establishments, installations or structures and oil rigs are all eligible for registration as Maltese vessels. A ship of less than six metres in length is not eligible for registration under the Maltese flag.

As a rule, merchant ships of 25 years old and over are not eligible for registration under the Maltese flag. Merchant ships of 15 years of age and over but less than 25 years may be registered under the Maltese flag following the satisfactory outcome of a pre-registration inspection by an authorised flag inspector. The registration of ships of 10 years and over but less than 15 years is subject to a satisfactory inspection by an authorised flag inspector within one month before registration.

At the time of registration of the vessel under the Maltese flag, the applicant must provide evidence of ownership in the form of a bill of sale or a builder's certificate as well as a declaration of ownership wherein the owner declares that the ship is free from registered encumbrances. The Maltese Ship Registry would require evidence of seaworthiness in the form of a confirmation from an approved classification society.

In case of registration of a vessel under construction under the Maltese flag, the requirements relating to surveying of the vessel and the declaration of ownership when the builders have not yet effected delivery to the owners are suspended until construction of the vessel or until delivery of the vessel is complete.

A ship may be only registered under the Maltese flag if it is owned (or in the case of bareboat registration in, if the vessel is chartered) by qualified persons.

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?

It is not necessary (and it is not the practice) for Maltese mortgages to attach loan documents evidencing the obligations secured.

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

It is sufficient for any documents or agreements on which the mortgage is based and which detail the terms and conditions of default to be mentioned in the mortgage deed without setting out in detail the circumstances giving rise to a right of enforcement in the actual mortgage deed.

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

It is not necessary for a Maltese mortgage to be notarized and/or legalized. It is sufficient if the execution of the Maltese mortgage be witnessed.

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

The registry fees for the registration of a Maltese mortgage are Euros 500.

At times, the mortgagor may wish to register a mandate or power of attorney given by a mortgagor as part of the security. Such registration of a mandate or power of attorney may be effected against a registration fee of Euros 100.

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

The registration of the mortgage is indefinite.

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 mortgage granted over a Maltese vessel only requires to be registered in the Maltese ship registry.

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.

Basic information relating to a registered Maltese mortgage - such as execution date and recording date of mortgage, the full style of the mortgagee and a short synopsis of the mortgage recital - is entered in the ship's register by the Maltese Registrar of Ships. A copy of the mortgage deed is not publicly available. The ship's register with the above basic information referring to mortgages is available for public inspection at the Maltese Ship Registry.

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

Since the ship's register is a public register, anyone can carry out a search over a vessel's register and there is no need to obtain the authorization of the ship's owner to carry out a search to identify the registered owners and registered encumbrances. Alternatively, one can request the Maltese Ship Registry to issue a transcript of register in respect of the

vessel which would indicate inter alia, the registered owners and registered encumbrances.

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

The Maltese Ship Registrar would verify whether the person executing the mortgage deed on behalf of the Shipowner is duly authorized to execute the mortgage but the Maltese Ship Registrar would not verify the accuracy of the Information indicated in the mortgage deed (such as information relating to any underlying obligation which the mortgage may be securing).

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

A search may be carried out over the vessel or a transcript of register may be obtained from the Maltese Ship Registry within a couple of working days from the request being made.

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.

Where the mortgage deed contains a prohibition of sale of the vessel without the prior written consent of the mortgagee, such prohibition is inserted in the vessel's register and the Maltese Registrar of Ships may not record any transfer of ownership of the vessel without the prior written consent of the mortgagee unless the transfer is made pursuant to a court order in a sale by auction of such a ship or pursuant to any other court order.

5 ARREST OF A CHARTERED VESSEL

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

The owner of a vessel that is registered in the Register of Ships in Malta may create a mortgage over such vessel, irrespective of whether the vessel is at the time, or at any time thereafter, bareboat or time chartered. Under Maltese law a mortgage is a 'special charge over a vessel'³ giving rise to real rights over the mortgaged vessel. It naturally follows that a mortgagee may exercise all its rights arising from the mortgage, including the right to arrest the mortgaged vessel, irrespective of the existence of a bareboat or time charter in respect thereof.

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 mortgagee would hypothetically only incur liability towards charterers or cargo interests (and in such case, as result of the tort of *abuse of right*) if found guilty of the improper use of enforcement or other rights afforded to him (*qua* mortgagee) contractually or by statute.

³ See article 37B(2)(a) of the Merchant Shipping Act [Chapter 234 of the Laws of Malta].

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?

Maltese law does not expressly provide for procedures and, or requirements in relation to cargo on board a vessel that becomes subject to judicial sale. These matters are left to the discretion of the presiding judge.

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?

Maltese law does not have a system of "priority notice". This is also acknowledged in Article 41 of the Merchant Shipping Act.

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?

Article 39(3) of the Merchant Shipping Act provides that the Registrar of Ships is to make a note in the register of ships prohibiting the creation of further mortgages over a vessel only if the mortgage instrument relating to the first registered mortgage states that such prohibition is to be put in place.

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

In accordance with the provisions of article 41 of the Merchant Shipping Act, if there are more mortgages than one registered in respect of the same vessel (or share thereof) the priority amongst the same is determined by reference to the date and time at which each mortgage is recorded in the Register of Ships on the basis of the principle *prior in tempore potior in iure*.

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?

There is no doctrine of notice applied under Maltese law. Indeed article 41 of the Merchant Shipping Act expressly provides that the order of priority established by reference to the date and time of registration of mortgages is to apply 'notwithstanding any express, implied or constructive notice.'

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

In principle a second registered mortgagee may exercise enforcement remedies without the consent of the first (or prior) registered mortgagees. However this is subject to any contractual undertakings (such as intra-creditor agreements) that may be in place. Moreover article 42(1)(b) of the Merchant Shipping Act recognizes that a subsequent

mortgagee may not, except under the order of a court of competent jurisdiction, sell the mortgaged vessel (or any share thereof) ‘without the concurrence of every prior mortgagee.’

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

The following security interests may be registered in the register of a vessel under Maltese law: (i) any of the special privileges specified in article 50 of the Merchant Shipping Act (see article 37B(2)(c) of the Merchant Shipping Act); (ii) the privilege granted to the seller for the price of the sale of a vessel under the provisions of article 2009(d) of the Civil Code⁴ (see article 52 of the Merchant Shipping Act); (iii) a special privilege or charge over any part, appurtenance or accessory of a vessel that may attach to the vessel by virtue of any law (see article 40(1)(a) and (2) of the Merchant Shipping Act); (iv) the reservation of ownership rights by a seller of any part, appurtenance or accessory sold to the shipowner under a contract of sale, hire purchase or any similar contract (see article 40(1)(b) and (3) of the Merchant Shipping Act); and (v) a general hypothec attaching to all the assets of the owner of the vessel (see article 37B(2)(b) of the Merchant Shipping Act and articles 1997(2), 2011, 2012 and 2013 of the Civil Code).

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?

Article 49 of the Merchant Shipping Act provides that a ‘foreign mortgage’ is recognized as a mortgage ‘with the status and all the rights and powers specified’ therein if: (a) such mortgage is recorded in the registry of ships of the country under whose laws the ship is documented; (b) such registry is a public registry; (c) such mortgage appears upon a search of the registry; and (d) such mortgage is granted a preferential and generally equivalent status as a mortgage under the Merchant Shipping Act under the laws of the country where it is registered.

It is further noted that the civil courts of Malta have jurisdiction *in rem* against vessels for any claim in respect of a mortgage, hypothec or charge thereon or on any share therein, irrespective of the nationality of the vessel and, or of the mortgage (see article 742B(c) of the Code of Organization and Civil Procedure).⁵ The same principle would be applied if a vessel is otherwise arrested in Malta as a result of an existing mortgage in the context of *in personam* proceedings brought against the owner of the vessel.

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?

Unless Maltese law it is not necessary for the mortgagee to obtain a judgment on its claim under the loan agreement or other applicable debt instrument before it can enforce

⁴ Chapter 16 of the Laws of Malta.

⁵ Chapter 9 of the Laws of Malta.

that mortgage. Indeed article 42(1) of the Merchant Shipping Act sets out the rights that the mortgagee may exercise in the event of default of any term or condition either of the registered mortgage itself or of any document or agreement referred to therein.

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?

See reply to question 7.2 above.

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 provisions of article 742B of the Code of Organization and Civil Procedure are largely modelled on the provisions of the 1952 and 1999 Arrest Conventions.

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?

We do not have specialised admiralty courts in Malta. Our Civil Courts are the only competent courts or tribunals vested with the authority to sell a vessel free of maritime liens and prior claims. Under Maltese law, a creditor may apply to sell a vessel judicially either by means of a sale by court auction or alternatively, by means of a court approved private sale. In both instances, the vessel is transferred to the new purchaser free and unencumbered.

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?

The applicant creditor would need to file an application including a demand for such sale and attaching thereto a copy of his final and non-appealable judgments or any other executive title which it holds and which empowers it to make such a demand for a judicial sale.

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?

No, the courts will not normally proceed with the sale of the vessel unless the executing creditor has a final and non-appealable judgment. Article 266 of the Maltese Code of Organization and Civil Procedure states that generally speaking judgments which are not *res judicata* shall not be enforceable, unless special leave allowing for provisional enforcement is first obtained from the courts.

9 SALE PROCEDURE

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

Yes, under Maltese law a mortgagee can indeed enforce its rights under a mortgage by applying for a judicial sale by auction. A Maltese registered mortgage is deemed to be an executive title and is given a special status under our law. Whilst any ordinary creditor alleging that a debt is owed to him by a debtor will have to commence legal action against the debtor and must ultimately be in possession of a favourable court judgment prior to being in a position to enforce such judgment, a mortgagee need not commence any action on the merits whatsoever against the mortgagor. Since a mortgage is deemed to be an 'executive title' (similar to a judgment) in terms of Article 253 et seq. of the Code of Organization and Civil Procedure, a mortgagee is in a position to bypass any lengthy judicial proceedings completely and to proceed directly to the enforcement of its executive title. All the mortgagee need to do is simply render its mortgage enforceable by filing a judicial intimation in the Registry of the Superior Courts in Malta calling upon the debtor to settle all the outstanding indebtedness within two (2) days. This intimation takes the form of a judicial letter which is to be filed in the Malta Court registry and immediately served on the debtor or on the vessel. If no payment from the debtor is forthcoming within the said 2 days from such service, the mortgage is rendered immediately enforceable and the mortgagee may proceed with all the various available enforcement mechanisms under Maltese law and consequently, the mortgagee may proceed directly with the judicial sale by auction of the vessel.

For all intents and purpose and in accordance to Article 49 of the Maltese Merchant Shipping Act the above would also apply to foreign registered mortgages provided that they satisfy the four conditions listed in our reply to question 7.1 above.

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?

Once a creditor has obtained an executive title or *res judicata* judgment, he may file an application demanding the court appoints a date for the judicial sale by auction of the vessel. The Court will normally proceed to then schedule the auction date of the respected vessel. However, alternatively the court may decide to first fix a short time limit within which the debtor has a final chance to pay the outstanding sums and failing which, the vessel is sold by auction. That said, in relation to auctions of vessels, the Courts tend to fix the auction date immediately, which is usually around 4-6 weeks after the date of filing of the auction application. This gives the Registrar of Court time to publish in the government gazette and the executing creditor to publish 2 advertisements in local newspapers as well as to general as much interest as possible in the vessel. In its order affixing the auction date, the court will also give notice of the time and place of the judicial sale by auction

At the auction, a court appointed public auctioneer conducts the judicial sale in the presence of the Court Registrar. Bids are made orally and the vessel is sold to highest offer received. The buyer has seven days to deposit the purchase price in court. Once the funds are deposited, a court appointed person will issue a bill of sale in favour of the buyer transferring the vessel free and unencumbered.

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?

Article 864 of our Code of Orgnaizatino and Civil Procedure grants our courts the power to order the sale of an arrested ship or vessel *pendente lite* if it appears to the court upon the application of a creditor that the debtor is insolvent or otherwise unlikely to be able to continue trading and maintaining the asset. The said article also dictates that the court should take into consideration all the circumstances connected therewith, including the nature of the plaintiff's claim, the defence raised against such claim, if any, and such other steps which the debtor has taken to secure the claim, or otherwise to preserve the asset. That said, to date and to the best of our knowledge there has to date only been one request made to our courts for a sale *pendente lite* of a vessel, which was turned down by our courts.

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?

There is no minimum reserve price for vessel sold by judicial sale by auction provided that the said vessel exceeds 10m in length. For smaller crafts of less than 10m, the law imposes a minimum reserve price of 60%. In such cases, an appraiser may be appointed upon the request of the creditor or debtor, to examine the craft and file his valuation in court, which may be accessed by interested parties. If in such cases, no offer below 60% of the value may be accepted and if no such offer is forthcoming, then the creditor may ask the small craft to be auctioned again at a later date.

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

In view of the above reply, the following response only applies in relation to ships not exceeding ten (10) meters in length. A creditor or debtor may request the appraisalment of such ship.

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

Given that there is no minimum threshold for ships over ten metres, public advertisement of the sale plays a crucial role in judicial sales by auction in Malta. The more interest generated in a vessel, the better the chance of a higher sale price being attained. The Registrar has the responsibility to advertise the judicial sale by auction of the vessel in the Government Gazette, a newspaper in Maltese and a newspaper in English. The advertisement shall include details of the vessel and of the sale. Moreover, whilst the law does not oblige creditors to do so, it is common for them to also advertise the sale in foreign shipping journals and newspapers to generate as much interest as possible in the sale.

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

Generally speaking, the Courts tend to schedule the auction around 4 to 5 weeks after the application requesting the said auction is filed. This gives the creditor time to advertise the sale and generate interest in the vessel. That said, if the owner and the creditor file an application asking to postpone the judicial auction and presenting valid grounds therefore, the Court will most likely postpone the auction. It is also possible for the owner to try and cancel the judicial sale by auction where it can be proven that the creditor does not have a valid *res judicata* judgment or executive title.

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?

With regards to a court approved private sale, the applicant creditor must submit an application which shall be served on the vessel and all the known creditors and shall include a demand for such a court approved private sale of a vessel in favour of an identified buyer and in consideration for a predetermined price. Accordingly, the applicant creditor usually concludes a Memorandum of Agreement with a prospective buyer, which would be conditional to the court's approval. The creditor must also submit a copy of his final and non-appealable judgments or any other executive title to show that it has the right to request such a sale. Moreover, the executing creditor would need to submit appraisements by two independent and reputable valuers confirming the value of the ship or vessel. Lastly, the creditor must also adduce to the court evidence that the private sale is in the interest of all known creditors and that the price offered by the proposed buyer is reasonable in the circumstances of the case.

The court will then schedule a first hearing date within 10 days from the filing of the application. Subject to no objections that the offered purchase price is not in the best interest of all interested parties, the Court will then schedule a final judgment date where it shall approve the sale. If there are such objections, the court must first delve into the merits of the allegations to see whether or not the court should acceded to the request to approve the sale. To date, only one court approved private sale application has ever been rejected by our courts.

Generally speaking, the procedure takes around four to six weeks depending on whether or not any objections are forthcoming and provided that the mortgagee has identified a prospective buyer.

The Court in its judgment approving the sale shall in its decree nominate a person who shall thereupon be entitled to transfer the ship or vessel in accordance with the terms and conditions approved by the Court, and as if he were the registered owner thereof. Moreover, the buyer has seven (7) days to deposit into court the purchase price of the vessel through the court agents.

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?

Any person to whom a liquidated debt is owing under any judgement or executive title or deed or other obligatory writing has the option to bid *animo compensandi* in a judicial sale by

auction. Prior to bidding *animo compensandi* and before the process of judicial sale by auction commences, the bidder must register his name through a note delivering a sworn declaration in front of the Registrar declaring the reason why he wishes to bid this way. This means that the creditor may set-off the purchase price against the said creditor's outstanding dues. It should however be noted that after the sale, interested parties can oppose the demand for such a *animo compensandi* bid. No such opposition can be made before or during the sale. To protect the sale, the law provides that any bid *animo compensandi* is made on condition that the bidder shall bind himself to pay the price into court in case it shall be so adjudged by the court. Accordingly, if the opposition is upheld after the sale, the purchasing creditor will need to deposit the whole purchase price amount in Court.

10 SALE PROCEEDS

10.1 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?

No the sale proceeds are held in a non-interest bearing court bank account and these are held in the currency of the sale, which must be concluded in Euros (the local currency in Malta)

(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, the proceeds are not subject to any exchange control or restrictions or court fees where they are paid out. A creditor must merely file an application requesting the withdrawal of the funds wherein it must prove it is entitled to do so and that there are no known pre-ranking creditors.

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 under local law (lex fori), being Maltese law.

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?

There are certain debts which are all special privileges which rank ahead of a Maltese mortgage or a foreign mortgage recognized under the Maltese Merchant Shipping Act.

These are:

- (a) judicial costs incurred in respect of the sale of the ship and the distribution of the proceeds thereof;
- (b) fees and other charges due to the registrar of Maltese ships arising under the Maltese Merchant Shipping Act;
- (c) tonnage dues;
- (d) wages and expenses for assistance, recovery of salvage, and for pilotage;
- (e) the wages of watchmen, and the expenses of watching the ship from the time of her entry into port up to the time of sale;
- (f) rent of the warehouses in which the ship's tackle and apparel are stored;
- (g) the expenses incurred for the preservation of the ship and of her tackle including supplies and provision to her crew incurred after her last entry into port;
- (h) wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;
- (i) damages and interest due to any seaman for death or personal injury and expenses attendant on the illness, hurt or injury of any seaman;
- (j) moneys due to creditors for labour, work and repairs previously to the departure of the ship on her last voyage: provided that such privilege shall not be competent where the debt has not been contracted directly by the owner of the ship, or by the master, or by an authorised agent of the owner;
- (k) dues owed to ship repairers, shipbuilders, or other persons in whose care the ship has been placed for the execution of works or other purposes;
- (l) ship agency fees due for the ship after her last entry into port, in accordance with port tariffs, and any disbursements incurred during such period not enjoying a privilege in paragraphs (a) to (i), though in any case for a sum in the aggregate not in excess of four thousand units.

Where funds are insufficient, competing creditors under the same heading shall share in such fund ratably.

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

There are no special rules on priority for local (as opposed 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?

Once the purchase price of the vessel is deposited in court, all creditors of the vessel and/or owners may compete to recover their dues, depending on the ranking of their claim at law. Their claims must be put forward within one month from date of notice of the opening of the competition of claims being given.

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

On average a vessel is sold through judicial auction within four to eight weeks from the date on which the mortgage is rendered enforceable. Before the proceeds are released the successful bidder will have to deposit the purchase price including court expenses relating

to the procedure (1% of the successful bid) and bill of sale that will be entered into by a court appointed lawyer, into the Courts by not more than seven days from the date of the final adjudication. The executing creditor is also liable to pay the auctioneer's fees which would amount to 0.2% of the final bid.

11.6 Is the distribution order decided by the court?

The distribution order is decided by the court depending on the ranking of the creditors' claims at law. The first expenses to be recovered from the proceedings are the expenses borne by the mortgagee / executing creditor who filed the proceedings for the judicial sale of the vessel. If there are no known competing claims the Court's order will generally be a mere rubber stamping process.

11.7 Is that order subject to a right of appeal?

Yes. The Order given following a competition of creditors procedure is deemed to be a decision of the Court which may be appealed within twenty days from grant.

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.**

Article 42 of the Merchant Shipping Act provides for non-judicial methods of enforcement which include the mortgagee's entitlement to take possession of the vessel as mortgagee-in-possession as well as the separate power to sell the vessel through a private sale to third parties. Such remedies become available where the mortgagee serves written notice on the mortgagor following the latter's default. Where the owner or master of the vessel is uncooperative in granting possession to the mortgagee, the mortgagee may request the courts to order that the crew surrender the vessel to the mortgagee.

The power to sell the vessel as mortgagee-in-possession is dependent on any prior incumbent mortgages. However, subsequent mortgagees may still affect the sale of the vessel without the concurrence of every prior mortgagee through a court order. In order for the vessel to be sold by private sale, the vessel need not be in Malta; it can be located in any jurisdiction.

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?

The mere presence of the vessel within the jurisdiction of Malta would not preclude a mortgagee from exercising rights that emanate from another applicable set of laws.

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 Court order obtained from another Member State may be enforced directly in Malta as a result of EU Regulations. Order of non-EU courts may be enforced if the procedure for the enforcement of foreign judgments under Maltese law is followed.

13 INSOLVENCY PROCESSES⁶

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

No, since Malta is part of the European Union it is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation.

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)

Maltese law provides for recognition of foreign insolvency proceedings in terms of the EU Insolvency Regulation. However, if the company in question is not an EU company or the assets of the Malta company are located in a non-EU jurisdiction then the principles of private international law will apply. Furthermore, it is important to mention the Code of Organisation and Civil Procedure which contains specific articles on the recognition of foreign judgements. These provisions state that any judgment delivered by a competent court outside Malta and constituting a res judicata may be enforced by the competent court in Malta, in the same manner as judgments delivered in Malta, upon an application containing a demand that the enforcement of such judgment be ordered.

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?

Assuming that the vessel in question is registered in Malta and there is a Malta registered mortgage over the vessel, then, in terms of the Malta Merchant Shipping Act, any judicial sale proceedings instituted by a mortgagee or privileged creditor may not be interrupted or hindered by any curator in bankruptcy or any liquidator or receiver of the shipowner for any cause other than a cause which could be set up by the owner.

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)?

⁶ 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.

Assuming that the vessel is registered in Malta and there is a Maltese registered mortgage registered over the vessel, then, in terms of the Malta Merchant Shipping Act, any judicial sale proceedings instituted by a mortgagee or privileged creditor may not be interrupted or hindered by any curator in bankruptcy or any liquidator or receiver of the shipowner for any cause other than a cause which could be set up by the owner.

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?

In terms of Maltese law, and assuming that the vessel is registered in Malta, the vessel is deemed to be a separate patrimony within the assets of the company and therefore the maritime court sale proceedings will not be affected by any insolvency proceedings and the maritime court sale proceedings shall proceed accordingly.

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 did not originate in our jurisdiction then our courts would need to refer the matters to the jurisdiction where insolvency proceedings have been initiated.

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?

Maltese law has the concept of “fraudulent preference”. The Maltese Companies Act holds that every privilege, hypothec or other charge, or transfer or other disposal of property or rights, and any payment, execution or other act relating to property or rights made or done by or against a company, and any obligation incurred by the company within six months before the dissolution of the company shall be deemed to be a fraudulent preference against its creditors, whether it is of a gratuitous nature or an onerous nature.

Such an act shall be deemed to be a fraudulent preference if it constitutes a transaction at an undervalue or if a preference is given, unless the person in whose favour it is made, done or incurred, proves that he did not know and did not have reason to believe that the company was likely to be dissolved by reason of insolvency, and in the event of the company being so dissolved such fraudulent preference shall be void.

A transaction shall be deemed to be at an undervalue if (i) the company makes a gift or otherwise enters into a transaction on terms that provide for the company to receive no consideration; or (ii) the company enters into a transaction for a consideration the value of which, in money or money's worth, is significantly less than the value in money or money's worth of the consideration provided by the company.

A company gives a preference to a person if (i) that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and (ii) the company does anything or suffers anything to be done which, in either case, has the effect of putting that person into a position which, in the event of the company going into

insolvent winding up, will be better than the position he would have been had that act or omission not occurred.

Unlike the Maltese Companies Act, the Merchant Shipping (Shipping Organisations - Private Companies) Regulations (the "Regulations") - which regulate Maltese shipping organisations - make no specific reference to hardening periods. This appears to have been intentional since it was decided to have a simpler regime in respect of shipping organisations. Art 3 (3) of the Regulations however states that "Where a matter is not specifically dealt with under these regulations, reference shall be made to the provisions of the Companies Act on such matter." The application of the fraudulent preferences rules contained in the Companies Act to shipping organisations would therefore depend on the interpretation given to Art 3 (3). If interpreted widely there is a possibility that a Maltese court may cross refer to the Companies Act and apply the fraudulent preferences section in the Companies Act even in the context of shipping companies

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)?

If the insolvency proceedings did not originate in our jurisdiction then our courts would need to refer the matters to the jurisdiction where insolvency proceedings have been initiated.

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?

If the vessels are registered in Malta (and especially if there is a Maltese mortgage registered over such vessels), then the insolvency courts of our jurisdiction would have a claim over such vessels, even if they are located in a different jurisdiction.

14 LEASING⁷

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

Maltese financial institutions do not favour the finance leasing model as a method of ship/vessel financing. International finance leasing institutions do however register their interests in Maltese registered vessel on the Maltese Ship Registry.

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)?

Malta legislation adopts the formal approach and considers the finance lease to be a proper
_____ lease.

⁷ '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.

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

Not applicable

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 be regulated by the lease agreement regulating the terms of the lease between the parties. The terms of the lease agreement in this regard shall also be interpreted in the context of international usages of trade. A lessor shall not be required to seek authorisation or confirmation from a competent court in order to exercise its rights and remedies under a 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?

Please have a look at the answer to question 14.4: self-help remedies are available and the lessor will not require authorisation and/or confirmation from a court in order to take possession of the vessel provided that the relevant provisions catering for such right are properly included in a lease agreement.

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?

The leased vessel is an asset of the lessor and not the lessee. The lessee will be specifically using the vessel under a title of lease. (this response is given from a legal and not from an accounting practice perspective)

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?

The insolvency of the lessee will not generally effect the position and ownership title of the Lessor, save for any lien/special privilege which could be 'tied' to the vessel even post termination of the lease.

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 lessor cannot arrest (or join in arrest proceedings relating to) a vessel which it owns and leases. However, the lessor has various remedies in terms of Maltese law, enabling it to repossess the vessel 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 lessor does not have a priority status in the ranking of claims.

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.

The terms of leases registered in other jurisdictions would be enforceable in terms of Maltese law if there are no violations of any public policy rules. There is no formal mechanism of recognition of a lease of a foreign registered vessel.

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.

There is a general trend towards recognising leases of vessels. Recent amendments to the Merchant Shipping Act have seen introduction of the formal recognition of a lease of a vessel for registration purposes whereby a Certificate of Registry of a vessel can be issued in the name of a lessee provided that the requisite conditions for such registration are met.

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?

Maltese law does not grant security interest holder status to a seller under a title reservation agreement. That being said, the right to receive the balance of the price of a ship by a seller constitutes a special privilege in terms of Maltese law provided that such privilege is registered in terms of article 52 of the Merchant Shipping Act.

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.

Maltese law does not provide for such registration.

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?

Please see the response to clause 15.2.

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.

The terms of title reservation agreements registered in other jurisdictions would be enforceable in terms of Maltese law if there are no violations of any public policy rules. That being said, any rights under a title reservation agreement would not be considered as a security interest having a priority status in terms of Maltese law.

16 INSURANCE

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

The rights of a mortgagee extend by operation of law to the insurance proceeds following a ship casualty.