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Stephanie Micallef Bonett

From: Stephan Erbe <erbe@thomannfischer.ch>
Sent: 09 February 2017 16:21
To: Ann Fenech
Cc: 'Raphael Brunner'; 'von Ziegler Alexander'
Subject: CMI Questionnaire
Attachments: CMI Questionnaire.pdf

Dear Ann

I hope you're doing fine.

On behalf of the SWISS MARITIME LAW ASSOCIATION (SMLA), please find attached the Swiss contribution which was completed by Raphael Brunner of MME Legal and myself. Please do not hesitate to get in touch if you have any questions.

Kind regards

Stephan

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CMI International Working Group

Ship Financing Security Practices - Questionnaire

Questions 1-8 answered by Stephan Erbe, lawyer, ThomannFischer, Basel (www.thomannfischer.ch)

Questions 9-15 answered by Raphael Brunner, LL.M., lawyer, MME, Zürich (www.mme.ch)

1. MARITIME AND OTHER CONVENTIONS

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

Switzerland has ratified the 1952 Arrest Convention but is not a signatory to the 1999 Arrest Convention

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

n/a

- 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

Please be aware that Switzerland is landlocked and therefore seagoing vessels will, apart maybe from yachts and similar small vessels, never be in the jurisdiction of Swiss courts/authorities. As a consequence, Swiss courts/authorities will never have the opportunity to arrest/attach a seagoing vessel.

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

Switzerland has ratified the 1926 Maritime Lien Convention but is not a signatory to the 1993 Maritime Lien Convention.

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

n/a

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

Yes. Switzerland has ratified the 1961 Convention Abolishing the Legal Requirements for Legalisation of Foreign Public Documents.

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.

Under Swiss Law, international treaties are directly applicable, if they are self-executing. There is therefore no need for special legislation incorporating such treaties.

2. NATURE OF THE SHIPS' REGISTER

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

Yes

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')?

No

According to Art. 94 of the Federal Law on Navigation under the Swiss Flag charterparties may be registered in the Swiss Ship Register. Although not specifically mentioned in the act itself, that provision only relates to vessels registered in the Swiss Ship Register.

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?

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?

This constellation is not dealt with at all in the Swiss Ship Register Act. From the Swiss point of view it is therefore permissible to register a charterparty in another register if title is registered in the Swiss register.

Since Swiss law does not address this issue, such registration is also possible if a mortgage is registered in the Swiss register.

No consent by the mortgagee is required for the registration of a charterparty in the register of another jurisdiction.

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.

Assets for offshore oil and gas exploration, production, processing or storage are not eligible for registration.

The requirements for the registration of a seagoing vessel are.

- Nationality requirements: Physical persons as shipowners need to be Swiss nationals. Legal entities or partnerships need to meet certain nationality requirements.
- Domicile requirements: Legal domicile of shipowner/shipowning entity in Switzerland, and, if a legal entity or a partnership is the shipowner, then certain domicile requirements in regard to shareholders/partners (depending on type of entity/partnership) have to be met

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

- Management: the management activity must predominantly take place in Switzerland. 2/3 of the management must be Swiss nationals and the majority must be Swiss residents.
- The shipowner must finance at least 20% of the newbuilt value (own equity)
- Only vessels used for a commercial activity can be registered (exceptions are granted for certain special purpose vessels, such as for humanitarian purposes, and for yachts).

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?

No. It is considered sufficient if the document by which the mortgage is established, refers to other documents such as loan agreements, etc. However, these documents don't have to be (but may be) attached.

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

A mortgage may be enforced if the secured obligation is not fulfilled. No further conditions need to be met.

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

No. The document by which the mortgage is established (Pfanderrichtungsakt) does not have to be notarized.

However, the signatures of the representatives of mortgagor on that document need to be legalized (and apostilled/re-legalized, if legalization originates from another jurisdiction).

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

1 o/oo of the mortgage amount, at least CHF 10, but not over CHF 2'000.

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

Registration 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.

There is no other registration required than the registration in the Ship Register.

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?

Any person may request and receive information about a specific vessel, but such information will be limited to a) specifics of the vessel, b) owner of the vessel, c) statutory liens, d) restrictions on disposal (limited excerpt).

A full excerpt, i.e. also providing information on mortgages may only be requested by the mortgagee and the owner.

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

Yes

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

1-2 working days. In urgent matters an excerpt may be picked up in person on the same day.

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.

Yes, a mortgaged vessel may be sold. The mortgage is a right in rem and will not be affected by such a sale.

If, however, the vessel shall be transferred to another register and shall therefore be deregistered from the Swiss register, then such deregistration can only be made with the consent of mortgagee.

5. ARREST OF A CHARTERED VESSEL

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

Theoretically, yes. However, with Switzerland being landlocked, maritime vessels will – apart from maybe yachts - never be arrested by a Swiss judge or authority.

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)?

No. Mortgagee is under no obligation to respect or protect charterer's interests.

Again, with Switzerland being an inland country, this is rather theoretical, since no Swiss judge or authority will ever arrest a maritime vessel.

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?

Seagoing cargo vessels cannot enter Swiss ports. No Swiss judge or authority will therefore ever carry out a judicial sale regarding maritime cargo which was arrested while being on board of a vessel.

6. PRIORITY ISSUES BETWEEN MORTGAGES REGISTERED IN THE SHIPS' REGISTER IN YOUR JURISDICTION

6.1. Does your jurisdiction have a system of "priority notice" to enable priority to be reserved for a period before actual registration of the mortgage?

No. When being registered, a mortgage will receive its priority, according to the applicable rules. A possibility of reserving a priority without actually applying for registration of a mortgage at the same moment is not possible.

It is possible, however, to register a mortgage in lower priority (e.g. second, third, etc. rank) without a prior mortgage actually being registered. The owner can therefore reserve a certain amount for later first priority mortgages. In the event of enforcement, such reservations will be disregarded, if no actual higher priority mortgage has been registered in the meantime.

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

Yes

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

Priority is determined by the parties.

It is possible to register a lower ranking priority, even if no higher ranking priority is registered (see above, question 6.1). A mortgage can therefore have a lower rank, even if no prior mortgage exists. In such cases, a higher ranking priority can be registered at a later stage.

- 6.4. Is there any doctrine of notice such that the priority of a registered mortgage is deferred to that of an earlier but unregistered mortgage of which the registered mortgagee has notice?**

No. There is no such system.

The only rights which can take priority over registered mortgages are statutory priority rights and maritime liens. Please refer to question 6.6. for these two categories.

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

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.**

Statutory Mortgages: the claim of a seller, claims for repair works and claims of heirs for their share of a ship may be secured by a mortgage. Such mortgage must be registered.

Statutory privileges: The Swiss Code on Maritime Navigation refers directly to the Brussels Convention of 1926. The privileges mentioned in Art. 1-13 of the 1926 Convention are considered as statutory mortgages which come into effect without being 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?**

According to the Swiss Supreme Court Swiss authorities will be competent for enforcement as soon as a ship is within the Swiss territory, irrespective of the flag it flies (of course this will only apply to yachts at the best).

- 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?**

Under Swiss law, enforcement can be initiated without a judgement. Upon a simple objection of the debtor ("Rechtsvorschlag"), however, the mortgagee will have to obtain a judgement

in order to be able to continue the enforcement. If the debtor does not object, an enforcement can therefore be carried out without obtaining a judgement.

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?

Duration of court proceedings cannot be predicted. The estimations below are therefore made with all reservations (however, running costs are of no concern to the court):

If the mortgagee is in possession of an acknowledgement of debt which meets certain criteria, then a judgement of the trial court (first instance) can usually be expected within 6-9 months.

If mortgagee is not in possession of such an acknowledgement, then the proceedings in the first instance may take 1-3 years (or in exceptional cases, e.g. when complex surveys or expert witness reports are necessary, even more), depending on the development of the case and the conduct of defendant.

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?

Yes, if the conditions of Art. 7 of the 1952 Arrest Convention are met, then a Swiss court will consider itself competent.

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?

The actual sale of a vessel within an enforcement procedure will not be carried out by a court, but rather by the Debt Enforcement Office (an administrative authority).

There is no special maritime or ship enforcement office.

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?

Claimant may apply at the Debt Enforcement Office for the serving of a Payment Order upon the debtor.

The debtor then usually opposes to the Payment Order ("Rechtsvorschlag"). If he does so, Claimant will have to obtain an enforceable judgement (see questions 7.2 and 7.3 above).

Once Claimant has obtained such judgement (or if the debtor does not raise an objection), Claimant may apply for sale of the vessel. Such request may be made at the earliest one month after the date on which the Payment Order has been served upon the debtor.

The vessel will be sold in a public auction (or by private sale, if all parties concerned agree and in some special circumstances as defined by the law). The sale can take place at the earliest one month after the request for the goods to be sold and at the latest one year after such request.

Proceeds out of the sale of the vessel will be paid to the Debt Enforcement Office who will be in charge of distributing the proceeds.

The distribution will be made according to the priority of the registered mortgages and privileges. Mortgages will be paid out even if they are not due and payable.

All mortgages will then be cancelled in the ship register.

- 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

9. SALE PROCEDURE

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

A judicial sale based on an arrest following the 1952 arrest convention will most likely not happen in landlocked Switzerland (possible exception re. yachts; the 1952 arrest convention is not applicable on river vessels). Switzerland does neither know a formal admiralty jurisdiction act nor is there an admiralty court. In case a yacht would be arrested in the territory of Switzerland based on art. 2 of the 1952 arrest convention such arrest would have to be ordered by the ordinary court. The sale procedure would follow the general enforcement rules as described hereafter.

An arrest following the 1952 arrest convention is an “actio in rem”; hence against the vessel. Swiss enforcement law does not know this concept. According to art. 271 DEBL (Swiss Federal Act on Debt Enforcement and Bankruptcy Law, DEBL, SR 281.1) a creditor may apply for an order freezing assets of the debtor with respect to an unsecured matured claim if e.g. the debtor does not live in Switzerland, provided the claim has a sufficient connection with Switzerland or is based on an enforceable court judgment or on a recognition of debt. Such freezing order would have to be qualified as an attachment (proceedings against the debtor not against the asset) and not as an arrest.

However, a vessel registered in the Swiss Ship register is mandatorily owned by a legal entity domiciled in Switzerland. A claim against such owner secured by a mortgage on the vessel can therefore be enforced in Switzerland at the domicile of the owner via specific Swiss debt enforcement proceedings (see DEBL).

The enforcement of a mortgage is governed by art. 54 to 61 Swiss Federal Law on the Ship Register (SLSR; SR 747.11). Subsidiarily are applicable the rules and regulations regarding the judicial sale of immovable property (art. 54 al. 1 SLSR; art. 130 to 143b DEBL and the Ordinance of the Swiss Federal Court on the judicial sale of immovable properties (VZG, SR 281.42). For a brief description of the enforcement proceedings, be referred to Question 8.2 above. In the enforcement proceedings, the creditor may request a judicial sale by auction 8 (art. 125 PILA)

- 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?**

As to the procedure, see para 8.2 above. Judicial sale by auction is the sale method envisaged by the law (art. 125 PILA). A private sale of a vessel is only possible if all involved parties agree (art. 130 PILA). The enforcement proceedings from its beginning until the completion of a sale by auction may easily take one or two years or even more. The time needed depends largely on the behaviour of the involved parties. In case the creditor has an enforceable judgment confirming his claim, an ideal timetable could look as follows:

- Issuing payment order: 10 days until the debtor declares objection against the payment order.
- Requesting a court order to put the objection aside based on the enforceable judgment confirming the claim in summary proceedings (if the judgment was made by a foreign court, including recognition of the foreign judgment): three months.

- The creditor can request for judicial sale not earlier than one month and not later than one year after the payment order has been served on the debtor.
- Execution of the judicial sale: 6 months.

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?

No. But as soon as the payment order is served on the owner, the enforcement authority is responsible for the management of the vessel (art. 59 SLSR). As such the enforcement authority could under certain circumstances order the “premature” sale of the vessel upon request from the debtor (the owner) in order to mitigate damages (see art 124 DEBL). Further it is possible to order a sale of the vessel pending judgment if in the course of enforcement proceedings insolvency- or bankruptcy proceedings are opened against the owner. In such case, the liquidator or trustee is under certain circumstances allowed to sell the vessel before a court has decided on the creditors claim against the debtor.

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?

The enforcement authority is obliged to estimate the market value and has to publish its estimation (art. 8 VZG). The enforcement authority adjudicates the lot to the highest bidder after three calls, provided the amount realised exceeds the sum of any secured claims having priority over the claim of the applicant creditor. If no such bid is forthcoming, enforcement proceedings cease with regard to the lot in question (art. 126 DEBL).

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

Yes, the owner or the creditor is entitled to file within 10 days upon the enforcement authority informing them on their estimation file a request for review of the estimation with the supervisory authority of the enforcement authority (art. 9 al. 2 VZG).

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

The sale will be published in the Swiss official gazette of commerce (www.shab.ch; art. 29 VZG). All involved parties receive the publication also personally.

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

n/a

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?

Yes, in case all involved parties (debtor resp. owner and all secured creditors) agree with the private sale (art. 130 al. 1 and 143b DEBL).

9.9. Can a mortgagee bid its debt (animo compensandi) so as to allow a set off of the debt against the purchase price (and provide security for the claims of potential prior lien holders)? Or does a mortgagee (or its preferred bidder or buyer) have to pay the full price in cash?

The mortgagee who bids in the judicial sale and who is adjudicated the vessel may set off the debt against the purchase price but has to pay off the claims of potential prior lien holders in cash.

10. SALE PROCEEDS

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

No. The sale proceeds will be deposited with a bank (official deposit bank; Depositenstelle). Currently the official deposit banks in fact charge negative interest under certain circumstances (amount to be deposited exceeding CHF 1'000.000.-).

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

Both is possible.

(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. Just the costs of the enforcement authority will have to be covered (art. 140 DEBL).

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?

In case the vessel is owned by a Swiss debtor but registered under a foreign flag, the situation is not entirely clear but most likely Swiss courts would decide that priorities are to be determined based on the law of the flag state of the vessel (art. 99 and 100 PILA).

In case the vessel is registered under Swiss flag, Swiss law would determine on the priorities.

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?

No. priorities are defined by the Ship Register and art. 3 of the 1952 Arrest convention. For river resp. inland vessels, priorities are governed by art. 53bis Swiss Federal Law on the Ship Register. Art. 53bis is similar to art. 2 of the 1952 Arrest convention.

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

No

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

Yes. With the announcement of a judicial sale all and any creditors having secured claims are requested to file their claims within 20 days (art. 138 DEBL).

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

There is no timetable. Depending on the circumstances.

11.6. Is the distribution order decided by the court?

No, by the debt enforcement authority (art. 33 VZG).

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

The decision of the debt enforcement authority may be appealed to the supervisory authority of the debt enforcement authority (art. 140 DEBL and art. 38 VZG).

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.

None of these options are available to a mortgagee under Swiss law.

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?

n/a

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?

The question would be if such court order would be recognised in Switzerland (based on the Lugano Convention or art. 25 to 32 PILA).

13. INSOLVENCY PROCESSES³

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

No

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

Yes. Switzerland strictly follows the principle of territoriality and has implemented, within its art. 166 to 165 Federal Act on Private International Law (PILA; SR 291), specific formal statutory procedures for the recognition of foreign insolvency orders complemented by particular insolvency proceedings again based on statutory Swiss insolvency law (Article 166 PILA).

A legal entity against which the competent (foreign) judge opened insolvency proceedings loses its legal capacity to the insolvency estate. The opening of insolvency proceedings and the appointment of a liquidator by a foreign Court is a governmental act which, following the principle of territoriality, remains without any effect in the territory of Switzerland as

³ If your jurisdiction is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation, please so indicate – but also respond to the questions.

long as such foreign governmental act has not been recognised by a competent Swiss Court. As long as a foreign insolvency order had not been formally recognised by a Swiss Court according to Articles 166 et seq. PILA a foreign insolvency estate represented by its liquidator therefore has no legal capacity in the territory of Switzerland. This basically has the following effects:

- a. A foreign liquidator is neither able to initiate enforcement proceedings, nor to issue payment orders, nor to initiate litigation, nor to otherwise act on behalf of the foreign insolvency estate in any ongoing litigation before a Swiss Court.⁴ A foreign liquidator lacks capacity to litigate according to Article 68 CCP (Swiss Code of Civil Procedure).⁵
- b. A foreign liquidator is not able to obtain an order for the recognition and/or enforcement of any final and legally binding judgment (exequatur) against a debtor domiciled in Switzerland.
- c. A foreign liquidator is not able to act on behalf of the foreign insolvency estate in insolvency proceedings against an insolvent debtor domiciled in Switzerland.⁶
- d. A foreign liquidator is not allowed to collect documents, data or other information in the territory of Switzerland or to summon individuals domiciled in Switzerland to provide respective documents, data or information. This is prohibited by Article 271 Swiss Criminal Code.⁷

The only thing that a foreign liquidator is entitled to do in Switzerland prior to the recognition of the foreign insolvency order is to request an order for the recognition of the foreign insolvency order (Art. 166 para. 1 PILA) and, once that request had been filed, to request the ordering of conservatory measures in the sense of Articles 162 to 165 and Article 170 DEBL.

Preconditions for the recognition of a foreign insolvency order upon the request of a foreign liquidator are the following:

- a. The order is enforceable in the state in which it was rendered;
- b. There is no ground for non-recognition according to Article 27 PILA (no duly summons, violation of Swiss ordre public, lis pendens);
- c. Reciprocity is granted by the state in which the order was rendered.

Simultaneously with the recognition of a Dutch insolvency order the Swiss Court orders the opening of particular or secondary insolvency proceedings concerning the Dutch debtor in Switzerland. The competent Swiss insolvency authority is appointed to pursue the particular insolvency proceedings in Switzerland.

All assets of the debtor located in Switzerland are subject to the legal consequences of insolvency according to Swiss law (Art. 170 para. 1 PILA). In the schedule of claims of the particular insolvency proceedings only privileged claims by creditors who have their domicile in Switzerland and claims by creditors which are secured by pledges or mortgages are recorded (Art. 172 PILA).⁸ The assets that form the insolvency estate in the particular

⁴ F. Lorandi, 'Handlungsspielraum ausländischer Insolvenzmassen in der Schweiz', *Aktuelle Juristische Praxis (AJP)* 5/2008, p. 563, footnote 37; with a different opinion I. Schwander, 'Anerkennung ausländischer Konkursdekrete, Nachlassverträge und Kollokationspläne in der Schweiz', in: C.J. Meier-Schatz and R.J. Schweizer (eds.), *Recht und Internationalisierung, Festgabe der Juristischen Abteilung der Universität St. Gallen zum Juristentag 2000*, Zurich: Schulthess 2000, p. 334 et seq.; R. Kuhn and M. Jakob, Die ausländische Insolvenzverwaltung in der Schweiz – eine Standortbestimmung, in: Jusletter, 13. August 2012, p. 4; Swiss Federal Court, BGE 129 III 683; Swiss Federal Court, BGE 134 III 366.

⁵ Swiss Code of Civil Procedure of December 19, 2008 (CCP), SR 272.

⁶ Swiss Federal Court BGE 137 III 570; Swiss Federal Court 5A_248/2014 E 5.

⁷ Swiss Criminal Code of December 21, 1937 (SCC), SR 311.0.

⁸ U. Bürgi, in: H. Honsell et al. (eds.), *Basler Kommentar, Internationales Privatrecht*, 3rd edn., Basel: Helbing & Lichtenhahn 2013, Art. 172 no. 4.

insolvency proceedings are first used to cover the creditors who are recorded in the schedule of claims. Only the remaining balance after the satisfaction of these creditors shall be made available to the foreign insolvency estate (Art. 173 PILA).

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

In case the insolvent debtor is foreign (not domiciled in Switzerland) but he is the owner of a vessel sailing under Swiss flag: The enforcement of secured rights against the vessel may continue in Switzerland as long as the foreign insolvency order has not been recognised by a Swiss Court.

In case the insolvent debtor is domiciled in Switzerland or the foreign insolvency order has been recognised by a Swiss Court: All secured rights and all mortgaged assets in Switzerland become part of the Swiss bankruptcy estate and the Swiss bankruptcy proceedings against the Swiss debtor (Article 197 and 199 Swiss Debt Enforcement and Bankruptcy Law, DEBL, SR 281.1). This provided that the mortgaged asset has, at the time of the opening of bankruptcy proceedings not yet been sold or otherwise realised (Article 199 DEBL).

A creditor whose claim is secured by a mortgage is privileged in the bankruptcy proceedings and will be satisfied directly out of the proceeds from the realisation of the mortgaged asset (Article 219 al. 1 DEBL).

In case of bankruptcy against an owner of a vessel sailing under Swiss flag, the liquidator orders the vessel to a specific port and collects the certificate of registry (Article 61 Swiss Law on the Ship Register, SR 747.11).

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)?

No. In case the foreign insolvency order has been recognised by a Swiss Court, the vessel sailing under Swiss flag becomes an asset of the Swiss particular or secondary bankruptcy proceedings.

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?

The "theoretical" answer would be no. The Swiss bankruptcy proceeding encompasses all assets of the bankrupt debtor. However, it is not possible to arrest a sea going vessel in landlocked Switzerland. Hence there is no maritime court and there cannot be a maritime court sale in the sense of an admiralty jurisdiction act.

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)?

No

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?

The answer is again "theoretical". Swiss insolvency law knows claw-back rules for transactions prior to insolvency (so called avoidance claims; Anfechtungsklage, paulianische

Anfechtung). According to Article 287 DEBL the following acts of a debtor are voidable if the debtor carried them out within one year before the opening of bankruptcy proceedings (Article 287 DEBL):

- a. the granting of collateral or security for existing obligations which the debtor was not bound to secure;
- b. the settlement of a debt of money by another manner than in cash or by other normal means of payment;
- c. the payment of an unmatured debt.

Additionally, all transactions are voidable, which the debtor carried out during the five years prior to the opening of bankruptcy proceedings with the intention, apparent to the other party, of disadvantaging his creditors or of favouring certain of his creditors to the disadvantage of others (Article 288 DEBL).

In case of the sale of a mortgaged vessel and the satisfaction of the creditor out of the proceeds of the sale, there is no risk that an avoidance claim could successfully be enforced against such creditor. As creditor of a secured claim, he would be satisfied directly out of the proceeds from the realisation of the mortgaged asset (Article 219 al. 1 DEBL). Therefore, the satisfaction of such creditor cannot have a disadvantageous effect on other creditors (Article 288 DEBL). This provided that the mortgage was not granted within one year before the bankruptcy and for a claim which the debtor was not bound to secure (Article 287 DEBL).

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)?

No

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?

Swiss bankruptcy proceedings claim to follow the principle of universality in view of the collection of assets. This means, any assets of the debtor, whether located in Switzerland or in another jurisdiction, belong to the bankruptcy estate (Article Universalitätsprinzip (197 DEBL; Article 27 Regulation on the Organisation of the Bankruptcy Authorities KOV, SR 281.32). However, it is a question of the laws of the jurisdiction in which the vessel is located whether and under which preconditions a Swiss liquidator is entitled to take control over the vessel or to move to the realisation of such asset (i.e. by way of sale).

Regarding vessels sailing under Swiss flag it should be considered that any enforcement of claims against such vessel is governed by Swiss law and by the rules and regulations regarding the enforcement of claims against immovable property (Article 54ff. Law on the Ship Registry). Based on the same provisions, a Swiss liquidator should be able to apply for the judicial sale of a vessel registered in the Swiss ship registry.

14. LEASING⁹

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

I'm not aware of any finance structure based on leasing for sea-going vessels but there are such structures in place for river vessels.

⁹ 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.

14.2. 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)?

Leasing is not a specifically normed type of a contract according to Swiss Law (Innominatkontrakt). It is generally qualified as a mixed contract with elements of a sales contract and a rental contract. The meaning and the interpretation of such contractual agreement depends primarily on the wording of the contract.

The Swiss Ship register as well as the Swiss Maritime Navigation Office take a formal approach. Consequently, the lessor has to fulfil the preconditions of an owner of a vessel (see question 2.5 above). He has then to bareboat charter out the vessel to the lessee (art. 90ff. Federal Law on Navigation under the Swiss Flag (LNSF; SR 747.30). The lessee may be registered as charterer in the Swiss Ship Register (art. 93). Is the lessee registered, he is considered to be the shipowner as far as the operation of the vessel is concerned (see art. 45 ff. LNSF).

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.

n/a

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?

No. The rights and duties of the lessor being the formal owner are defined by art. 92 LNSF regarding the bareboat charter. Therefore, the lessor is obliged to hand over the seagoing vessel in seaworthy condition and the lessee shall return the seagoing vessel in the same condition, subject to normal wear and tear, to the lessor at the end of the bareboat charter.

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?

Only with the assistance of the court.

14.6. Under the laws of your jurisdiction is a leased vessel considered to be an asset of the lessor or the lessee, or both?

In terms of ownership the vessel is an asset of the lessor. But as a contract may also be an asset, the bareboat charter-agreement is an asset of the lessee.

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 vessel would be considered an asset of the lessor. The lessor could therefore request the vessel to be transferred to him without compensation to the lessee who is facing insolvency. However, this is only the case if the bareboat charter-agreement provides that the charter will be automatically terminated in case the lessee faces insolvency. Should this not be the case, the lessor has to fulfil the bareboat charter agreement and in case of an early termination has to compensate the lessee for damages.

- 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?**

The question could only be relevant for river vessels or yachts. Seagoing vessels will not reach Swiss territory. There is no case law but most likely not as precondition for an attachment according to Art. 271 DEBL is that the asset to be attached is a property of the debtor.

- 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?**

The lessor is considered the owner. He therefore ranks after third parties with claims secured by maritime liens.

- 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.**

n/a

- 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.**

n/a

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?**

Neither the Swiss Ship Register nor the Swiss Maritime Navigation Office have considered this question up to date. However, a reservation of title is according to Swiss law a legal concept only available for movable property (Fahrniseigentum, see art. 715 Swiss Civil Code). As the registration of vessels and mortgages on vessels follows the legal rules of immovable property, the agreement and registration of a reservation of title is in Switzerland most likely not possible.

- 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.**

No

- 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?**

n/a

- 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.**

n/a

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