

## CMI International Working Group

### Ship Financing Security Practices - Questionnaire

#### 1 MARITIME AND OTHER CONVENTIONS

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

No. The United States has not ratified either Convention.

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

The maritime laws of the United States distinguish between the concepts of maritime “arrest” and “attachment” of a vessel.

Under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Civil Forfeiture Actions of the Federal Rules of Civil Procedure (the “**Supplemental Rules**”), a plaintiff may, in the context of an *in personam* action brought against a defendant in federal district court, seek to “**attach**” tangible and intangible property belonging to such defendant, including the defendant’s vessel, for the purpose of obtaining security with respect to the plaintiff’s claims against the defendant. Upon application of the plaintiff, the court will issue process of maritime attachment against such property (including a vessel) upon a successful showing by the plaintiff that (a) it possesses a “**maritime claim**” against the defendant, and (b) the defendant cannot be “found” within the district (for purposes of *in personam* jurisdiction and service of process) when the complaint is filed.

Under Rule C of the Supplemental Rules, a plaintiff may commence an action *in rem* in federal district court to “**arrest**” a vessel to enforce “any maritime lien” possessed by the plaintiff against such vessel or whenever a statute of the United States “provides for a maritime action in rem.” Upon application of the plaintiff, the court will issue process of maritime arrest against the vessel if “conditions for an in rem action appear to exist” (i.e., it appears that the plaintiff possesses a maritime lien against the vessel or that the plaintiff has a right to bring a maritime action in rem as a matter of federal statute).

Note that the maritime laws of the United States distinguish between “maritime claims” for purposes of Rule B and “maritime liens” for purposes of Rule C. A maritime claim is a claim giving rise to the admiralty and maritime jurisdiction of the district court which typically arises from the breach of a maritime contract or the commission of a maritime tort. By contrast, a maritime lien is described as “a privileged claim upon maritime property, such as a vessel, arising out of services

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

rendered to or injuries caused by that property.” [Citation] U.S. courts have identified general average claims, salvage claims, crew wage claims and claims arising from a maritime tort or an owner’s breach of charter as giving rise to a maritime lien. In addition, claims arising from goods and services constituting “necessaries” that are supplied to a vessel “on the order of the owner or a person authorized by the owner” are also accorded maritime lien status. See 46 U.S.C. §31342

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

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

Yes. A vessel documented under the laws of the United States that is subject to a “preferred mortgage” under 46 U.S.C. §31322 may be arrested by its mortgagee under Rule C in the courts of the United States to enforce the latter’s mortgage lien against the vessel. See 46 U.S.C. §§31301(6)(A), 31325 and 31326

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

Yes. Under the laws of the United States, a “preferred mortgage” includes a mortgage, hypothecation, or similar charge that is established as a security on a foreign vessel if the mortgage, hypothecation, or similar charge was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register at the port of registry of the vessel or at a central office.” 46 U.S.C. §31301(6)(B) A foreign flag vessel that is subject to a ship mortgage meeting these “preferred mortgage” requirements can be arrested under Rule C in the courts of the United States for purposes of enforcing the mortgage. See 46 U.S.C. §§31325 and 31326

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

No. The United States has not ratified either 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?

Generally speaking, a maritime lien asserted by a foreign creditor for goods and services furnished in a non-U.S. port to a foreign flag vessel, which vessel is subsequently arrested in U.S. waters, will be recognized by U.S. courts unless the foreign jurisdiction in which the goods or services were provided does not recognize a maritime lien for such goods and services. In such cases, the courts will typically engage in a conflict of laws analysis to determine the proper law to be applied in the circumstances.

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

Yes.

## 2 NATURE OF THE SHIPS' REGISTER

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

No. Vessels eligible for documentation under the laws of the United States will, upon application, receive a Certificate of Documentation ("CoD") issued by the National Vessel Documentation Center ("NVDC") of the United States Coast Guard ("USCG"). The CoD provides "conclusive evidence of nationality for international purposes" and "conclusive evidence of qualification to engage in a specified trade," but "not conclusive evidence of ownership in a proceeding in which ownership is an issue." 46 U.S.C. §12134

- 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. The documentation laws and regulations maintained and administered by the NVDC with respect to U.S. flag vessels do not allow or contemplate the inbound registration of demise charters.

- 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?

Not applicable.

- 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?

No. The documentation laws and regulations maintained and administered by the NVDC with respect to U.S. flag vessels do not allow or contemplate the outbound registration of demise charters.

- 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.

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

Any vessel of at least five net tons wholly owned by a citizen or citizens of the United States is eligible for documentation as a U.S. flag vessel whereas all vessels of less than five net tons are excluded from documentation. See 46 C.F.R. §§67.5 and 67.9 Specific criteria for vessel documentation will be informed by the “endorsement” sought for and assigned to the vessel by NVDC.<sup>3</sup>

Under the laws of the United States the term “vessel” is broadly construed to include “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. §3; see also 46 C.F.R. §67.3 However, what types of assets qualify as a “vessel” under the laws of the United States, for purposes other than documentation, presents a different question and outcomes are fact dependent.<sup>4</sup>

### 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?

The law and regulations of the United States do not specify or require that certain categories of documents be attached to preferred mortgages submitted for recordation against U.S. flag vessels. However, as a matter of custom and practice, underlying loan documents are often attached to the preferred mortgage and incorporated by reference. Practitioners who follow this practice believe that, by doing so, it is easier to prove the authenticity of the debt obligation in domestic and foreign courts.

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

The law and regulations of the United States do not require that a preferred mortgage submitted for recordation against a U.S. flag vessel contain a recitation of events, circumstances and defaults that give rise to or otherwise trigger the mortgagee’s enforcement rights thereunder. However, as a matter of custom and practice, most preferred mortgages do so.

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

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<sup>3</sup> An endorsement is an “entry” appearing on the vessel’s CoD which serves as “conclusive evidence” that the vessel is entitled to engage in a specified trade. 46 C.F.R. §67.3

<sup>4</sup> For more information concerning the tests utilized by U.S. courts to determine whether a structure constitutes a vessel, see *Response of the Maritime Law Association of the United States to the Vessel Nomenclature Questionnaire* issued by the CMI International Working Group on Vessel Nomenclature (<http://comitemaritime.org/wp-content/uploads/2018/05/US-MLA-Replies-to-the-Ship-Nomenclature-Questionnaire.pdf>).

To be filed with the NVDC, every preferred ship mortgage must be signed and “acknowledged.” 46 U.S.C. §31321(b)(6); 46 C.F.R. §67.207(a)(2) An acknowledgement is defined to mean “(1) an acknowledgment or notarization in any form which is in substantial compliance with the Uniform Acknowledgments Act, the Uniform Recognition of Acknowledgments Act, the Uniform Law on Notarial Acts, or the statutes of the State within which it is taken, made before a notary public or other official authorized by a law of a State or the United States to take acknowledgment of deeds; (2) an acknowledgment or notarization before a notary or other official authorized to take acknowledgments of deeds by the law of a foreign nation which is a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961, provided that the acknowledgment or notarization is accompanied by the certificate described in Article 4 of that Convention; or (3) any attestation [in a form prescribed by the Coast Guard.” 46 C.F.R. §3

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

Fees assessed by NVDC for the recordation of a preferred mortgage against a U.S. flag vessel are established by regulation. See 46 C.F.R. Subpart Y. The current fee is \$4.00 per page. See 46 C.F.R. §67.550

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

The mortgage lien against a U.S. flag vessel arising from a duly executed and recorded preferred ship mortgage in favour of a mortgagee does not expire with the passage of time (i.e., there is no requirement for re-registration after a certain period).

- 3.5** In your jurisdiction is a mortgage of a vessel required to be registered only in the ships register or, in addition, in another register? If so, please give brief details.

All preferred mortgages against U.S. flag vessels must be filed and recorded with the NVDC. No other registrations or filings are required.

#### **4 INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS**

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

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

No. Information concerning security interests in U.S. flag vessels (including preferred mortgages) is publicly available from NVDC upon request and the payment of

applicable fees. Authorization of the vessel owner is not a requirement for the release of such information.

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

No. NVDC will provide a certified copy of the vessel's abstract of title or a Certificate of Ownership ("CoO") for a fee, but NVDC will not certify the accuracy of its contents. See 46 C.F.R. §§67.301, 67.302, 67.535 and 67.537

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

Timing varies depending upon staffing and workloads at NVDC. Generally, NVDC will provide an abstract of title within 48 hours of request. A CoO may take longer to process.

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

A U.S. flag vessel subject to a preferred mortgage may be sold by the owner prior to the release of a duly recorded preferred mortgage only upon the written consent of the mortgagee. See 46 C.F.R. §67.145

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

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

The laws of the United States do not prohibit the mortgagee of a U.S. documented vessel or a foreign registered vessel, in either case operating under a bareboat charter or time charter, from arresting such vessel to enforce its mortgage lien.

**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, unless the arrest is found to be wrongful by the district court. An arrest may be wrongful in circumstances where the underlying claim or mortgage is found to be invalid or defective or where the underlying facts fail to establish probable cause or reasonable grounds for the arrest of the 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?

Cargo aboard a vessel at the time of arrest is not appurtenant to the vessel. Accordingly, to the extent that such cargo remains on board a vessel that later become subject to an order of judicial sale, it is likely that the order will direct the removal of such cargo prior to the date and time of sale. Under local admiralty rules of the district court having jurisdiction over the arrested vessel, or possibly under the terms of an order issued by the court, one or more of the arresting parties or a substitute custodian or the U.S. Marshal may be authorized to effect the discharge of such cargo with the costs thereof being deemed an expense of the arrest of the vessel payable from the sale proceeds thereof or as a condition of her release from arrest.

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

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

No.

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

Yes. Subsequent preferred mortgages may be filed and recorded without the consent of the original mortgagee.

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

In the absence of equitable subordination or a binding inter-creditor agreement which alters or reverses lien priorities, preferred mortgages against a U.S. flag vessel are prioritized in the order of their filing and recordation with NVDC with first-in-time mortgages being senior to and having priority over preferred mortgages that are filed and recorded subsequent thereto, and so on.

**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.

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

Yes, although such enforcement action may violate the terms of any inter-creditor agreement between the first and second mortgagees to the extent that the agreement restricts or subordinates the enforcement prerogatives of the second 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.

U.S. law permits trade creditors holding maritime liens against a U.S. flag vessel to record lien notices with NVDC, but only in circumstances where the vessel is already subject to a duly recorded preferred mortgage. 46 C.F.R. §§67-253-67.255

## **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?

With one caveat, the laws of the United States do not distinguish between the enforcement of preferred mortgages against U.S. flag vessels and preferred mortgages against foreign flag vessels as the enforcement procedures available in the courts of the United States are the same as to both. See 46 U.S.C. §§31301(6)(b), 31325 & 31326 That said, under the laws of the United States, enforcement of a mortgage lien arising from a preferred mortgage against a foreign flag vessel is deemed to be “subordinate to a maritime lien for necessities provided in the United States.” 46 U.S.C §31326(b)(2) This subordination rule, which reflects Congressional preference for maritime liens possessed by domestic trade creditors, does not apply to mortgage liens arising from preferred mortgages against U.S. flag vessels.

- 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?

No. Upon default of any term of the preferred mortgage, and as set forth in the preferred mortgage or related financing document, the mortgagee may exercise any one of a number of enforcement remedies prior to obtaining a judgment on the underlying loan agreement. See 46 U.S.C. §31325

- 7.3** If so, how long is it likely to take to obtain a judgment if the claim is contested? Will the local court expedite the proceedings having regard to the ongoing costs of maintaining the vessel?

Not applicable.

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

Under the laws of the United States, U.S. district courts have jurisdiction of admiralty and maritime actions commenced by mortgagees to enforce and foreclose preferred mortgages against vessels. See 46 U.S.C. §31325(c).

## 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?

As a general rule, U.S. federal courts possess subject matter jurisdiction over admiralty and maritime cases and bankruptcy cases.

In an admiralty or maritime case, when a vessel is sold by order of a U.S. district court in a civil action *in rem* to enforce a preferred mortgage lien or other maritime lien, “any claim in the vessel existing on the date of sale is terminated” and “the vessel is sold free of all those claims.” 46 U.S.C §31326(a)

In a bankruptcy case, a U.S. bankruptcy court having jurisdiction of the case possesses statutory authority to sell property of the debtor, other than in the ordinary course of business, “free and clear of any interest in such property or an entity other than the estate” in various enumerated circumstances, including where “applicable non-bankruptcy law permits the sale of such property free and clear of such interest” or where “such entity consents.” 11 U.S.C. §363(f) Such sale may only occur pursuant to an order of the court issued after notice and hearing. Although the point is not without controversy, most practitioners are of the view that U.S. bankruptcy courts have authority under Section 363 of the U.S. Bankruptcy Code (the “Code”) to sell a vessel free and clear of maritime liens.

- 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?

In the case of a vessel sale ordered by a district court in a civil action *in rem* to enforce a preferred mortgage lien or other maritime lien, all pre-existing claims against the vessel, including maritime lien claims, are automatically terminated and all such terminated claims thereupon attach to the sale proceeds. The sale of the vessel free and clear of liens and prior liens occurs by operation of law (i.e., by statute). In the case of a vessel sale ordered by a bankruptcy court pursuant to Section 363 of the Code, the sale may be effected free and clear of any interest in the vessel so long as one of the requirements set forth in Section 363(f) of the Code is satisfied.

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

If the creditor obtains a judgment against the vessel *in rem* prior to the sale of the vessel, and the owner of the vessel appeals from such judgment (without having previously released the vessel from arrest through the posting of security), enforcement of the judgment against the vessel will continue notwithstanding the appeal unless the owner-appellant seeks and obtains a court order which stays such enforcement pending appeal.

## 9 SALE PROCEDURE

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

Yes.

**9.2** What are the criteria for an application for a judicial sale by auction and what is the procedure and timetable for such an application and sale?

See response to Question 9.3 below.

**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?

Yes. Following the commencement of an *in rem* mortgage enforcement action in a United States district court, the mortgagee may apply to the court for an order directing the sale of the vessel by judicial auction (conducted by the United States Marshal) prior to the entry of a final judgment in the action. Such pre-judgment vessel sales are referred to as “interlocutory sales” and are permitted under Rule E (9)(a) of the Supplemental Rules if one or more of the conditions set forth in the Rule are found to exist. Among others, a condition will be found to exist under the Rule in circumstances where the vessel is “perishable or liable to deterioration, decay or injury by being detained in custody pending the action.”

**9.4** Will the court in your jurisdiction fix a minimum bid price (reserve price) for the vessel and will the amount of that minimum bid price be disclosed to interested parties? What happens if the maximum amount bid for the vessel is lower than the reserve price?

A minimum bid price (reserve price) for the judicial sale of a vessel is typically fixed by court order upon request by one or more parties. Information concerning any court-ordered minimum bid price is typically included in the notice of sale that is published prior to sale. If an auction is conducted and the maximum amount bid for the vessel is less than the minimum bid price, the auction may have to be reset unless the court order allows other outcomes.

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

All original and intervening parties to an arrest action *in rem* have standing to make, oppose or comment upon a motion for a court order directing the interlocutory sale of the vessel under arrest. Since a court order may direct the establishment of a minimum bid price (or not), all parties having standing in the action have the ability to influence the minimum bid price.

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

Minimum requirements for public advertisement of the sale may be contained in the local admiralty rules of the United States district court in which the vessel is being auctioned and sold. If not, the order of sale, usually prepared by one of the parties and signed by the court, may also contain provisions specifically dealing with public advertisement of the sale. Additional public advertisements and notices (which exceed minimum requirements) are sometimes pursued and are typically geared toward the market for the type of vessel being auctioned and the universe of potential bidders being solicited.

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

See response to Question 9.5.

- 9.8** Can a mortgagee enforce its mortgage in your jurisdiction by applying for a court approved private sale? If so, what are the criteria for an application requesting the court to approve a private sale and what is the procedure and timetable for such an application and sale?

A mortgagee may seek to enforce its mortgage in a United States district court through a private sale subject to supervision of the court. 28 U.S.C. §§2001-2004. A private sale conducted in this manner requires a hearing on notice to all interested parties, followed by a court order authorizing the sale on terms and conditions approved by the court. Before a court-supervised private sale can be confirmed, the court must appoint three different appraisers to appraise the vessel and, by law, no private sale can be confirmed at a price less than two-thirds of appraised value. In addition, prior to confirmation by the court, the terms of sale must be published in a newspaper of general circulation. A private sale may not be confirmed by the court if a bona fide offer is made which guarantees at least a 10% premium over the privately negotiated sales price.

- 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 local admiralty rules of some district courts permit a mortgagee to credit bid the owner's outstanding mortgage indebtedness. In districts which do not specifically provide for credit bidding, the mortgagee may seek to include this right in the court order directing the sale of the vessel.

## **10 SALE PROCEEDS**

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

All sale proceeds deposited with the registry of the district court require an order of the court permitting the deposit. If the funds are to be placed in an interest-bearing

account, the court order shall so indicate and, in such circumstances, the Court Registry Investment System, administered by the Administrative Office of the United States Courts, will be the only investment mechanism authorized.

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

The proceeds of judicial sale conducted by a U.S. district court will be held in U.S. Dollars, unless otherwise specified in the court order directing the sale.

- (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?

Sale proceeds will be used to pay court fees and court-approved expenses before distribution to creditors on the basis of lien priorities *inter se*. Distribution of sale proceeds should not be subject to exchange control restrictions.

## 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 actions *in rem* in the courts of the United States, priorities between and among preferred mortgage liens, maritime liens and non-maritime liens are determined under local law (*lex fori*). The law of the jurisdiction in which the claim arose (*lex causae*) and the law of the flag of the vessel are not relevant to the issue of lien 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?

A mortgage lien against a U.S. flag vessel has priority over all claims against the vessel, except for expenses and fees allowed by the court, costs imposed by the court, and “preferred maritime liens.” 46 U.S.C. §31326(b)(1).<sup>5</sup>

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

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<sup>55</sup> A “preferred maritime lien” means a maritime lien on a vessel “(A) arising before a preferred mortgage was filed...; (B) for damage arising out of a maritime tort; (C) for wages of a stevedore when employed directly [by certain persons]; (D) for wages of the crew of the vessel; (E) for general average; and (F) for salvage, including contract salvage.” 46 U.S.C. §31301(5).

A mortgage lien against a foreign flag vessel enjoys the same ranking and priority as its counterpart against a U.S. flag vessel, except that, in the case of vessels operating under foreign flag, the mortgage lien is subordinate to a “maritime lien for necessities provided in the United States.” 46 U.S.C. §31326(b)(2).

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

Yes. As explained in 7.1 and 11.2(b) above, maritime liens for necessities “provided in the United States” rank ahead of mortgage liens arising from a duly registered preferred mortgage against a foreign flag vessel.

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

In an action *in rem* in the courts of the United States, in which a vessel is sold by interlocutory sale, the bar date for the presentation of claims against the vessel is typically fixed by court order. Whether that date is before or after the date of sale will be specific to that order.

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

This depends upon the timing of the sale. If the sale occurs after final adjudication (i.e., judgment) of all *in rem* claims against the vessel, the distribution of sale proceeds should occur shortly thereafter. If the sale is an interlocutory sale, distribution of the proceeds of sale will likely await the final adjudication of all *in rem* claims against the vessel.

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

Yes.

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

Yes.

## **12 MORTGAGEE'S SELF-HELP REMEDIES**

**12.1** Under the laws of your jurisdiction does a vessel mortgage governed by and registered in accordance with such laws give the right to take the following enforcement steps without a court order in your jurisdiction?

(a) to take possession of the vessel;

Under the laws of the United States, upon default of a preferred mortgage, the mortgagee may take possession of the vessel if such remedy is provided for in the mortgage or related financing document. Under Article 9 of the Uniform Commercial Code, as applicable in most states, a secured creditor who repossesses

collateral without judicial assistance may do so only if he proceeds “without breach of the peace.” U.C.C. §9-609(b)(2)

(b) to appoint a receiver, manager or other party to operate the vessel;

In a civil action commenced by the preferred mortgagee in a U.S. district court against a U.S. flag vessel, the mortgagee may ask the court to appoint a receiver and authorize the receiver to operate the mortgaged vessel.

(c) to sell the vessel as mortgagee;

Subject to applicable transfer restrictions to non-U.S. citizens or transfer restrictions in time of war or national emergency, a mortgagee may sell a U.S. flag vessel privately, without judicial intervention, in accordance with applicable state law. A vessel sold in this manner will not cleanse the vessel of pre-existing liens and claims.

(d) to sell the vessel as attorney in fact of the owner.

A mortgagee may sell a U.S. flag vessel as attorney-in-fact of the owner if such remedy is provided for in the mortgage or related financing document.

**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?

If, under the law of the register applicable to the foreign flag vessel subject to the preferred mortgage, the mortgagee has the right to take the enforcement steps above without court order, such rights would not be prohibited by a U.S. court. In the case of the appointment of a receiver and manager, such right is expressly provided for in 46 U.S.C. §31325(e)(1).

**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?

Not applicable.

## **13** **INSOLVENCY PROCESSES<sup>6</sup>**

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

Yes. The Model Law has been adopted by the United States and codified in Chapter 15 of the Code.

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<sup>6</sup> If your jurisdiction is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation, please so indicate – but also respond to the questions.

**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. Chapter 15 of the Code sets forth the means and methods by which a foreign insolvency proceeding may be recognized by the courts of the United States.

**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?

Yes. The commencement of a plenary bankruptcy case under the Code automatically stays the enforcement rights of secured creditors against property of the debtor's estate, including vessels owned by the debtor, although the stay may be lifted or modified by the court in the circumstances for good cause shown.

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

Yes.

**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?

Even if the maritime court sale proceedings were commenced prior to the commencement of insolvency proceedings, the insolvency proceedings would likely take precedence over the maritime court sale proceedings. Under the Code, the commencement or continuation of proceedings to enforce a mortgage lien or maritime lien, including a maritime court sale related thereto, would be automatically stayed in the absence of court-ordered relief from the stay. 11 U.S.C. §362. Accordingly, the sale of any property of an owner subject to U.S. bankruptcy proceedings would require relief from the automatic stay and court approval of any sale process outside of the ordinary course of business. 11 U.S.C. §362; §363.

**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)?

Yes. As a general rule, the commencement of foreign insolvency proceedings by a vessel owner would not stay parallel maritime court sale proceedings brought in the United States to enforce a mortgage lien or maritime lien against such owner-debtor's vessel. However, if the foreign representative of the owner-debtor commences an ancillary bankruptcy proceeding in the United States pursuant to Chapter 15 of the Code, the maritime court sale proceedings will be automatically

stayed upon U.S. court recognition of the foreign proceeding as a “foreign main proceeding.” 11 U.S.C. §1520 If the foreign proceeding is recognized by the U.S. court as a “foreign non-main proceeding,” stay relief will not be automatic, but may be sought by the foreign representative of the owner-debtor to “protect the assets of the debtor or the interests of the creditors.” 11 U.S.C. §1521 Prior to recognition, a U.S. bankruptcy court may, at the request of the foreign representative, grant provisional stay relief where such relief “is urgently needed to protect the assets of the debtor and or the interests of the creditors.” 11 U.S.C. §1519(a)

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

Yes.

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

Yes. A foreign representative of an owner-debtor who commences an ancillary bankruptcy proceeding in the United States pursuant to Chapter 15 of the Code does not possess the same clawback rights that a trustee enjoys in a plenary bankruptcy proceeding commenced under Chapter 11 (reorganization) or Chapter 7 (liquidation) of the Code.

- 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?

In a plenary bankruptcy case under Chapters 7 or 11 of the Code, the estate of the debtor is deemed to include all property of the debtor, wherever located and by whomever held. 11 U.S.C. §541.

## **14 LEASING<sup>7</sup>**

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

Yes. Leasing transactions, including sale and leaseback transactions, are a common method by which vessels may be financed.

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<sup>7</sup> By 'leasing' is meant a demise chartering of a vessel where the holder of legal title ('lessor') is a financier rather than a commercial shipping company and the vessel is demise chartered to a shipping company ('lessee'). It might or might not involve the lessee having an option to purchase for a pre-agreed price or title automatically passing to the lessee at the end of the lease term. It covers both finance leases, where the lessee by one means or another has substantially the whole economic interest in the vessel and operating leases where the lessor retains some economic risk and interest in the vessel.

- 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)?

Under applicable federal and state law, there is a risk that federal bankruptcy courts will re-characterize a vessel lease as a disguised financing arrangement, in which event the lessee, and not the lessor, will be deemed to be the owner of 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.

The bankruptcy courts often consider a variety of tax, accounting and commercial laws to determine whether a vessel lease is a true lease or a disguised financing or security interest. For example, employing Section 1-201(37) of the UCC, courts may use a so-called *bright line* or *residual value* test which involves a series of objective factors to determine whether the lease is a disguised security interest. In addition, courts may use the so-called *economic realities* test which analyses a number of factors to determine the economic substance of the transaction regardless of the label ascribed to it by the parties.

- 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?

Yes. Under Article 2-A (“**Article 2-A**”) of the Uniform Commercial Code (“**UCC**”), applicable to lease transactions, a non-defaulting lessor has rights and remedies as provided in Article 2-A and, except as limited in Article 2-A, as also provided in the lease agreement between the lessor and lessee. UCC §2-A 501(2) U.S. courts have stated that the UCC is “indicative” of the maritime law of the United States.

- 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?

Yes. Under Article 2-A of the UCC, a lessor has numerous enforcement options available to it upon the occurrence of a default by its lessee, including “self-help” remedies and “non-judicial” procedures. UCC §2-A 501(3) If the exercise of self-help remedies may result in a breach of the peace, then the lessor may be required to seek the assistance of a court in the exercise thereof.

- 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?

This depends upon the commercial nature of the lease. If the lease is characterized as a true lease, the leased vessel will be viewed as an asset of the lessor. If the lease

is characterized as a disguised financing, the leased vessel will be viewed as 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?

See response to 14.6.

- 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?

Under the laws of the United States, a lessor cannot possess a maritime lien against its own vessel and, therefore, as a general rule, it cannot arrest its vessel or join in any third party arrest of the vessel on the basis of a claimed maritime lien. On the other hand, a lessor can arrest its own vessel under **Rule F** of the Supplemental Rules to regain possession of the vessel in circumstances where the lessee of the vessel or other third party is exercising unlawful possession or detention thereof.

- 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?

Under the laws of the United States, as general rule, the equity interest held by a lessor in a vessel which it owns and which is on lease to a lessee will rank below maritime liens and other judicial liens (such as liens arising from maritime attachment) against the vessel.

- 14.10** Do the laws of your jurisdiction recognise registered leases in respect of vessels registered in a different jurisdiction? If so, please give brief details.

No, and it remains to be seen if a U.S. court will recognize as a preferred mortgage a finance charter recorded under the laws of Marshall Islands or Liberia.

- 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 has been no governmental initiative to promote the leasing of vessels.

## **15 RESERVATION OF TITLE<sup>8</sup>**

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

As explained in 14.3 above, federal bankruptcy courts may review a vessel lease transaction (in which the finance lessor retains title to the vessel) to determine

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<sup>8</sup> References to 'reservation of title' are intended to include arrangements where a seller retains title to the vessel until the buyer pays the full price in circumstances where the buyer's obligation to pay the full price is deferred over time.

whether the underlying charter is a true lease or a disguised financing or security interest. If the charter is so re-characterized, the lessee, and not the lessor, will be deemed to be the owner of the vessel. In most re-characterization scenarios, the underlying charter will contain grant to the lessor by the lessee of a security interest in the vessel, notwithstanding the retention of title held in favour of the lessor. The question then becomes what steps, if any, have been taken by the lessor to perfect the security interest and the relative priority of that interest against other liens and claims (including maritime lien claims) asserted by others against the vessel.

- 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.

Retention of title arrangements involving U.S. flag vessels are not registered with the NVDC. However, to the extent that the underlying charter conveys a security interest to the finance lessor, the lessor may "perfect" that interest in accordance with the requirements of the UCC. Perfection is typically accomplished by filing a financing statement with a state recordation office (and not the NVDC). Note, however, that the perfection of a security interest under the UCC does not create an enforceable maritime lien against the vessel nor does it afford maritime lien status to the lessor as secured party.

- 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?

To the extent that the underlying charter contains a grant of a security interest in favour of the finance lessor, and the lessor takes the necessary steps to perfect that security interest under state law, the finance lessor will be deemed to possess a perfected interest under state law. The lessor will then possess, as a matter of law, all rights and remedies of a secured party under the UCC.

- 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.

No.

**April 2016**