



COMITÉ MARITIME INTERNATIONAL

PRESIDENT

19 April 2016

Presidents of MLAs

Dear President

By email

CMI IWG - Ship Financing Security Practices Questionnaire

I **attach** an amended version of the Questionnaire which replaces the Questionnaire attached to my letter dated 29 March 2016.

I am informed by the Chair of the International Working Group that there were some last minute changes made to the last version I sent to you and some of the cross-references to earlier paragraphs were overlooked and not changed.

Those references have now been corrected.

Kind regards

Stuart Hetherington

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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?
- 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?
- 1.3** In particular, can arrest be made:
- (a) by a mortgagee of a vessel registered under the laws of your jurisdiction?
 - (b) by a mortgagee of a vessel registered under the laws of a different jurisdiction?
- 1.4** Has your jurisdiction ratified the 1926 and/or the 1993 Maritime Liens and Mortgages Convention or neither?
- 1.5** If your jurisdiction has not ratified either Maritime Liens and Mortgages Convention does your jurisdiction recognize foreign maritime liens? If so what types of claim are recognised as maritime liens?
- 1.6** Does the law of your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents?

2 NATURE OF THE SHIPS' REGISTER

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

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.

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

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?
 - (b) set out in detail the circumstances giving rise to a right of enforcement?
- 3.2** Does a mortgage in respect of a vessel registered in your jurisdiction need to be notarised and/or legalised?
- 3.3** What are the registry fees in order to have a mortgage registered against a vessel registered in your jurisdiction?
- 3.4** Is registration indefinite or is there any 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.

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?
 - (b) Does your jurisdiction certify the accuracy of the information?
 - (c) How much time is generally required to obtain such information?
- 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.

5 ARREST OF A CHARTERED VESSEL

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

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?
- 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?
- 6.3 When there are two or more registered mortgages what determines their priority?
- 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?
- 6.5 Can a second registered mortgagee exercise enforcement remedies without the consent of the first registered 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.

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?
- 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?
- 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?
- 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?

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?
- 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?
- 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?

9 SALE PROCEDURE

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

- 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?
- 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?
- 9.5 Can the owner or other creditors influence the amount of the reserve price?
- 9.6 What arrangements will be made for public advertisement of the sale?
- 9.7 To what extent is it possible for the owner or other creditors to influence the timetable or procedure for sale?
- 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?
- 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?

10 SALE PROCEEDS

- 10.1 Will the sale proceeds be held in an interest bearing account?
 - (a) Will they be held in the currency of the sale or will they be converted into local currency?
 - (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?

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?
- 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?
- 11.3 Are there any special rules on priority for local creditors?
- 11.4 Is it necessary for claimants to introduce their claims prior to the date of sale or within some specified period thereafter?
- 11.5 What is the timetable leading up to the distribution of the proceeds of sale?

11.6 Is the distribution order decided by the court?

11.7 Is that order subject to a right of appeal?

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.

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?

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?

13 INSOLVENCY PROCESSES³

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

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)

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?

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)?

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?

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)?

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

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.

set-aside by applicable insolvency claw-back rules for transactions prior to insolvency?

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)?

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?

14 LEASING⁴

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

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)?

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.

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?

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?

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?

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?

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?

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?

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.

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.

⁴ 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.

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

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⁵ 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.