

Ship Finance

Contributing editor
Lawrence Rutkowski



2018

GETTING THE
DEAL THROUGH

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Lawrence Rutkowski
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This article was first published in July 2018
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Published by
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London, W11 1QQ, UK
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No photocopying without a CLA licence.
First published 2014
Fifth edition
ISBN 978-1-78915-069-8

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Ship Finance 2018

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Ship Finance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Lawrence Rutowski of Seward & Kissel LL, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
June 2018

Cayman Islands

Ellie Crespi and Nicole Pineda

Harneys

Due diligence

1 How does one demonstrate title to or legal ownership of a vessel registered under the laws of your jurisdiction?

A certificate of registry issued by the Registrar of Shipping (the Registrar) at the Cayman Islands Shipping Registry (a Category 1 British Registry) (CISR) demonstrates title to or legal ownership of vessels registered in the Cayman Islands. Upon the transfer of a registered vessel, a bill of sale of a vessel or of shares therein shall be entered in the Register of Ships (the Register) in the order of production to the Registrar, and upon the transfer being registered the Registrar shall issue a new certificate of registry.

2 How can one determine whether there are any liens recorded over a vessel?

Mortgage registration is evidenced by a certificate of registry, but because this is a document used for navigation purposes, it is more likely that a copy of the transcript of British Registry will be provided by CISR as evidence of mortgage registration over a vessel.

3 How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

Where security is created by a company incorporated in the Cayman Islands, and whether or not the asset is situated within the Cayman Islands, it is necessary under section 54 of the Companies Law (2016 Revision) of the Cayman Islands (the Companies Law) to enter the particulars of such security in the register of mortgages and charges of the company, maintained by the company's registered office provider. Note that failure to register in this way exposes the company and directors to a financial penalty (and may technically result in the company failing to be in good standing under the Companies Law), but does not invalidate the security itself or affect the relevant chargee's priority. Unlike some jurisdictions (eg, England and Wales), there are no statutory time limits within which the registration must take place to avoid being void against a liquidator or creditor, although it is prudent for lenders to ensure their security is registered as soon as possible so that other potential creditors who search the register are put on notice. Generally, there is no public registration of security in the Cayman Islands and there are no publicly searchable registers, so copies of the register of mortgages and charges must be obtained from the company itself or from its registered office provider (with the company's consent). Certain assets, such as aircraft, ships and intellectual property, have statutory registration requirements for security interests granted over them – see question 2.

4 Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

A search at the Cayman Online Registry Information Service of the General Registry of the Cayman Islands (available to registered users only) (the Companies Registry) will show whether an entity is in existence in the Cayman Islands, when it was incorporated and who is acting as the company's registered office provider. To establish whether

a Cayman entity is in good standing, a request must be made to the entity's registered office provider to order a certificate of good standing from the Registrar of Companies in the Cayman Islands. There are two elements to good standing in the Cayman Islands:

- all fees and penalties under the Companies Law must have been paid; and
- the Registrar of Companies must have no knowledge that the company is in default under the Companies Law.

5 Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

Information on shareholders, directors, officers and authorised signatories of a Cayman Islands entity is not available publicly in the Cayman Islands. To obtain this information, a request must be made to the company (or its registered office provider acting on the instructions of the company) to provide a copy of the company's register of members and register of directors and officers. Authorised signatories are generally approved by a company in the resolutions of the board of directors approving a specific transaction. Certain Cayman Islands companies are required to maintain a register of beneficial ownership; this is not a public document and is only accessible by the Cayman Islands authorities, following a lawful request by UK legal authorities.

6 What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

Subject to any specific requirements under the Cayman obligor's articles of association, generally the board of directors of a Cayman entity would need to approve the obligor's entry into a written guarantee by passing a resolution of the board of directors. There is no prohibition against a Cayman Islands company providing financial assistance under Cayman Islands law. The directors of a company providing a guarantee or a security interest must ensure that any proposed transaction is in the best interests of the company as a whole and that, in entering into the guarantee, they take due account of their other fiduciary duties. A guarantee or other security arrangement may be construed as not being in the best interests of a company if the granting company receives no commercial benefit from the underlying financing arrangements. If the transaction is not deemed by the directors of the company to be in the best interests of the company or where the guarantee or security interest is upstream (subsidiary to parent) or cross-stream (to an affiliate), secured parties may also seek the approval of the security grantor's shareholders before entering into the transaction – this should avoid the validity of the transaction subsequently being challenged by a shareholder and gives comfort to the directors committing the company to the transaction.

7 Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

Under the laws of the Cayman Islands, foreign lenders will not be deemed to be resident, domiciled or carrying on any commercial activity in the Cayman Islands or subject to any tax in the Cayman Islands by reason only of the extension of credit to a borrower incorporated or formed within the Cayman Islands, nor is it necessary for a foreign lender to be authorised or qualified to carry on business in the Cayman Islands to extend credit to a borrower incorporated or formed within the Cayman Islands.

Repayment

8 Is central bank or other regulatory approval required for repayment of a loan in foreign currency?

No authorisations, consents, orders, permissions or approvals are required from any governmental, regulatory or judicial authority or agency in the Cayman Islands for repayment of a loan in foreign currency.

9 Do usury laws limit the interest payable to a lender in respect of a vessel financing?

There is no applicable usury or interest limitation law in the Cayman Islands that would restrict the recovery of interest payments to a lender in respect of a vessel financing.

10 Are withholding taxes payable on principal or interest payments to non-resident lenders?

There are no withholding taxes payable under Cayman Islands law on principal or interest payments to non-resident lenders.

Registration of vessels

11 What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?

Vessels of all sizes and classes, from small yachts to supertankers, and including offshore drilling rigs and mobile offshore drilling units, are eligible for registration in the Cayman Islands. However, as a matter of policy, fishing vessels are not currently being registered except those owned locally and operating in Cayman waters. CISR offers five vessel registration options:

- full;
- interim;
- term;
- under construction; and
- demise (bareboat) charter.

Prior to accepting any commercial vessel for registration, the CISR uses a 'merchant ship flag-in matrix' scoring system to ensure the vessel meets minimum safety and operational standards. The matrix examines a vessel's port state control record, age and type of vessel, classification society and previous flag. Generally, vessels over 15 years old or vessels with a medium to high score may require a preregistration survey.

The effect of registration in the Cayman Islands with CISR is that the port of registry of the ship shall be one of the following ports: George Town, the Creek or Bloody Bay. In addition, a vessel registered in the Cayman Islands is a 'British ship' and is entitled to fly the red ensign flag and, as British ships, come under the protection of the British Royal Navy. Full British consular services and Royal Naval assistance and protection for Cayman-flagged vessels are available worldwide.

12 Who may register a vessel in your jurisdiction?

In order to register a vessel on the Register the owner must be a qualified person. Although it is generally recommended to use a Cayman Islands vehicle for ownership purposes it is, in fact, possible for any corporate body to own a Cayman Islands-registered yacht or ship either by appointing a representative person or registering as a foreign company

under Part IX of the Companies Law. This allows owners the flexibility to use a foreign corporate vehicle where there are taxation benefits or other reasons for doing so. Using a corporate body to own a vessel has the important benefit of limiting the liability of the owner if a collision or other event incurring liability should occur. However, in practice, usually a new Cayman Islands company limited by shares is incorporated to own each vessel, as this is generally simpler administratively and less likely to result in delay.

The following persons are qualified to be owners of Cayman Islands-registered ships: nationals or individuals who hold passports from a European Union (EU) or European Economic Area (EEA) country or a country included in the Third Schedule of the Cayman Islands Money Laundering Regulations, including their overseas dependencies. Other persons may be eligible to own up to 31/64 shares in a vessel.

The following companies and other entities are qualified to register Cayman Islands vessels: a company or shipping entity formed in the Cayman Islands or a country that is either an EU or EEA country or a country included in the Third Schedule of the Cayman Islands Money Laundering Regulations, including their overseas dependencies and companies formed in other countries (and not qualifying as set out above), but registered in Cayman as foreign companies and having a place of business in the Cayman Islands.

If the owner of the vessel (individual or joint owners, or a company or entity) is not resident or incorporated in the Cayman Islands, then a Representative Person resident on the Islands must be appointed to act on behalf of the owner(s) on matters within the Cayman Islands. This appointment must be made before submitting the vessel registration application to Cayman.

13 Is there an alternate registry for international shipping operations?

No.

Ship mortgages and other liens over vessels

14 What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?

There are two forms of statutory ship mortgage in the Cayman Islands:

- a 'principal sum and interest' mortgage, which secures principal and interest under the relevant loan; and
- an 'account current' mortgage, which covers all amounts payable by the borrower to the lender under the relevant loan (including costs associated with the mortgage).

Contingent obligations may be secured. The Cayman Islands follows the English model whereby the short-form statutory ship mortgage, accompanied by a deed of covenant (which does not need to be Cayman Islands law-governed) (along with Form CISR 857) is registered with the CISR.

In addition, Cayman offers the option to record a 'priority notice', which enables a party to articulate the intention to register a mortgage for a period of up to 30 days after the priority notice has been recorded with Cayman. This prevents (for 30 days) a subsequent priority notice or mortgage from gaining priority over the subject vessel before the party who issued the initial priority notice is able to register a mortgage.

15 Give details of any required form for ship mortgages in your jurisdiction.

See question 14.

16 Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

The Registrar is obliged to register any mortgage produced to it that satisfies the requirements of section 79(2) of the Merchant Shipping Law (2011 Revision) of the Cayman Islands (the Shipping Law) on the Register. The mortgage documents must be physically delivered to either CISR's head office or any of the other depositories (Southampton (UK), London (UK), Singapore, Athens (Greece), Tokyo (Japan), or Fort Lauderdale (US)) or alternatively, sent by fax or email and supported by a notarised undertaking to deliver the original documents

to the Cayman Islands head office within seven days of the date of registration.

The Register contains information regarding details of the mortgage, including the name and address of the mortgagee and any prohibitions in the mortgage that require the mortgagee's consent (eg, transfer of ownership of the ship, creation of further mortgages over the ship, termination of registration of the ship). All information held on the Register is available for inspection for a fee by anyone, either in the form of a 'Transcript of Registry', or at the Registry's head office in George Town.

Mortgage registration in the Cayman Islands confers a number of advantages on the mortgagee:

- where the mortgage instrument contains a negative pledge, the Registrar is obliged to note this in the Register and may not register a further mortgage against the same vessel without the prior written consent of the mortgagee. Mortgages registered in violation of this provision are void;
- where the mortgage instrument contains a restriction on the mortgagor transferring the vessel's ownership of terminating its registration without the consent of the mortgagee, the Registrar is obliged to note this in the Register and may not register a transfer of ownership or terminate the vessel's registration without such consent, and any transfer or termination in violation of this provision is void;
- mortgage registration over a vessel confers statutory priority on the security-holder. The Registrar will register mortgages in the order produced to the Registrar and the order of registration determines the priority of the mortgage;
- where two or more mortgages are registered over the same vessel, a subsequent mortgagee may not exercise the power of sale without a court order or the concurrence of each prior mortgagee; and
- the Shipping Law recognises the common law principle that secured assets sit outside the pool of assets available to a liquidator on insolvency and provides that a registered mortgage will be unaffected by the mortgagor's bankruptcy or insolvency and will be preferred to all unsecured creditors and trustees in bankruptcy.

17 Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

The statutory mortgage must describe the nature of the transaction so as to show how the amount of principal and interest due at any given time is to be ascertained, and the manner and time of payment. In practice this is done by cross-referencing the deed of covenants that is submitted alongside the statutory mortgage for registration.

There is no requirement that the underlying debt instrument be filed with or attached to the registered mortgage.

18 Can a mortgage be registered in the name of an agent or trustee for the benefit of multiple lenders?

Yes, a mortgage can be registered in the name of an agent or trustee for the benefit of multiple lenders.

19 If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?

No.

20 If the mortgagee transfers its interest to a new lender, agent or trustee what filings are required? Is the mortgagor's consent required?

A mortgagee may transfer the mortgage (or a share of it) to any person by any lawful means. The Register may be updated to record a change of identity of the mortgagee either on submission of evidence of a transfer or transmission (eg, on bankruptcy) of the benefit of the mortgage. The transferor will also need to complete the sections on the back of the statutory mortgage (which must be signed by the mortgagee and witnessed by a notary if no seal is used).

21 What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?

Seafarer liens, master of ship liens and salvor's maritime liens are all recognised in the Cayman Islands under the Shipping Law. Where the court makes an order directing payment to be made of any seafarer's wages then, if the person directed to pay is the master or owner of the ship and the money directed to be paid is not paid in accordance with the order, the court that made the order may direct the amount remaining unpaid to be levied by distress. Where a fine imposed by a court in proceedings against the owner or master of a ship for an offence is not paid, the court shall have power to direct the amount remaining unpaid to be levied by distress or arrestment and sale of the ship, its tackle, furniture and apparel. In addition, a receiver may detain the vessel and the cargo and equipment or the wreck, as the case may be, until payment is made for salvage or process is issued for the arrest or detention of the property by the court.

The 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships has been extended to the Cayman Islands and this convention covers ship arrest in relation to maritime liens, mortgages and any other hypothecation of a ship.

22 What maritime liens rank higher than a mortgage lien?

None. Under the Shipping Law, a mortgage is preferred to any right, claim or interest of any other creditors of the bankrupt mortgagor or of any trustee or assignee on their behalf.

23 May non-mortgage liens be recorded over a vessel?

No, non-mortgage liens may not be registered or otherwise recorded over a vessel.

24 Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?

We cannot comment on mortgages on a ship registered in another jurisdiction. However, it is likely that the Cayman court would follow the priority of maritime claims established under English law. Mortgages registered on Cayman Islands-registered vessels are ranked in order of priority of when they are registered.

25 What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?

A mortgagee's enforcement options will depend largely upon the facts in the relevant case and the extent to which the mortgagor is willing to cooperate. The mortgagee's first step in the enforcement process is to serve a demand on the mortgagor in accordance with the terms of the relevant financing documentation. Unless a commercial sale can be agreed amicably between the parties, the mortgagee will usually need to take possession of the vessel, either actually by placing a master and crew appointed by the mortgagee or constructively (by giving notice of possession to the parties concerned). Possession is sometimes taken as a precursor to exercising the power of sale or at other times in order to get the vessel to a jurisdiction that is suitable for an arrest or a court sale (an interlocutory sale).

If the mortgagee has problems securing physical control of the vessel, it may be necessary to apply to the maritime courts of the jurisdiction in which the vessel is situated (or to which it is navigated) to arrest the vessel and to conduct a court sale. Equally, where the mortgagor is apathetic (rather than obstructive), it may be possible to take possession of an operating ship by securing the cooperation of the master and the crew (possibly through the appointed ship managers if this is not the borrower), thus bypassing the need to involve the mortgagor.

As in the case of other civil proceedings, the costs of admiralty actions are at the discretion of the court. A successful litigant stands to reap back its costs from the unsuccessful party. However, there are cases where the court departs from this general rule. The courts may apportion the costs between the parties or disallow, to a certain degree, a successful litigant's costs. This discretion must be exercised judiciously in line with rules of the court and practice directions.

26 May a vessel be sold privately by a mortgagee? Will the sale discharge liens over the vessel?

The Shipping Law confers upon a registered mortgagee a statutory power of sale that the mortgagee may exercise without recourse to the courts or the mortgagor and the mortgagee is given the right to give receipts for purchase money provided the mortgage money or any part of it has become due. A right of sale also exists at common law.

Exercising the power of sale may be complicated if the mortgagor has any other creditors who may take steps to protect their position (for example, by arresting the ship), though if the mortgage is duly registered with the CISR, the mortgagee will take from the proceeds of the sale (less administration fees, bailiff or docking charges) in priority to unsecured creditors and the lien over the vessel will be discharged.

A mortgagee or receiver also needs to ensure that it sells the mortgaged vessel to a person permitted under the Shipping Law to be its registered owner and if the majority owner of the vessel is not resident in the Cayman Islands, a local representative will also need to be appointed.

27 What are the limitations on rights of self-help by a mortgagee?

The Shipping Law provides that every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or the share in respect of which it is registered, and to effectively give receipt in relation to the sale of the ship or share. If there are two or more mortgagees registered in respect of the same ship or share, a subsequent mortgagee must obtain a court order from a court of a competent jurisdiction in order to sell the ship or share without the permission of every prior mortgagee.

28 What duties does a mortgagee owe to an owner or third-party creditors?

In exercising its power of sale, a mortgagee will need to have regard to its common law duty to sell the vessel for the best price reasonably obtainable. In practice, the mortgagee's ability to obtain a good price will be adversely affected by the distressed nature of the sale (especially where the mortgagee has taken possession of the vessel and requires a quick sale). It is generally recommended to obtain two vessel valuations from independent industry professionals as evidence that the best price possible has been obtained.

A mortgagee or receiver also needs to ensure that it sells the mortgaged vessel to a person permitted under the Shipping Law to be its registered owner, and if the majority owner of the vessel is not resident in the Cayman Islands, a local representative will also need to be appointed.

Collateral

29 May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?

Yes.

30 May finance leases be recharacterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

The position in relation to recharacterisation risk will largely depend upon the governing law of the relevant transaction documentation used for the structure. This commonly will not be Cayman Islands law, but assuming Cayman Islands law is relevant under conflict of laws rules, then the position will be broadly the same as it is under English law, which is persuasive in the Cayman Islands. Provided the structuring of the transaction is not a sham, the courts will generally give effect to the parties' intentions and will not seek to recharacterise a sale and leaseback transaction as security unless there is evidence that the lessor and lessee did not intend the leasing documentation to record their true intentions.

31 How is a security interest created over earnings of a vessel, charter contracts, insurances, etc? How are these security interests perfected?

Earnings, rights under charter contracts and rights under policies of insurance are typically secured by an assignment in favour of the relevant creditor. While Cayman Islands law security interests do not

generally need to be 'perfected' to be valid and enforceable, assignments do, and assignments must be notified to the relevant counterparty to the contract under the common law principle in *Dearle v Hall*. In this example, therefore, an assignment of insurances in respect of a vessel would have to be notified to the relevant insurer in order to constitute a perfected security interest.

Note that our answer assumes that the relevant security interest is governed by Cayman Islands law. It is generally accepted that the appropriate governing law for a security interest is the *lex situs* of the asset that is the subject of the security. In many cases, therefore, the governing law of a security interest granted by a Cayman Islands company over vessel earning or a contract of insurance will not actually be governed by Cayman Islands law.

32 Must security interests against non-vessel collateral be registered to be enforceable? If so, where are such filings made?

No. All security interests granted by Cayman Islands companies (including non-vessel collateral) are required to be recorded in the company's internal register of mortgages and charges. Failure to keep this register up to date will cause the company to be in technical breach of the Companies Law and may expose its directors and officers to fines by the Companies Registry. However, failure to attend to such registration will not invalidate a valid security interest, and equally registration does not confer any statutory priority on the holder of the relevant security interest. Different rules apply to the registration of security interests in respect of vessels.

33 How is a security interest over a deposit account established? How is a security interest perfected?

Assuming a Cayman Islands law security interest is appropriate (see question 31), accounts are usually secured by a fixed and floating charge. The characterisation of the security interest as a fixed or floating charge is complex and will depend largely upon the level of control the relevant chargor is given over the account and its ability to deal with credit balances thereon in the ordinary course of business. Fixed and floating charges are not required to be 'perfected' to be valid and enforceable under Cayman Islands law, but they are required to be registered internally in the relevant company's register of mortgages and charges maintained under the Companies Act.

34 How are security interests in non-vessel collateral enforced?

The answer to this question will depend upon the nature of the security interest that has been granted over the relevant non-vessel collateral. Under Cayman Islands law, only a mortgagor has the power of foreclosure, but foreclosure is widely accepted to be a draconian measure of last resort. All of the main types of Cayman Islands security (mortgage, charge, pledge) confer on the charge the power of sale and, except in the case of a pledge, the right to appoint a receiver, which is the most common way for secured parties to enforce security.

35 How are share pledges for vessel financings established? Are share pledges or share charges common in your jurisdiction?

Share charges are customarily taken in respect of the shares of the vessel-owning company. In the case of a Cayman Islands company, the shareholder will typically grant an equitable mortgage. While it is not necessary to deliver physical share certificates in respect of registered shares (delivery would amount to nothing more than a pledge over the share certificate, but not the shares themselves), it is customary for original share certificates to be delivered to the mortgagee together with the following additional ancillary documents:

- signed but undated resignations of each director of the company whose shares are charged;
- signed and dated authority from each such director to date the resignation on occurrence of a specified default;
- an irrevocable proxy or power of attorney in respect of voting at shareholder meetings;
- a letter of instruction to the company's registered office provider; and
- a signed but undated blank share transfer form.

Cayman Islands-exempted companies are no longer permitted to issue bearer shares. The Companies Law was recently amended to prohibit companies from issuing negotiable shares as part of the Cayman Islands' commitment to global efforts to tackle tax evasion and corruption and to increase transparency. All existing bearer shares were required to have been converted into registered shares before 13 July 2016. Any that are not converted are void.

36 Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

This would be unusual. In ship financing transactions, the exempted limited liability company is used as the vessel-owning entity. A members' liability is limited to the amount unpaid in respect of its shares and the principle of separate corporate personality generally prevents the members (and, by extension, any legal mortgagee or equitable mortgagee on enforcement) from being liable for the company's debts.

Tax considerations for vessel owners

37 Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?

There are no direct taxes in the Cayman Islands. This is one of the reasons that Cayman Islands special purpose vehicles are popular in ship financing transactions. Income earned by Cayman Islands vessel-owning companies is not subject to taxation, and exempted limited liability companies may apply to the Cayman Islands authorities for a guarantee against the imposition of any income tax in the future.

38 Is there an optional tonnage tax exempting vessel owners from tax on income?

See question 37.

39 What special tax incentives are available to shipowners registering vessels in your jurisdiction?

See question 37.

40 Are there any other noteworthy tax provisions specifically applicable to shipping, shipping income or ship finance?

As mentioned, there are no direct taxes in the Cayman Islands. Certain indirect taxes, such as import duties, stamp duties and registration and licensing fees may apply in the ship finance context (for example, annual fees payable to the Companies Registry by an exempted limited liability company), but generally speaking such amounts will be nominal.

Insolvency and restructuring

41 Is there a general scheme of reorganisation or insolvency administration in your jurisdiction?

There is no equivalent of the US Bankruptcy Code in the Cayman Islands, and indeed no separate insolvency legislation pertaining to companies. The insolvency of companies is regulated under the Companies Law. Creditors with a valid security interest are treated as having a proprietary interest in the assets of a Cayman Islands company, and are entitled to enforce their security without recourse to a liquidator or the Cayman Islands court. The Companies Law provides that where the property of a company is distributed pursuant to liquidation proceedings (whether solvent or insolvent), the collection and distribution of such property is without prejudice to and after taking account of the rights of secured creditors.

42 Will the courts of your jurisdiction respect the rulings of a foreign court presiding over reorganisation or liquidation proceedings?

Generally speaking, yes; the Cayman Islands adopts the 'universalist' approach in that it will recognise foreign insolvency proceedings where the foreign court's jurisdiction is recognised, where there is a final and conclusive order in respect of the commencement of proceedings and where there are no public policy grounds for avoiding foreign proceedings.

43 Has your jurisdiction adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law?

The Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. However, under Part XVII of the Companies Law, relief is given to liquidators in foreign bankruptcy proceedings seeking ancillary orders from a Cayman Islands court for the purposes of (i) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor; (ii) enjoining the commencement or staying the continuation of legal proceedings against a debtor; (iii) staying the enforcement of any judgment against a debtor; (iv) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and (v) ordering the turnover to a foreign representative of any property belonging to a debtor. Common law remedies for cross-border insolvency cooperation are also available.

44 What is the order of priority among creditors? In what circumstances will creditors be required to disgorge payments from an insolvent company?

As discussed in question 41, a secured creditor has a proprietary interest in the property of a company, and is treated separately from unsecured creditors of the company in an insolvency scenario. After having given effect to the rights of secured and preferred creditors, unsecured creditors will be dealt with on a *pari passu* basis with member creditors being repaid last. The order of priority as between creditors may be varied by contract, and the Cayman Islands courts will generally give effect to any contractual subordination of claims. Distribution of assets may also be affected where claims can be avoided (see question 46).

45 May a vessel owner provide security on behalf of other related or unrelated companies? What are the requirements for it to be enforceable?

Generally speaking, Cayman Islands companies have full capacity irrespective of corporate benefit and full rights, powers and privileges. Accordingly, most vessel owners, being Cayman Islands companies, will be able to encumber their vessels to secure the obligations and liabilities of related or unrelated companies. However, the directors of Cayman Islands companies remain subject to certain fiduciary duties that require that they exercise their powers for a proper purpose and in the best interests of the company. Where there is no easily ascertainable benefit to a company in providing collateral for the obligations of a third party, the directors of the company would be well advised to seek shareholder consent to the provision of security in order to avoid any allegation that they are acting in breach of their powers.

46 Is there a law of fraudulent transfer that permits a third-party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

Dispositions made at an undervalue with an intent to defraud creditors are voidable at the instance of the official liquidator of a company if made no more than six years prior to the commencement of liquidation. The grant of a mortgage might also be challenged as a voidable preference if granted with an intent to prefer a creditor within six months prior to the commencement of liquidation of the relevant grantor company.

The Cayman Islands also operates a non-insolvency avoidance regime under the Fraudulent Dispositions Law (1996 Revision), which allows a creditor to challenge any disposition of property made by a company with an intent to defraud and at an undervalue.

47 How may a creditor petition the courts of your jurisdiction to declare a debtor bankrupt or compel liquidation of an insolvent obligor?

Creditors of Cayman Islands companies may petition the Cayman Islands courts for a company to be wound up compulsorily by the court on the basis that the company is unable to pay its debts. In the Cayman Islands, a company is deemed to be unable to pay its debts if:

- it has failed to pay a statutory demand of CI\$100 or more within three weeks of such demand being served;
- it fails to satisfy a judgment; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts.

Creditors of Cayman Islands companies should note that there is no 'balance sheet' solvency test in the Cayman Islands.

Creditors of Cayman Islands companies should ensure that they do not agree to any non-petition provisions as these are given statutory recognition in Cayman, and the courts are obliged to dismiss any petitions brought by creditors who are contractually bound not to present a petition for winding-up against a company.

48 Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)? If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

The Cayman Islands has not, to date, adopted ISDA's Model Netting Act. However, the Companies Law (specifically section 140(2)) makes provision for the recognition of contractual rights of set-off or netting of claims between an insolvent Cayman Islands company and any other person or persons. As both bilateral and multilateral contractual set-off or netting arrangements would be given effect in the insolvency of a Cayman Islands company, the Companies Law confers a similar effect to the ISDA Model Netting Act.

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