

Reply by the German Maritime Law Association
to the CMI IWG Questionnaire of 19 April 2016
“Ship Financing Security Practices”

1 MARITIME AND OTHER CONVENTIONS

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

Germany has ratified the 1952 Arrest Convention, but has not (yet) ratified the 1999 Arrest Convention.

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

Outside the scope of application of the 1952 Arrest Convention, any claim for money against the registered owner of a vessel can be brought by way of arrest inter alia of the vessel in Germany.

1.3 In particular, can arrest be made:

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

Yes.

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

Yes.

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

Germany has neither ratified the 1926 nor the 1993 Maritime Liens and Mortgages Conventions.

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.

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?

German law recognises foreign maritime liens.

According to the German conflict of law rules, the law applicable to a maritime lien is the law applicable to the claim that gave rise to the maritime lien ("lex causae"). Thus, German law will in principle recognise a maritime lien for any claim that, under the lex causae, gives rise to a maritime lien.

German law, however, applies to the ranking of maritime liens. Maritime liens thus rank according to the rank that they would have if they were German maritime liens. Foreign maritime liens that do not have an equivalent under German law are ranked according to the so-called priority principle, meaning in practice that a foreign maritime lien with no direct equivalent under German law will rank after registered mortgages.

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' register² in your jurisdiction a register of legal title?

The German ships' register for sea-going ships is not a register of legal title, as the registration of title in the vessel is only of a declaratory nature. Title in a sea-going vessel passes upon agreement between the parties (see sec. 2 I of the relevant German law, the "Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken", Schiffsregistergesetz - SchRG).

By contrast, the ships' register for inland water vessels is a register of title as title in an inland waterway vessel passes upon agreement between the parties and registration (sec. 3 I SchRG).

In either case, however, it remains possible to prove that an entry in the register is wrong.

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 ship registry only provides for the registration of vessels flying the German flag in case the vessel is owned by a German or EU or comparable entity; see sec. 2 II of the relevant German flag law / statute, the "Gesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe" (Flaggenrechtsgesetz – FlaggRG). There is, however, also the possibility to fly the German flag on the basis of a bareboat charter ("bareboat charter in"). A bareboat charterer may apply for a flag certificate ("Flaggenschein") to be issued by the

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

relevant German authority (the Federal Maritime and Hydrographic Authority, BSH). Such authority does keep an internal list of all flag certificates. However, it does not qualify as registration of vessels in its common sense.

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?

Yes, this is allowed, even if the vessel is subject to a mortgage registered in Germany. The mortgagee's consent is required pursuant to sec. 20 II no. 7 of the relevant German statute, the "Flaggenrechtsverordnung" (FIRV).

According to sec. 7 I FlaggRG, the owner of a German-flagged vessel can be granted the right to flag out the vessel to another State ("bareboat charter out") under certain conditions (either training on board of the vessel for which the application was made to temporarily fly the flag of another state or payment of a redemption amount to support training and education activities, see sec. 7 II and III FlaggRG). Such permit is limited to a period of not more than two years, however, it is renewable. For the purposes of private property interests, the vessel will continue to be regarded as a German-registered vessel.

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.

According to German law precedents, a "ship" is *"an object which is hollow and capable of floating, of more than insignificant size, which is capable of and meant to be moved on water or below the water surface and to carry persons or objects."*

Hence, stationary objects such as fixed offshore oil platforms are not eligible for registration, but offshore mobile units might be eligible if they are meant to, and effectively are, occasionally moved. As to the capability to carry goods or persons, a theoretical capability to carry the objects' own crew or equipment has been considered as sufficient.

In addition, German law provides for the possibility to register ships under construction and floating docks in a special register.

3 FORMALITIES FOR MORTGAGE REGISTRATION

3.1 Does a mortgage in respect of a vessel registered in your jurisdiction need to:

(a) attach documents, such as a loan agreement, evidencing the obligations secured?

No, it is not required for registration of a German law ship mortgage to attach the loan documentation.

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

In which circumstances a mortgagee has a right to enforce a German law ship mortgage depends on the agreement reached with the mortgagor in the underlying security agreement. Usually, the minimum requirements for the enforcement of security under German law are, however,

(a) a payment default; and

(b) the lapse of a period of not less than one week (in case of a commercial transaction, otherwise one month) after the mortgagee has notified the mortgagor of its intention to enforce the mortgage.

In addition, a mortgagee has a statutory right to enforce a ship mortgage if due to a deterioration of the vessel or its equipment the ship mortgage is endangered and a reasonable grace period expired without result.

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

The application for registration of the mortgage needs to be notarially certified, and, if notarially certified by a foreign notary, apostilled / legalised.

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

The fees of the ship registry for the registration of a ship mortgage are prescribed by law and depend on the amount of the mortgage. If the amount of the mortgage exceeds EUR 60,000,000 such higher amount will not be taken into account when calculating the registration fee; e.g. the registration of a mortgage in the amount of EUR 60,000,000 (or higher) will trigger a registration fee of the ship registry in the amount of approximately EUR 27,000 plus VAT of 19% (if any).

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

No, there is no requirement for re-registration of the ship mortgage 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.

Under German law, no additional registration is 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?

Owner's consent for disclosure of such information recorded in the ships register is not required. The ship registers are public registers accessible by everyone without limitation and for a nominal fee. A ship register excerpt states, inter alia, the main details of the vessel, the owners and the registered encumbrances. Registerable interests are limited to ownership title, security interests such as mortgages, usufruct (*Nießbrauch*) and attachment liens, and priority notices (*Vormerkung*) in respect of each. Other security interests, such as those created by operation of law, including maritime liens or maritime claims, are not registered.

The general information right does not normally extend to inspection of the actual files of the registry and any underlying documents. Inspection of the registry files and underlying documents in person is possible, if the applicant credibly demonstrates a justified interest to obtain such information, for example if required for the assertion of rights or the defence against a claim.

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

Upon request, the ship register certifies the excerpts to be true copies of the register folio entry. The accuracy of the information contained in the excerpt is not confirmed thereby. Furthermore, the ship register can upon request issue a certificate confirming that specific entries have not been made or there are no other entries concerning a registered right. There is only a statutory rebuttable presumption that the content of the ships register is accurate, because entry into the ships register is in case of seagoing vessels (in contrast to inland waterway vessels) not constitutive for *in rem* ownership rights in the vessel. Title to seagoing vessels can be transferred by simple oral agreement, without the need for recordation of such change in the ships register.

However, reliance on the accuracy of the register record by a bona fide third-party transferee or taker of a security interest is statutorily protected in respect of certain information, as long as no objection has been recorded in the register in respect of such information. Such statutory protection only extends to certain information, including in respect of ownership, mortgages, usufruct and the deletion of mortgages or usufruct (“*öffentlicher Glaube des Registers*”). Even if not explicitly mentioned in the relevant statutes, this also applies to attachment liens in Germany and the right to fly the German flag. Reliance on other information shown in the excerpt, such as the physical details of the vessel, does not benefit from statutory protection.

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

Ship register information is not available electronically so far (although there are now political intentions to modernize / digitalize ship registers). During the ship register's opening hours, an excerpt from the ship register can be obtained quickly - often on the same day. For lawyers making an application for a ships register excerpt, all that is required in addition to the actual request for the excerpt is an undertaking regarding fees. As there is no centralised ships register in Germany and ships registers are maintained by the competent local courts (currently 17 different ships registers), it may take more time to retrieve information if the competent ship register is not known already and must be determined first.

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 vessel can be sold without prior release or consent of the holder of the security interest (e.g. mortgagee). In case the vessel is sold without mortgagee's consent, the mortgage remains on the vessel as the ship mortgage is an *in rem* security interest and not *in personam*. If the vessel is to leave the relevant German ships register, the German ships registry will only delete the vessel and issue its deletion confirmation with the consent of the holder of the security interest.

5 ARREST OF A CHARTERED VESSEL

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

Our jurisdiction allows 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)?

In our jurisdiction, the mortgagee will not incur any liability in tort or similar to charterers or cargo interests by arresting a vessel being subject to a charter and/or carrying cargo. A claim in tort would require an infringement of ownership on the part of the claimant by physical damage or permanent deprivation. As cargo owned by third parties other than the shipowner is not subject to the arrest order and the cargo owner may request delivery under the charter party or bill of lading at any time, the arrest of the vessel does not constitute such infringement of ownership. The statutory liability for wrongful arrest (sec. 935 of the German Code of Civil Procedure – ZPO) only applies to liability of the arresting party towards the shipowner and not to liability towards any third party.

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?

It is not necessary to discharge cargo on board a vessel sold by judicial sale. The cargo owned by a third party is not considered as belonging to the vessel. It is therefore not part of the arrest and not part of the judicial sale. The cargo may at any time request delivery of the goods from the mortgagee or the new owner under the charter party or the bill of lading contract.

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?

Yes, a priority notice can be registered to secure a claim (present, future or contingent) for creation of a mortgage provided that such claim is sufficiently specified.

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, under German law a subsequent mortgage can be registered without the consent of the first registered mortgagee.

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

The order of the registration of the ship mortgages determines the ranking of the ship mortgages.

German law allows, however, a subsequent change of the ranking subject to the agreement of the beneficiaries of the mortgages and consent of the respective owner and registration of such change in the register.

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, the creation of the mortgage requires (i) an application and consent of the owner and (ii) the registration of the mortgage, i.e. without a registration no mortgage is in place. The owner may, however, in connection with the registration of a mortgage reserve its right to have another ship mortgage (specified by its amount) registered ranking prior to such mortgage which is currently registered.

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

Yes, a second ranking mortgagee can enforce its mortgage without the consent of the first ranking mortgagee. However, the first ranking mortgage will remain in place and will be taken over by the acquirer of the vessel.

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.

No, under German law, there are no public or private registers for the registration of securities other than the land register for the registration of land charges and mortgages over real estate and registers for aircrafts and vessels (for registration of aircraft / ship mortgages).

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?

Yes, there are some minor distinctions pursuant to sec. 171 of the German Act on Enforced Auction and Civil Receivership (Zwangsvorsteigerungsgesetz – ZVG), e.g. for enforcing any foreign mortgage, the debtor must be in the possession of the ship as owner (Eigenbesitz), there is no requirement for a minimum protective bid and the maximum bid is to be paid in cash in the full amount.

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?

The legal requirement is an enforceable title against the debtor. This can be i.a. a judgment (either from a German court or, if issued by a foreign court, (declared) enforceable in Germany) or a notarized submission to immediate enforcement.

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?

To obtain a final and binding judgment in Germany could take several years. Whether or not a court will expedite the proceedings is at the court's own discretion. The claimant has no specific right to apply for an expedition.

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

Yes, German courts would accept jurisdiction under article 7. However this rule is not necessary as the German procedural law already provides for this scenario in sec. 23 ZPO.

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?

There are no special courts, such as admiralty courts, in Germany. Pursuant to sec. 163 ZVG the competent court is the local court where the ship is situated.

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?

Required is a title (declared) enforceable in Germany (see 7.2 above).

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?

Yes, the claimant will generally be allowed to enforce its claim on the basis of a judgment which is not yet final and binding, provided that it deposits a security with the competent court.

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?

The claimant has to file an application for judicial sale by auction ("*Zwangsvorsteigerung*") together with the original of its enforceable title with the competent court. If the application and the title comply with the legal requirements, the court will order the enforced sale and fix a date for the auction which will be published. Further the court will order the service of its order for enforced sale on the debtor (i.e. the vessel's owner) and any other interested parties. The auction shall take place not earlier than 6 weeks and not later than 6 months after the date of the auction has been published, and not earlier than 4 weeks after the court order for enforced sale has been served on the debtor.

9.3 Will the court in your jurisdiction order a sale of the vessel pending judgment (*pendent lite*), recognising that the vessel is a wasting asset?

No.

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?

For vessels / mortgages not registered in Germany, there is no requirement for a minimum protective bid. For vessels / mortgages registered in Germany, the minimum protective bid must be higher than the aggregate of all claims that rank higher than the claimant's claim and the costs of the proceedings.

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

For vessels / mortgages not registered in Germany: Not applicable; for vessels / mortgages registered in Germany: Only by paying (and thereby reducing) claims ranking higher than the claimant's claim and / or the costs of the proceedings.

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

The date of the auction, the name and a rough description of the vessel as well as the contact details for questions will be published in the official communication gazette or information system generally used by the competent court. Further, this information will also be published in a "suitable shipping magazine" in the choice of the court.

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

Prior to the auction: Within the statutory time frames, the claimant can seek the court's cooperation and try to agree the timetable and details with the court. The owner can only use procedural remedies, such as an application to set aside the enforced sale proceedings. Other creditors (who have not themselves filed an application for an enforced sale) have no formal influence on the time table or procedure for sale.

During the auction: If the claimant is not satisfied with the highest bid, he can withdraw the application for sale, or apply for a stay of the proceedings before the bid has been accepted by the court. In that case a new auction will be held at a later date upon the claimant's respective application. Other "interested parties" (for example, the owner) can apply for a new auction before the highest bid has been accepted by the court if they undertake to cover the additional costs and other damages incurred until the next auction and put up security; and in the new auction they will be deemed to having given a bid for not less than the highest bid in the first auction.

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?

No.

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?

For vessels / mortgages registered in Germany: Yes, there are certain provisions in the law allowing for this possibility but the prior ranking claims (including the costs of the proceedings) have to be paid in cash. For Vessels / mortgages not registered in Germany: No, the law strictly requires "payment of the full amount of the bid".

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?

Sale proceeds paid to the court or centralized depository will be converted into Euro.

(b) Will the proceeds of sale ultimately be subject to any exchange control or similar restrictions (and/or court fees) when they are paid out? If so, what is the procedure and likely timetable for obtaining permission to remove the funds?

No exchange control or other restrictions apply, the payment will be made to the recipient by order of the court in accordance with the final distribution plan established following the auction.

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?

The priorities are determined under the local law regardless of the flag that the vessel is flying. A vessel that passes several jurisdictions maintains those priorities that have arisen in different jurisdictions.

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?

Sec. 596 German Commercial Code (HGB) stipulates that crew wages, public fees, damages arisen out of the injury or death of human, salvage costs and social security fees rank ahead of the rights of the mortgagee. The interests and legal costs are included.

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

No difference to above a).

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

The maritime liens have their own ranking which is separate from those creditors that do not possess maritime claims. The latter's claims are ranked according to sec. 10 and sec. 171 ZVG.

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

The claimants need to register their claims with the court latest at the court's auction (sec. 37 no. 4, sec. 110 and sec. 171 III ZVG). Upon the court's award of the bid the buyer receives title and ownership of the vessel and all maritime liens against the physical vessel cease to exist, with the exception that the claims are secured with the sale proceeds received by the court.

Claims can still be introduced at a later stage but will lose their priority and only be satisfied after all claims filed with the court until beginning of the auction have been satisfied.

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

The court is not bound to an absolute statutory time limit for the distribution of the sale proceeds under a "distributional procedure" (sec. 105 and sec. 162 ZVG etc.). However, the calculation of the different claims and the interests involved may lead to discussions between all claimants. Therefore the ZVG foresees a rather detailed procedure which requests the claimants to submit their calculations and in which the court shares its calculation by preparing a preliminary plan for the distribution of the sale proceeds among the claims that have been duly filed in accordance with their priority.

Timing will much depend on certain notice and appeal periods for, and the number of, the interested parties and the quality of their claims as well as on the cooperation between the court, the claimant and the other creditors. Within a few weeks after the auction, the court will order an oral hearing to hear the interested parties (including the owner and creditors) and the successful bidder to agree on the final distribution plan. If and as far any claim is disputed, the funds attributed to it will be set aside and the immediately succeeding party alternatively entitled to these funds will be identified in the distribution plan. Generally, undisputed claims will be paid out within a few days after the hearing. In case of arrest creditors, funds will be set aside until they have presented to the court a valid and enforceable title for their claim. Any party disputing a claim must commence legal action to prove that (and as far) the disputed claim is unjustified. If no proof for the commencement of such action has been filed with the court within one month, the dispute will be ignored and the funds paid out according to the distribution plan. If action has been duly commenced and proven, the funds will remain set aside until a valid and binding judgment has been presented to the court (no matter how long that takes), and the funds will be paid out to the originally chosen creditor, or the immediately succeeding party in accordance with the distribution plan.

All going well, a well prepared mortgagee with an undisputed claim can reasonably expect to receive funds within two to six weeks after the auction.

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;

No.

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

Not by statutory law, however the mortgagee and mortgagor may agree on the basis of loan documentation to the above.

(c) to sell the vessel as mortgagee;

No.

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

Not by statutory law, however the mortgagee and mortgagor may agree on the basis of loan documentation to the above. While this is commonly agreed, there seems not to be any judicial decision confirming this practice.

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?

German law recognizes the title and ownership of foreign flagged vessels according to Art. 45 II no. 1 German Introductory Act to the Civil Code (EGBGB). Hence, in case that foreign law foresees and enables such enforcement steps, then these rights will be recognized too.

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 PROCESSES³

The German jurisdiction is subject to the 'Recast' EU Insolvency Regulation (EU) No. 2015/848 of 20 May 2015.

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

No. The German domestic rules on cross-border insolvency do not feature an adoption of the UNCITRAL Model Law on Cross-Border Insolvency. The respective rules stated in sec. 335 to 358 of the German Insolvency Statute (Insolvenzordnung – InsO) provide an independent regulation of cross-border insolvency cases. The same holds true for the provisions under European law, which are applicable in inner-European cases and as such override the German domestic rules. Neither the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, nor its latest recast, the Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015, feature an adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Nonetheless one can say that these provisions do not necessarily contradict the UNCITRAL Model Law on Cross-Border Insolvency either. They rather follow the Model Law's tendency to an "universalist" approach.

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. German domestic law provides a set of extensive rules on the recognition of foreign insolvency proceedings, stated in sec. 343 to 353 InsO. These rules follow a rather "universalist" approach, meaning that pursuant to sec. 343 InsO foreign insolvency proceedings are generally recognized ipso jure, provided they were properly and effectively opened. Exceptions are solely made in cases in which the appointed insolvency court in the foreign insolvency proceeding has no jurisdiction according to German law or in which the foreign insolvency proceeding contradicts with fundamental principles of German law (public policy – "where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights"). A similar approach can be found in European law, which overrides German domestic law in inner-European cases. Currently applicable is the European Council Regulation (EC) No. 1346/2000, which includes rules on recognition of foreign insolvency proceedings in art. 16 to 26. Pursuant to art. 16 all insolvency proceedings properly and effectively opened in one of the EU member states are recognized ipso jure in any other member state, unless as per art. 26 the recognition of the foreign proceeding would be manifestly contrary to the member states fundamental principles of law (public policy). Nearly the same provisions are included in art. 19 and 33 of Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015, which will be applicable from 26 June 2017 on and as such will replace the former Council Regulation.

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

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. Although the individual enforcement of rights of secured creditors generally remains admissible regardless of the opening of any insolvency proceedings before a German insolvency court, the insolvency administrator may achieve the temporary suspension of enforcement upon application before the responsible German enforcement court. In detail, mortgagees of a vessel gain a right of segregation ("Absonderungsrecht") pursuant to sec. 49 InsO which, amongst other things, allows them to continuingly pursue the enforcement of their rights autonomously from any insolvency administrator. In certain cases however the court appointed insolvency administrator is entitled to file an application for temporary suspension of enforcement with the responsible enforcement court pursuant to sec. 30d ZVG, provided that German enforcement law is applicable. This is the case when the vessel is situated within German territory and a secured creditor undertakes the enforcement of his rights before a German enforcement court.

13.4 Is the answer to 12.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

No. If a secured creditor undertakes the enforcement of his rights before a German enforcement court, any insolvency administrator, regardless if foreign or domestic, may file an application for temporary suspension of enforcement with the responsible enforcement court pursuant to sec. 30d ZVG. The only requirement is that the foreign insolvency proceeding fulfils the requirements to be recognized under German cross-border insolvency law.

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?

Not applicable. The concept of a maritime court sale does not exist under German law.

13.6 Is the answer to 12.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

No.

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

Not applicable, see above.

13.8 Is the answer to 12.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

No.

13.9 Do the insolvency courts of your jurisdiction have, or claim, extraterritorial jurisdiction, such as over vessels located in a different jurisdiction? If so, how?

Yes. German insolvency law claims jurisdiction over all the debtor's assets, regardless if they are situated within German territory or not. Consequently the initiation of insolvency proceedings through a German insolvency court as well as the following decisions of that court claim unconditional extraterritorial effect. If these decisions will actually be recognized within the foreign jurisdiction is not taken into any account but is rather deemed a follow-up question within the procedure of recovering the debtor's assets. If the vessel is located within the territory of the European Union the German insolvency proceeding will be recognized pursuant to art. 16 to 26 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings or, from 26 June 2017 on, pursuant to art. 19 to 33 of Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015. Extraterritorial effects of the initiation of a German insolvency proceeding include a general prohibition of disposals by the debtor as well as enforcements by unsecured creditors pursuant to sec. 80 to 102 InsO.

14 LEASING⁴

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

Leasing financing is not a very common method of financing in Germany. German shipping, for the time being, remains predominantly financed by traditional bank financing. However, the need to access financing sources outside of Germany in recent years due to the lack of available financing resources for shipping within Germany has certainly led to an increase of sale- and lease-back models.

In particular the ever increasing financing raised in the Asian market tends to be provided in this form. Such financing is, however, not commonly subject to German law.

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)?

Germany tends to adopt a functional approach.

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.

In order to determine whether a lease contract (as opposed to a formal rental contract) has been concluded, the designation of the contract and the parties in individual cases is not decisive, but a substantial indication. According to the prevailing opinion, a lease contract is considered to be an atypical rental contract. The Courts have held that a contract which is designated as a "rental contract" and contains the terms "tenant" and "landlord" is nevertheless a lease contract (as further defined in 14.3 below) if it contains provisions which are typical for a lease contract.

However, the legal nature of a lease contract under German law still is to a certain extent controversial, depending on the type of lease contract.

Nonetheless the courts will up-hold the ownership structure determined by the lease agreement, and not regard the position of the lessor as purely a security interest.

14.3 If the laws of your jurisdiction adopt a functional approach (13.2) 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.

Whilst German law is statute based, the lease contract is a type of contract which is not explicitly regulated by statute. There are hardly any statutory provisions applying directly to lease contracts. German law will, given that an underlying principle of the German contract law is the principle of freedom of contract, nonetheless give effect to lease contracts by means of analogous application of principles governing related contract types, and general law principles.

As stated before, lease contracts are broadly considered to be atypical rental/lease contracts. Therefore, according to the constant ruling of the Federal Supreme Court, the rules governing tenancy can generally be applied to lease contracts.

The law of tenancy of vessels is regulated in sec. 553 ff. HGB. These statutes are *lex specialis* with regard to the law of tenancy regulated in sec. 535 ff. of the German Civil Code (BGB), which is generally applicable if specific questions are not already regulated in the Commercial Code. However, not all rules governing the general law of tenancy in sec. 535 ff. BGB can be applied to the rental of vessels. Then, general contract law statutes as laid down in the BGB are generally applicable. Depending on the underlying intention of the contract (operating lease/financing lease), principles from e.g. the law of credits and securities may also apply.

If a lease contract is governed by a foreign law and a German court has jurisdiction, it would apply German private international law to determine which law governs the contract. The German private international law is set out in the EGBGB. When determining the applicable law, categorization of the relevant contract within the conflict of law application is subject to the "lex fori". Choice of law clauses will generally be given effect if entered into between business men; if used in connection with consumers, certain protective rules (e.g. to prevent unfair contract terms) might be given precedence over the choice of law clause. With regard to European countries, the regulations in the Rome I Regulation need to be observed.

If in accordance with the conflict rules a foreign law regime is applicable to a lease contract, the German court would apply the foreign law to the lease contract, regardless of the approach this regime contains.

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?

The laws of the German jurisdiction, giving effect to the "Freedom of Contract"-principle, generally do permit the parties to expand by contract the rights and remedies of the lessor on default by the lessee. However, this is only possible as long as the contract does not contradict mandatory rules. Especially sec. 305 ff. BGB, governing the incorporation of standard business terms into the contract, as well as sec. 134 and 138 BGB, which contain rules regarding statutory prohibition and legal transactions contrary to public policy and usury will be observed to limit variations of the statutory contract model. The statutes explicitly governing the tenancy of vessels (sec. 553 ff. HGB) can generally be deviated from by the parties.

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?

Owners are generally not allowed to re-take the possession of the vessel through self-help without the assistance of a court, since this would be a case of unlawful interference with the possession of another. The BGB generally allows for self-help only under very limited circumstances.

If the contract provides a securing right, this does not include the authority to re-take possession through self-help. If necessary, the securing instead should be undertaken via a preliminary injunction. Unlawful interference with the possession of another could cause a claim for damages and the loss of the entitlement to leasing rates for the period of unlawful interference.

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?

Whether German law considers a vessel subject to a lease contract as an asset of the owner or the lessee depends on the area of law one is looking at.

For the purposes of property law, the vessel is clearly an asset of the lessor.

For the purpose of accounting and tax laws, the vessel will be regarded as an asset of the lessee if the consideration payable under the lease contract covers at least 90% of the acquisition costs of the vessel.

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?

I. Insolvency Process

An insolvency process in respect of the lessee affects the rights of the lessor under the laws of the German jurisdiction in different ways.

First of all, lease contracts concluded by the debtor as lessee may not be terminated by the other party after the opening of the insolvency proceedings has been requested (1) because of default in the payment of the lease fees arising before the opening of the insolvency proceedings was requested or (2) because of the degradation of the debtor's financial situation (cf. sec. 112 InsO). Arrears which arise after the aforementioned request give the lessor the right to termination. A termination undertaken before the request leaves sec. 112 InsO unaffected. Sec. 112 InsO is mandatory.

The German laws differentiate between movable and immovable objects as part of an insolvency estate.

Under German insolvency law, a vessel registered in Germany is considered to be an immovable object. Therefore, the impact on rights of the lessor is different if the lease object is a vessel. Appurtenances of vessels, which are subject to a lease contract, are considered to be moveable objects.

According to sec. 108 InsO, the lease contract concluded by the debtor of immovables shall continue to exist, but to the credit of the insolvency estate. The liquidator does not have the option previewed in sec. 103 InsO, whether or not the contract should be performed. However, according to sec. 109 InsO, the liquidator is allowed to terminate the lease contract without regard to the agreed term of the contract or an agreed exclusion of a right to the legal period of notice. The period of notice shall be three months to the end of the month unless another shorter period is applicable. If the liquidator makes use of said special right of termination, the lessor is entitled to claim damages as an insolvency creditor for premature termination of such contract. Under the preconditions stipulated in sec. 112 InsO, the lessor does not, however, have the right to termination himself.

If the debtor had not yet entered into possession of the immovables when the insolvency proceedings were opened, the liquidator and the other party may withdraw from such contract. If the liquidator withdraws, damages may be claimed by the other party as an insolvency creditor for premature termination of the contract.

II. Other Processes

Sequestration of vessels is not admissible. A compulsory auction of vessels is regulated in sec. 162 to 171 ZVG. Rental contracts generally remain effective during a compulsory auction of ships registered in Germany. The compulsory auction of foreign vessels is dealt with in sec. 171 ZVG.

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 German law, the assets of an obligor can be arrested pursuant to sec. 916 ZPO in order to enable compulsory enforcement of monetary claims. A vessel can therefore in general only be arrested in order to secure a claim directed against the owner of the vessel. This is different, however, in case of claims of maritime lienors, who may also arrest a vessel in case of claims against third parties such as the lessee; however, the owner himself as lessor under German law does not belong to the group of maritime lienors.

Thus, if the lessor is the owner, he will not be able to arrest his own vessel. Consequently, he will also not be able to join in arrest proceedings instigated by third parties against his own vessel.

However, under certain circumstances there is a possibility of filing an action for an injunction, e.g. when the lease contract has been terminated and the lessor claims restitution and there exists a specific interest in interim security, e.g. that restitution would be rendered unenforceable by removal of the vessel from the jurisdiction. In general only an effective termination of the lease contract gives the lessor the right to claim restitution from the lessee. As long as the contract is not terminated, the lessee is entitled to possess and utilize the leased object. A delay of payment on the part of the lessee does not affect this right.

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?

There are no particular "maritime claims" under German law.

According to sec. 602 ff. HGB, priority is given to the rights of maritime lienors compared to all other parties, including the owner and mortgage secured creditors, with regard to liens concerning the vessel. This is irrespective of whether the facts leading to the lien have been set by the owner or the lessee.

The rank of maritime lienors among themselves is listed in sec. 596 HGB (cf. sec. 603 HGB). However, sec. 603 HGB states that certain claims, e.g. salvage charges, have priority as opposed to the liens of all other maritime lienors, whose claims previously arose. Sec. 604 of the HGB contains more detailed statutory provisions regarding the ranks of the maritime lienors under the same number.

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.

There is no registration of leases in Germany. The German courts will give effect to a registered lease on a vessel registered in a different jurisdiction pursuant to conflict of law rules.

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.

We do not have the impression that there is a general wish in our jurisdiction to promote the leasing of vessels by reforming the law.

15 RESERVATION TITLE⁵

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

Generally, German law fully supports reservation of title clauses, both for sales credit and loan credit protection purposes. This includes broad support of extended reservation of title clauses, both into replacement assets (manufactured assets and/or sales proceeds) as well as replacements of the claims secured by conditional title arrangements. The creditor/present owner is considered to hold full legal title under a resolute *in rem* condition (*auflösende Bedingung*) (e.g. payment of the purchase price) whilst at the same time the debtor/future owner holds legal title under the corresponding same, *in rem* suspensive condition (*aufschiebende Bedingung*). Title will automatically transfer once the condition matures, even if the creditor of the secured claim (e.g. seller) is insolvent. Reservation of title for loan credit protection purposes, and conditional title retained under extended reservation of title clauses are, however, recharacterised as an *in rem* security interests upon insolvency of the debtor of the secured claim (e.g. buyer), where any appropriation right of the creditor is reduced to a preferential right to proceeds against the insolvent estate of the debtor.

But in case of registerable assets, e.g. ships, the parties regularly do not intend any *in rem* condition to automatically mature, because a separate register entry is commercially required for the transfer of title to become effective and to avoid any false appearance of title in the ships register. In case of inland waterway vessels, register entry is a legal perfection requirement, which will not even allow for *in rem* conditionality of transfer outside the register. In addition, a separation of possession and title, or payment by way of instalments, as typically is the case in reservation of title arrangements, does not normally commend itself to sales of ships. Possession incurs a multitude of liabilities and exposures to third-party risk. And payment in instalments exposes the seller to credit risk of the buyer in an often international and complex context. The seller as creditor of the purchase price will instead regularly seek to synchronise performance of the payment and delivery obligations. And in case of loan credit protection, the loan creditor regularly has no interest in becoming the owner of a ship even under conditional title arrangements and relies on registered ship mortgages as readily available non-possessory security instead.

In the absence of *in rem* reservation of title agreements in case of ships, only the contractual *in personam* right of the debtor (e.g. buyer) to transfer of title can optionally be given special protection against subsequent *in rem* disposals over the ship by the present owner/creditor, cf. answer to 15.2. The *in personam* right of the debtor so secured is enforceable even in case of insolvency of the creditor of the secured claim (cf. sec. 106 InsO), thereby to a great extent replicating *in rem* conditionality for the debtor.

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.

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.

The German ship registers do not record *in rem* reservation of title arrangements in respect of ships. Instead, the essentially *in personam* right of the debtor (e.g. buyer) of the secured obligation (e.g. payment of purchase price) to transfer of title by the creditor (e.g. seller) of the secured obligation is separately registerable in the form of a priority notice (*Vormerkung*) in favour of the debtor. This *in rem* encumbrance may be granted by the creditor as registered owner by way of notarial application to the ships registry. Registration of a priority notice is optional and only the fact of the priority notice, the beneficiary, that it relates to a transfer of title, its date, and only general reference to the secured contractual obligation are recorded in the publicly accessible register.

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?

Registration of a priority notice binds both the registered owner of the ship and third parties and any subsequent *in rem* disposal or encumbrance in relation to the ship is void to the extent it adversely affects the priority notice earlier recorded. Upon the transfer or creation of the encumbrance in respect of which the priority notice has been recorded, the *in rem* right of the holder of the priority notice will take effect with priority from the date of registration of the priority notice. The *in personam* right of the debtor to transfer of title so secured by a priority notice is enforceable when the contractual condition is satisfied (e.g. payment of the purchase price), even in case of insolvency of the creditor of the secured claim (cf. sec. 106 InsO), thereby to a great extent replicating *in rem* conditionality for the debtor.

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.

German conflicts of law generally recognise *in rem* rights validly acquired in a foreign jurisdiction once the asset becomes subject to German substantive law, either because of a change of situs or, in case of a ship, of registration in Germany. German law will try to accommodate such foreign rights within the framework of German substantive law, even if there is no direct equivalent.

Considering that German law broadly supports reservation of title and extended reservation of title clauses, it will regularly seek to implement these without imposing additional risk of recharacterisation as a security interest. This also applies to enforcement of *in rem* rights in assets not subject to German substantive law, such as foreign registered ships physically located in Germany. In case of ships registered in Germany, the type of registerable encumbrances is, however, limited by statute. Any *in rem* reservation of title arrangement validly created in a foreign jurisdiction and with third-party effect will then need to be translated into a priority notice in favour of the debtor of the secured claim.

Upon insolvency of a German debtor, however, mandatory German insolvency law will result in recharacterisation of certain ownership-based security, such as reservation of title clauses for loan credit protection or under extended reservation of title arrangements, as security interests resulting in preferential rights to

enforcement proceeds rather than appropriation rights by the conditional title holder.

16 [INSURANCE PROCEEDS]

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

Yes.