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The Enforcement of Malta-registered Mortgages, ‘In Rem’ Actions Against Vessels Sailing in Maltese Waters, and the Recognition of Foreign-Registered Mortgages

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One of the major attractions of the Maltese flag to financing banks is the ease and efficiency with which mortgages are registered over Malta-flagged vessels and the relative simplicity with which mortgage security rights can be enforced in terms of Maltese law. In this paper we shall be mainly considering (i) the procedures required for a mortgagee to enforce a registered mortgage over a Malta-flagged ship and (ii) the arresting of a vessel by a mortgagee in security of its maritime claims, giving rise to the ‘in rem’ jurisdiction of the Maltese courts.

Rights of Mortgagees

Maltese law provides a high degree of protection to mortgagees¹. In the event of any default on the part of the mortgagor of its obligations as set out in the mortgage deed, the mortgagee may simply serve written notice on the mortgagor, take possession of the ship in respect of which the mortgagee has a registered interest and proceed with any one of the following courses of action:

- (i) the private sale of the ship or any share/s therein; or
- (ii) file an application with the Civil Courts in Malta for the judicial sale of the vessel; or
- (iii) file an application with the Civil Courts in Malta for a court approved sale.

The three options available to a mortgagee seeking to enforce its rights shall be examined below.

Apart from the mortgagee’s rights to take possession and sell the vessel secured by the mortgage when the debtor is in default, the mortgagee is also empowered to maintain the status and validity of the registration of the ship, thereby safeguarding its ability to operate the ship commercially pending the sale procedure.

A mortgage may secure debts arising from any account current² or overdraft or other credit facilities. Of particular interest is the fact that the procedure for the recovery of such debts is significantly expedited since validly registered mortgages are conferred the status of “executive titles” according to Maltese law, meaning that there is no need for any court judgment in order for the mortgagee to enforce its claim.³ The mortgagee’s security rights become immediately enforceable against the mortgagor without the requirement of resorting to lengthy and potentially costly court procedures. The mortgagee can summarily

¹ Article 42 of the Merchant Shipping Act is the most salient article in this regard.

² For the purposes of the Merchant Shipping Act, the term “account current” means any indebtedness of a mortgagor in favour of a mortgagee arising and determinable in accordance with an underlying obligation.

³ In accordance with Article 42(2) a registered mortgage is deemed to be an executive title where the obligation it secures is a debt which is certain, liquidated and due and not consisting in the performance of an act.

proceed with the private sale of the vessel, with an application filed in the Maltese courts requesting the judicial sale of the vessel or with an application to the Maltese courts for a court-approved sale.

Private Sales vs. Judicial Sales By Auction

As mentioned above in the event of any default on the part of the mortgagor, the mortgagee will have the absolute power to sell the vessel privately. However if there is more than one registered mortgage over the vessel, the mortgagee is only permitted to sell the vessel privately with the consent of prior ranking mortgagees. Once such consent is obtained the vessel may be sold privately. There is however one caveat that applies here- the purchaser of the vessel does not acquire the vessel as free and unencumbered and every registered mortgage will remain attached to the vessel until each one is discharged in full.

Where there is more than one mortgagee registered over a particular ship, the mortgagee may opt to enforce its security rights by virtue of a judicial sale by auction of the vessel, rather than have to obtain the consent of the other mortgagees for a private sale. This may indeed be a preferred avenue to a private sale explored by the mortgagee since under Maltese Law, the surplus from the proceeds of the judicial sale of the vessel, after discharging the mortgaged debt, is required to be deposited under the authority of the Maltese courts for the benefit of other subsequent mortgagees, preferred creditors, general creditors and the mortgagor, in that order. Such deposit has the effect of releasing the vessel from the unsatisfied mortgages, giving the purchaser a free and unencumbered title to the vessel. All unsatisfied claims against the vessel may only be enforced against the residual proceeds from the judicial sale, if any.

It is worth noting in this regard that whilst a judicial sale by auction of a vessel ensures that the vessel is being sold to the purchaser free and unencumbered – which assurance cannot be given to a buyer in a private sale of a vessel over which more than one mortgage is registered - one disadvantage typical of judicial sales by auction is that the price obtained for the sale of the vessel is relatively low compared to the price which would be obtained in the case of a private sale.

Where pursuant to a judicial sale of a vessel, the purchaser is not a person who is qualified to own a Maltese vessel, the Registrar of Shipping shall, upon receiving copies of the proceedings of the sale, make an entry of such sale in the register of the vessel and the register shall be considered as closed except in so far as it relates to any unsatisfied mortgages entered in the register. In the context of a private sale by a mortgagee, the Registrar of Shipping applies the same procedure for the closure of the registry upon production of the prescribed bill of sale form.

Court Approved Sales vs. Private Sales & Judicial Sales by Auction

A notable amendment to the Maltese Code of Organisation and Civil Procedure – Chapter 12 of the Laws of Malta (“COCP”), was introduced by Act XV of 2008, with “Court Approved Sales” being introduced to Maltese law. This procedure provides the mortgagee with an alternative to private sales and judicial sales by auction mentioned above. Under the new provisions of the COCP, any creditor with an executive title (which would therefore include a mortgagee, as already observed above), can file an application in court

requesting it to approve the private sale of a vessel in favour of an identified buyer and in consideration of a determined price.⁴

Should a mortgagee opt to pursue this route, he would be required to file together with the application, two separate valuations prepared by two independent valuers confirming the value of the vessel. Moreover, the mortgagee must also prove to the court that the private sale is in the interest of all the creditors and that the price offered by the buyer is reasonable in the circumstances, meaning that the price must be at least equal to or in excess of the two valuations obtained. In order to expedite the procedure, the application is appointed for hearing within 10 days of its filing. If the court approves the private sale, in its decree it shall nominate a person who will be entitled to transfer the vessel in accordance with terms and conditions approved by the court, as if he were the registered owner of the vessel and the nominated person shall deposit the price in court within 7 days for the date of completion of the sale.

This recent legal development which may be availed of by both the mortgagee and the mortgagor is more advantageous than a judicial sale by auction since the procedure for a court approved private sale is more expeditious than a judicial sale and a more adequate price for the vessel should be obtained. Moreover, whilst in the case of a private sale of the vessel over which more than one mortgage is registered and which is pursuant to the consent of every prior mortgagee, the purchaser's title would not be free and unencumbered, on the other hand a court approved sale grants the purchaser a title which is free and unencumbered and after the sale all claims against the vessel may be enforced only against the proceeds of the sale and this alone acts as a direct incentive to third party buyers making it less cumbersome for the mortgagee to discharge the debt due by the mortgagor.

Actions “in rem”

Although Malta is not yet signatory to the Arrest Conventions of 1952 and 1999, various measures relating to judicial proceedings in respect of a number of heads of maritime claims ‘*in rem*’ were introduced by virtue of Act XIV of 2006 amending the COCP, which claims are recognized and incorporated in both Conventions. Under the new Article 742B of the COCP, the Civil Courts of Malta are now vested with jurisdiction ‘*in rem*’ against ships in relation to a total of twenty five heads of maritime claims which include *inter alia* any claim to the possession, ownership or title to or of a ship or to the ownership of any share therein and any claim in respect of a mortgage, hypothec or charge on a ship or any share therein. The introduction of Article 742B reformed to a large extent our laws on admiralty jurisdiction which laws were previously regulated by the Vice-Admiralty Court Act 1840 and the Admiralty Court Act 1861 which provided for limited heads of maritime claims and which did not regulate the substance of an ‘*in rem*’ action.

The Warrant of Arrest

By virtue of the 2006 amendments to the COCP, the “Warrant of Arrest” in security of maritime ‘*in rem*’ claims was introduced replacing the former “Warrant of Impediment of Departure” and the “Warrant of Seizure” which necessarily had to be filed to enforce a creditor’s rights. In terms of the COCP a warrant of

⁴ Article 358 of the COCP

arrest can be sued out on the basis of any one of the twenty five heads of maritime claims giving rise to the '*in rem*' jurisdiction of the Maltese Courts **when the vessel is within the territorial jurisdiction of Malta, irrespective of her flag.**

Maltese law provides for a precautionary and an executive warrant of arrest. The precautionary warrant of arrest may be issued against any sea-going vessel having a length exceeding ten metres to secure a debt or a claim of not less than Eur11,600 which could be frustrated by the departure of the said vessel.⁵

A warrant of arrest has the effect of seizing the vessel from the debtor and also to attach the same in the hands of the Authority for Transport in Malta not to release such vessel or allow the debtor to divest himself in any way from the same in whole or in part or to give surrender to any person any rights on the same. The Authority for Transport in Malta is designated as the relevant authority for the purpose of maintaining in its hands or under its power or control the arrested vessel.

A debtor in possession of an executive title, which debtor would therefore include a mortgagee of a Maltese registered vessel, may make a demand for the issue of an executive warrant of arrest. In this case the Maltese court will first establish whether an order for a judicial sale of the vessel is warranted or alternatively it will fix a time-limit within which the mortgagor is to pay the amount due. If the court decides to grant a time limit within which the mortgagor is to pay, the court will also order that the executive warrant remains in force until payment of the amount due is effected. If the mortgagor does not effect payment within the time limit the court will, pursuant to a demand made by the mortgagee, order the judicial sale of the vessel.

An executive warrant of arrest is sued out in the form of an application in the prescribed form on which form the necessary court orders and decrees are given and issued. The application for the issue of this newly introduced warrant of arrest must include (i) particulars enabling the identification of the ship in question (ii) the name of the authority under whose power or control the ship may be at the time when the warrant is requested and (iii) the place where the ship is located at such time. ⁶

Recognition of Foreign Mortgages

It is interesting to note that Merchant Shipping Act provides that a foreign mortgage is also recognised as a mortgage for the purpose of Maltese law and thereby benefits from the status, rights and powers granted by law as described above, notwithstanding the fact that it is not entered over a Maltese registered ship. The recognition of a foreign mortgage is subject to the following conditions:

- (a) it has been validly recorded in the registry of ships of the country under whose laws the ship is documented;
- (b) the registry of ships wherein the foreign mortgage is recorded is a public registry;
- (c) it appears upon a search of the registry; and

⁵ Article 855 of the COCP

⁶ Article 860 of the COCP



- (d) under the laws wherein it is registered, it is granted a preferential and generally equivalent status as a mortgage under Maltese law

Pursuant to the above, a foreign mortgage registered over a vessel that is in Maltese territorial waters may, if the above-mentioned conditions are satisfied be deemed to be an executive title and consequently the mortgagee may enforce its security against the mortgagor without the requirement of obtaining a court judgment against the mortgagor, arrest the vessel in Malta and have the vessel sold either by (i) private sale (ii) court order or (iii) a court approved sale, irrespective of the flag under which the vessel is registered.

With regards to the enforcement of a foreign mortgage as set out above, for the purpose of determining the amount certain, liquidated and due in connection with any sale of a ship, the mortgagee must specify the sum due at the time of the enforcement by means of an affidavit served on the mortgagor.

It is noteworthy that for the purposes of proceedings for the enforcement of a mortgage, whether such mortgage is registered over a Maltese registered vessel or otherwise, the mortgagor will be deemed to be duly served if the judicial act is served on the master of the vessel, or if he is absent from Malta, on the local agent appointed for the vessel or in the absence of such local agent, on a curator appointed by the court to represent the mortgagor and the vessel.

Conclusion

In the light of the developments outlined above, Malta has continued to reinforce its position as a leading shipping centre by ensuring that its legal framework encompasses various legal solutions intended to safeguard mortgagees and other creditors of shipowners when vessels are either registered under the Maltese maritime flag or alternatively when vessels registered under a foreign flag are situated within Maltese territorial waters. Once the jurisdiction of the Maltese courts is established, the enforcing creditor may apply the various legal remedies intended primarily at facilitating the potentially cumbersome process of recovering payment from the shipowner.

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