

Ship Finance

Contributing editor
Lawrence Rutkowski



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GETTING THE
DEAL THROUGH 

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Ship Finance 2016

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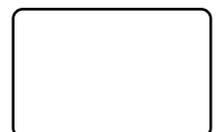


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Bahamas

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Due diligence

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

A transcript of the ship register demonstrates legal ownership of a Bahamas flag vessel. The transcript is issued by the Registrar of Bahamian Ships from one of the offices of the Bahamas Maritime Authority (BMA). A transcript may be obtained for a fee.

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

The only lien or encumbrance capable of being registered with the BMA over a Bahamas-registered vessel is the ship mortgage. A transcript will indicate whether any mortgages are recorded 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?

Typically vessel finance security agreements are not registered in any public registry. However, if the obligor is a company incorporated under Bahamian law and if the security documents are governed by Bahamian law, it is possible to conduct a search of documents recorded in the Registry of Records for any such liens or a search of the corporate records of the company at the Companies Registry. These registries are situated at the offices of the Registrar General's Department of the Government of The Bahamas.

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?

Yes. In addition to the searches noted in question 3, upon payment of a fee it is possible to obtain from the Registrar General a certificate of good standing in relation to an obligor.

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?

Yes, a search of the Companies Registry as indicated above; an obligor that is a domestic company incorporated under the Companies Act (CA) is required to file an annual return containing the names of the legal shareholders, officers and directors of such company. An obligor that is incorporated under the International Business Companies Act (IBCA) must file a copy of its register of directors and officers. There is no requirement to file the names of shareholders. Permission of the directors of such a company would have to be obtained in order to conduct a search of the company's records maintained at the registered office of such a company.

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 restrictions contained in its memorandum or articles of association, a company incorporated under the IBCA has the power, irrespective of corporate benefit, to perform all acts and engage in all activities necessary or conducive to the conduct, promotion or attainment of the objects or purposes of the company. Given such broad powers and subject as mentioned above, it may enter into or guarantee a debt obligation by passing a resolution of its board of directors without the need to obtain shareholder approval. However, a company incorporated under the CA may only provide such financial assistance upon passing a board resolution and without the need to obtain shareholder approval, in circumstances that are not prejudicial to the company such that the company would not become insolvent after giving the financial assistance. For the avoidance of doubt, such companies need to obtain the approval of both the directors and shareholders.

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?

A non-resident foreign lender is not required to be qualified to do business in the Bahamas and will not be deemed resident or domiciled or carrying on business in the Bahamas if it extends credit to a borrower in the Bahamas that is also deemed non-resident for exchange control purposes.

Repayment

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

It depends on whether the obligor is deemed to be, or is designated resident or non-resident for exchange control purposes. A Bahamian company that is designated resident for exchange control purposes will be required to obtain the prior approval of the Exchange Control Department of the Central Bank of the Bahamas in order to borrow foreign currency and to make the loan repayments in a foreign currency. The absence of such approval may render the loan or security unenforceable.

However, a Bahamian company that is either designated non-resident or deemed to be non-resident for exchange control purposes may transact in a foreign currency and make the loan repayments in a foreign currency without any regulatory approval. This type of Bahamian company is most commonly used in vessel-financing transactions.

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

There are no caps on interest rates if the loan is in a currency other than the currency of the Bahamas. However, any provisions requiring any party to pay interest on overdue amounts in excess of the rate (if any) payable on such amounts before they become overdue may be unenforceable if held by a Bahamian court to be a penalty.

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

No. There are no withholding taxes payable in the Bahamas.

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?**

A 'ship' under Part II of the Merchant Shipping Act 1976 (MSA) includes 'any structure capable of use in a marine environment which the Director or Registrar may consider appropriate for registration as a ship', and under Part VII, 'includes every description of lighter, barge or like vessel, however propelled, and any structure launched and intended for use in navigation as a ship or a part of a ship'.

Offshore oil and gas support vessels (which includes drilling rigs) are eligible for registration and account for 16 per cent of the vessels registered with the Bahamas flag. A ship that is not registered will not be recognised in the Bahamas or for the purposes of the MSA as a Bahamian ship or as being entitled to the rights and privileges accorded to Bahamian ships.

12 Who may register a vessel in your jurisdiction?

Any person regardless of nationality or jurisdiction of incorporation may register a vessel as a Bahamian ship. Foreign-owned ships engaged in international trade may be registered in the Bahamas. However, there are restrictions on the age and size of vessels which may be registered as a Bahamian ship. Vessels over 12 years old are subject to a preregistration inspection undertaken by an authorised Bahamas inspector and applications are approved on an individual basis. Applications for vessels of less than 1,600 net tons may also be submitted and will be assessed on an individual basis.

13 Is there an alternate registry for international shipping operations?

The BMA is an open international register. All ships eligible for registration under the Bahamas flag are registered under this register. There are no alternate registries distinct from this national register.

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?**

Mortgage registration form R208 is the prescribed statutory form of ship mortgage in the Bahamas, which form may be made security for a loan or other valuable consideration (section 33 MSA). It has been used and is accepted for registration to secure various types of financing arrangements including swap obligations. A deed of covenants, although collateral to the ship mortgage, is not permitted to be registered with the BMA.

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

In addition to the details in question 14, the statutory form contains a short summary of the parties and the documents regulating the financing transaction, including reference to a deed of covenants. It is a deed and must be executed under seal in the presence of a witness and notarised. Before final registration, a draft form of the mortgage must first be submitted to the BMA for preclearance. Registration requires presentation of the original mortgage containing original signatures and seals.

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 Director or Deputy Director of the BMA are registrars of Bahamian ships and are responsible for maintaining the register of mortgages. The BMA has offices located in Nassau, London, New York and Piraeus with agents in Hong Kong and Tokyo. The register contains the particulars of the ship including the name of the ship, the IMO number, port of registry, registration number, building details, propulsion and engine details, vessel type, dimensions and hull materials, tonnage, names and addresses of owners and the particulars of any mortgages registered against the vessel.

The mortgage is recorded by a registrar at the one of the offices of the BMA, in the order and at the time it is produced, irrespective of the date of its execution. The registrar manually makes a notation on the original mortgage of the date and time of such registration. The mortgage is perfected upon registration and in addition to giving priority over mortgages registered after it, a registered mortgage gives a mortgagee the power to sell the ship or any share in respect of which it is registered and to give effectual receipts for the purchase money.

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?

There is no requirement to include either the mortgage amount or the maturity dated in the mortgage. No other document may be filed with or attached to the recorded mortgage.

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

Yes. However, 'no notice of any trust, express or implied or constructive, shall be entered in a register or be receivable by a registrar' (section 49 MSA), therefore use of the word 'trustee' is not permitted to appear in the mortgage instrument. It is, however, permissible to register a mortgage in the name of an agent or security agent 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. If there is no change of the mortgagee as agent or trustee for a lending syndicate on the mortgage, a transfer of a portion of the underlying debt among existing lenders or to a new lender would not necessitate any filing to be made in connection with the mortgage.

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 transfer from a mortgagee to a new lender, agent or trustee as mortgagee necessitates the filing at the BMA of a transfer of mortgage. The section entitled 'Transfer of Mortgage' contained on the statutory form R208 must be completed by the mortgagee and executed under seal and notarised. A draft form of the transfer must first be submitted to the registrar for preclearance. In order to be accepted for registration, the transfer must be attached to the original registered mortgage and produced to the registrar who manually makes a notation of the date and time of its registration.

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?

Other maritime liens are:

- seamen's wages;
- port, canal, and other waterway dues and pilotage dues;
- fatal accidents and personal injury claims;
- damage done by a ship; and
- claims for salvage, wreck removal and contribution in general average.

These maritime liens give rise to a right to arrest a vessel and are enforceable against a ship or the proceeds derived from the sale of the ship as a result of the arrest.

In accordance with section 9(4) Supreme Court Act, where a claim arises in connection with a ship and the person who would be liable for the claim was, when the cause of action arose, the owner or charterer of, or in possession or in control of the ship, an action in rem may be brought against a sister ship, if at the time the action is brought, both ships share the same beneficial ownership.

22 What maritime liens rank higher than a mortgage lien?

Subject to a shipbuilder's or ship repairer's possessory lien, the maritime liens noted in question 21 rank in priority over a registered ship mortgage.

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

Non-mortgage liens may not be recorded over a vessel with the BMA.

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?

Yes, mortgages on foreign flag vessels will be recognised and will be regarded as having the same priority over a vessel as a mortgage on a vessel that is registered under Bahamian law.

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?

An action must be commenced by a writ of summons issued out of the Supreme Court Registry. An inspection of the caveat book must be conducted to ascertain whether the owner of the vessel has entered a caveat against arrest of the vessel. In the event the owner has entered such a caveat, the legal representative of the owner must be contacted to advise of the claim, to secure his or her undertaking that an appearance would be entered in the action and that an acceptable bond or guarantee from a bank or financial institution would be put in place. The time specified is usually within three days. In the event that no caveat has been entered, a summons must be filed in the Supreme Court Registry together with a praecipe for warrant of arrest and an affidavit in support filed in the Supreme Court.

An application must then be made to the Supreme Court for the issuance of a warrant of arrest and upon an undertaking being given to the court to pay the expenses of the admiralty marshal the court will issue the warrant of arrest which will be executed on the vessel and master by the admiralty marshal and subject to a release obtained by the owner from the court, the vessel will remain in the custody of the admiralty marshal until the action has been determined.

The owner has 14 days in which to enter an appearance after service of the writ of summons and 14 days thereafter to enter a defence. In default of either, an application may be made to the court for a default judgment to be entered pursuant to which the court may order the vessel be appraised and sold. The admiralty marshal after obtaining at least two appraisals from shipbroking firms of international repute and advertising the sale in at least two international maritime publications may sell the vessel by public or private auction, the gross proceeds of which are paid into court. All costs arising out of the proceedings including expenses associated with the arrest or sale of a vessel will have priority over all claims including that of a mortgagee as well as all claims for maritime liens, and are paid out of the proceeds of sale, which are paid into court. All other liens are paid out of the remaining proceeds. All other claims such as from necessities will be paid out after that of a mortgagee. The process from arrest to sale takes approximately four to six months.

The admiralty marshal's fees may rise as high as B\$75,000–B\$100,000 including incidentals such as dockage, security, transport and airfare. Thus a requirement to post bond or provide a written undertaking is not likely to be less than B\$75,000.

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

Yes, a vessel may be sold privately by a mortgagee. The loan agreement or the deed of covenant would provide for the order in which the proceeds of sale are to be applied and would be likely to include the discharge of all prior mortgages and maritime liens over the vessel; otherwise a sale by a mortgagee will not discharge prior liens.

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

While a mortgagee has the express power to dispose of a ship, a mortgagee is not the owner of the ship and must take care in the exercise of its rights to enforce a mortgage to avoid opening itself up to suit by the mortgagor for damages or an injunction if it rejects a valid offer for the purchase of the ship or wrongfully arrests a ship. Furthermore, unlike a sale by the admiralty marshal, where the ship is sold free from all liens, encumbrances and claims whatsoever with the claims against the ship being transferred to claims to the sale proceeds held by the court, a sale by a mortgagee, while free from subsequent mortgages, would be subject to any prior mortgages and maritime liens that follow the ship, even upon a sale to a bona fide

purchaser. It would be important therefore for the loan agreement to provide for these prior liens to be discharged from the proceeds of sale.

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

Where the owner has assigned its insurance and earnings to a mortgagee as collateral security for the mortgage, immediately upon a default, a mortgagee should give notice to insurers, charterers and cargo-owners that all payments of insurance, hire and freight be paid directly to the mortgagee. A failure by the mortgagee to give such notice will not discharge the liability of the mortgagor to pay same, if the insurance monies, hire or freight are paid directly to the mortgagor.

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

No, finance leases or charters may not be recorded with the BMA.

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?

It is unlikely that a finance lease would be recharacterised as a financing contract. In the Bahamas such transactions are typically structured either by way of a transfer of title to the asset, with the purchase monies being financed and secured by way of a mortgage that could be registered with the Registrar General and thereby provide actual notice to the world of the lessor's interest, or are structured as true leases that are terminable on the happening of certain events, at which time possession to the leased property would revert to the lessor.

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

A security interest over earnings or insurances of a vessel is created by way of a deed of assignment. In order to perfect its interest in the earnings or insurance a mortgagee should give notice to all third parties as to the existence of the assignment and directing that all monies due to the mortgagor be paid directly to the mortgagee. There is no requirement that the assignment be registered in any public registry.

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

Security interests against non-vessel collateral need not be registered to be enforceable.

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

A security interest over a deposit account or earnings account may be established by creating either a fixed or floating charge over that account depending on whether the account holder is to have free use of the funds in the account and whether the chargee is to have control over the account. If the account is not in the Bahamas and the charge is not governed by Bahamian law, there is no requirement that the charge over the account be registered in any public registry in order to be perfected; however, an entry of the particulars of the charge over the account may be made in the Register of Mortgages and Charges of a Bahamian company kept by the registered office of such company.

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

See question 28 for where a mortgagee may enforce an assignment of earnings or insurance by giving notice to the relevant third party directing all payments be made to the mortgagee. A mortgagee may enforce a charge over an account made by way of fixed charge by taking control of the account. In the case of share pledges, a mortgagee could enter its name as transferee of the shares and take control of the company. See question 35.

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

The shares of Bahamian companies are often granted as security to a lender pursuant to a share pledge agreement securing the indebtedness

of the mortgagor. The original share certificates are physically delivered to the mortgagee together with undated, but endorsed, share transfers as well as undated letters of resignation of officers and directors. In the event of default, the mortgagee may enter its name or its nominee's name as the transferee of the shares, thereby taking ownership of the company and appoint new directors. Depending on the terms of the share pledge agreement, until the occurrence of an event of default, a shareholder would be able to exercise its voting rights and to receive dividends, while also providing an undertaking or covenant with the mortgagee, not to carry any act that would be inconsistent with or imperil the security created by the pledge.

Bahamian law does not permit the issue of bearer shares.

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?

Under the principle that a company is a separate legal entity distinct from its shareholders, a pledgee, even if it becomes the shareholder of the pledged company, will not be liable for the debts of the pledged company. However, it is possible under the Companies Winding Up (Amendment) Act (CWUAA) for a court to make an order declaring any person personally liable, if the court is satisfied that at any time before the commencement of the winding-up of a company, any of its business has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, and that person was knowingly a party to the carrying on of the business. Similarly, the court may make an order against any director of the company, past or present, who knew or ought to have concluded that there was no reasonable prospect that the company would avoid being wound up by reason of insolvency, and that such person was a director of the company at that time.

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 is no income tax in the Bahamas.

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

No.

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

There is no income tax, withholding tax, transfer tax, stamp tax, value added tax, stamp duty or similar levy, imposed by or within the Bahamas for registering vessels in the Bahamas.

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

See questions 37 and 39.

Insolvency and restructuring

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

No, there is no general scheme or reorganisation similar the US Chapter 11. However, the CWUAA provides a comprehensive regime for company liquidations in the Bahamas.

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

Yes. A Bahamian court will recognise and enforce any final and conclusive judgment provided that:

- such courts had proper jurisdiction over the parties subject to such judgment;
- the judgment is for a debt or definite sum of money other than a sum payable in respect of taxes or charges of a like nature or in respect of a fine or penalty;
- such courts did not contravene the rules of natural justice of the Bahamas;
- such judgment was not obtained by fraud;
- the enforcement of such judgment would not be contrary to the public policy of the Bahamas;
- the correct procedures under the laws of the Bahamas are duly complied with;
- such judgment is not inconsistent with a prior Bahamian judgment in respect of the same matter; and
- enforcement proceedings are instituted within six years after the date of such judgment.

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

Pursuant to the provisions of the CWUAA, secured creditors rank ahead of all unsecured creditors and are entitled to enforce their security at any time without leave of the court and without reference to the liquidator. However, if a liquidator sells assets on behalf of a secured creditor, the liquidator is entitled to deduct its expenses and remuneration from the proceeds of the sale and is paid in priority to all other claims. Other preferential debts include all rates, taxes, assessments, salaries, wages and gratuities, of medical health insurance premiums or pension fund contributions, severance pay and earned vacation leave, which debts rank equally among themselves but rank ahead of a floating charge.

Creditors would be able to disgorge payments from an insolvent company on the grounds of fraudulent preference on the grounds that the transaction was made in favour of a creditor at a time when the mortgagor was unable to pay its debts, with a view to preferring such creditor over other creditors and the transaction was entered into within six months immediately preceding the commencement of liquidation of the company. Similarly, a transaction that was made at an undervalue, or for which no consideration is given with intent to defraud its creditors, would entitle a creditor to disgorge payments from an insolvent company.



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

Yes, see question 6 regarding provision of financial assistance.

45 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?

Yes, see question 43 for where transactions could be set aside on the grounds of fraudulent preference or for being made at an undervalue.

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

A creditor may petition the Supreme Court to wind up a company on the basis that it is unable to pay its debts or on the grounds that it is just and equitable to do so. At any time after the presentation of the petition and

before a winding-up order a creditor may apply for a stay of proceedings or any action that is proceeding or pending against the company in the Bahamas including the Court of Appeal or the Privy Council or for an injunction to restrain further proceedings where any action is proceeding against the company in a foreign court.

However, when a winding-up order is made, or a provisional liquidator is appointed, there is an automatic stay on any actions or proceedings against the company. A creditor may apply for the appointment of a provisional liquidator on the grounds, among other things, that it is necessary to prevent the dissipation or misuse of the company's assets.

47 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 Bahamas has not adopted the Model Netting Act of the ISDA. Bahamian law would permit a swap provider to exercise its close-out netting rights under the ISDA master agreement in the event of insolvency of an obligor.

Getting the Deal Through

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