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Global Practice Guides

# Shipping

Malta – Law & Practice

Contributed by  
Mamo TCV - Advocates

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# MALTA

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## LAW & PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law & Practice

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**Mamo TCV - Advocates** holds strong links with all sectors of shipping and maritime law and the firm has specialised lawyers in these fields of law. The team has the capacity to offer services in all aspects of shipping-related work including ship finance, litigation and admiralty. Key areas of expertise include flag and ship registration under Maltese flag and overseas and dealings with formalities related thereto; bareboat charter registrations; ship owning and ship management company incorporation; marine mortgages and other form of securities; discharging of mortgages; ship

sales and purchases; ship finance; chartering and leasing; syndicated bank loans; and generally advising financing institutions on security and mortgage enforcement matters as well as on other Maltese maritime law matters. Lawyers also have extensive experience of Admiralty claims (both wet and dry) and marine litigation and arbitration including arrests of vessels in Malta; salvage; loss or damage; towage; collision; enforcement of mortgages; cargo claims; bills of lading; contracts of affreightment; judicial sales and auctions of vessels; oil pollution.

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## 1. Overview

### 1.1 Domestic Legislation

The main piece of Maltese legislation regulating ship registration and ship finance is the Merchant Shipping Act – Chapter 234 of the Laws of Malta. That being said, there are several other legislative enactments which also have a bearing on the ship finance world. In this regard, we would cite the Civil Code – Chapter 16 of the Laws of Malta, the Code of Organisation and Civil Procedure – Chapter 12 of the Laws of Malta and the Companies Act – Chapter 386 of the Laws of Malta.

### 1.2 Registering Domestic Flag Vessels

Vessels are registered in one central ship registry (the Registry of Ships) which is in turn administered by the Merchant Shipping Directorate within the Authority for Transport in Malta (or Transport Malta). Transport Malta is a government authority set up by law.

### 1.3 Requirements for Domestic Ownership of Vessels

Vessels (of any type and however used) can be registered in the name of: (i) citizens of Malta; (ii) Maltese companies; (iii) foreign companies, provided that these appoint a Maltese resident to act as their Resident Agent (a form of registry

representative); and (iv) any citizen of the EU, EEA or Switzerland provided that such citizen appoints a Resident Agent as above described. The appointment of a Resident Agent and all administrative formalities in that regard are administered by the Merchant Shipping Directorate of Transport Malta.

### 1.4 Requirements to Register a Vessel

The registration process is quite straightforward. Besides complying with technical requirements mandated by the IMO for a particular vessel type (compliance with applicable conventions), the registration process would entail the filing of the following documents: (i) an application for registration; (ii) a declaration of ownership (these two items are required in order to obtain provisional registration); (iii) documentation evidencing the root of title of ownership of the vessel; and (iv) a deregistration certificate from the vessel's previous registry (originals of the latter two items are required within six months from provisional registration). The registration of a vessel by a bareboat charter is also permitted, provided that the aforementioned requirements are satisfied.

### 1.5 Temporary Registration

Vessels above the age of 25 years are not typically eligible for registration unless they form part of a fleet of younger ves-

sels, and are subject to the discretion of the Registrar General of the Merchant Shipping Directorate.

### 1.6 Characteristics of a Vessel

For the purposes of the foregoing, in terms of the Merchant Shipping Act, a vessel that can be registered in Malta comprises any description of a vessel used in navigation, whether self-propelled or not, and includes barges, pontoons, floating establishments, installations or structures, oil rigs and other similar vessels, and for those parts of the Act, wherever applicable, it shall also include a ship under construction.

## 2. Shipping Finance: Liens and Mortgages

### 2.1 Types of Mortgage/Lien

Mortgages over vessels can be registered in Malta in order to secure the performance of any obligation/s (whether existent or future obligations) and/or the payment of a sum of money by a creditor (whether such debtor is the shipowner, or whether the debtor is a third party for whom the shipowner is providing a guarantee for the performance of obligations or the payment of amounts due, by virtue of the mortgage over an owned vessel).

### 2.2 Registration of Liens and Mortgages

In order to benefit from the terms of Maltese law relating to mortgages, a mortgage must be registered with the Ship Registry and recorded accordingly.

### 2.3 Disclosure Requirements

Mortgages are recorded on a standard form which would specify the following: (i) standard vessel identification data; and (ii) the nature of the debt being secured by reference to the various instruments regulating the creation of such a debt.

The actual debt instruments to which the mortgage refers does not need to be filed with the Registry of Ships. Neither is there a requirement for a Deed of Covenants to be filed with the Registry.

### 2.4 Restrictions on Types of Indebtedness

A mortgage may be drawn up to secure the payment of a principal sum and interest, an account current, as well as the performance of any other obligation, including a future obligation due by the debtor to the creditor. It shall not be necessary to indicate the monetary value of the indebtedness in the mortgage unless it is intended to secure a future obligation, in which case, a maximum sum by way of principal for which the mortgage is granted must be expressly stated in the registered instrument and such sum shall be recorded in the register of the Registry of Ships.

### 2.5 Swaps or Other Derivative Transactions

A mortgage to secure a future obligation may only be granted in favour of a credit institution in an approved jurisdiction.

### 2.6 Execution Before the Debt Exists

It should be noted that a mortgage may only be registered over a vessel, if such vessel is registered (at least provisionally, as explained above) with the Registry of Ships.

### 2.7 Other Claims Against Title to a Vessel

In terms of the Merchant Shipping Act, a special privilege can encumber the ownership of a vessel in such a manner that, in the case of the sale of the vessel at the instance of a creditor, holders of such special privileges would have special ranking rights arising *ex lege* over the vessel sale proceeds. Such special privileges are not subject to recordation in the ship registry.

Therefore, even if the rights arising pursuant to a mortgage are validly entertained and enforced, the rights of persons holding privileges arising at law over the vessel (whether such privileges arise in terms of the Merchant Shipping Act of any other statute duly enacted in Malta) may have prior ranking in any proceedings where various credits arising over the vessel are subject to the ranking by the Courts of Malta.

In this regard, the claim of a mortgagee pursuant to the mortgage would rank ahead of the claims of unsecured and unsubordinated creditors, except those relating to: (i) claims for judicial costs incurred in respect of the sale of the ship under the authority of a competent judicial authority and the distribution of proceeds pursuant to such sale; (ii) fees, charges and tonnage dues payable in terms of the laws of Malta; (iii) wages and expenses for assistance, recovery of salvage and pilotage dues; (iv) the wages of watchmen and expenses for watching the vessel from the time of the vessel's entry into its last port (up to the time of sale); (v) rent of warehouses in which the vessel's tackle and apparel are stored; (vi) the expenses incurred in the preservation of the vessel and of her tackle including supplies and provisions to her crew incurred after her last entry into port; (vii) wages of crew on board the vessel in respect of their employment on the vessel (including costs for repatriation and social insurance contributions payable on their behalf); (viii) damages due to a seaman for death, injury or illness thereof; (ix) monies due to creditors for labour, work and repairs previously to departure of the vessel on her last voyage; (x) ship agency fees limited to EUR10,000 from the time of the vessel's entry into its last port (up to the time of sale) and other persons with preferential claims under insolvency laws, employment laws, taxation laws or similar legislation.

## 2.8 Sale of a Vessel Without the Consent of a Mortgagee

It should be noted that the sale of a vessel encumbered by a mortgage is prohibited in terms of Maltese law. Such sale can only occur with the consent of the mortgagee.

## 2.9 Enforcement of Mortgages and Liens

The enforcement of mortgages allows self-help remedies at the time of the occurrence of a default in terms of the transaction documents regulating a particular financing arrangement. Subject to the completion of basic procedures, the default amount (including an accelerated amount if applicable) would constitute an executive title in terms of Maltese law (equivalent to a judgment). This would allow any enforcing creditor to: (i) proceed to the sale of the vessel, whether by public auction or under private charter (sale to a private buyer sourced by the mortgagee) under the authority of the court or otherwise directly by the mortgagee in terms of Maltese law and the terms of any Deed of Covenants; or (ii) proceed to recognition of such executive title as a judgment in other European jurisdictions with a view to seizing the mortgaged vessel accordingly.

## 2.10 Timeline for Exercise of Foreclosure

The process for obtaining an executive title, as detailed above, can be completed within a very short timeframe (typically six working days). Maltese law allows for the sale of a vessel on the basis of such executive title and therefore immediately after the aforementioned period. Typically, a vessel would be sold within two months from its arrest in Maltese territorial waters. Our law, therefore, permits the sale of a mortgaged vessel before all competing claims over the vessel are resolved.

It should be noted that the sale of any mortgaged vessel by auction or otherwise to an entity privately sourced by the mortgagee under the authority of the court, is made on a “free from encumbrances” basis in terms of Maltese law.

## 2.11 Duties of Mortgagee to Owner of Vessel/ Creditors

It should be noted that should the mortgagee decide to exercise their right of possession over a vessel post default, then such mortgagee would be responsible for the running and upkeep of such vessel from such period as the mortgagee would have taken over possession.

## 2.12 Recording of Charter Party Contracts

The right of an owner under a bareboat charter party/finance lease arrangement can be registered under special procedures in terms of Maltese law. That being said, any outstanding balance of lease amounts due does not have the status of a prior ranking lien or special privilege.

## 2.13 Share Pledges

It is quite common for vessel financing transactions to involve share pledges in scenarios where debtors would be Maltese limited liability companies. A pledge of shares would need to be recorded (by filing standard notice to this effect) with the Malta Financial Services authority (MFSA) within 14 days from the execution of the relevant agreement constituting the pledge. This recordation is made at no cost. Once the relevant notice of pledge of shares is filed with the MFSA, such record of the pledge would be accessible in the publicly accessible register of the particular company.

Rights pertaining to a pledgee can be enforced extra-judicially. The pledgee has the right to apply for the judicial sale of the shares (the normal remedy under the Civil Code), but they are also entitled, in the event of a default under the agreement of the pledge and upon giving notice by judicial act to the pledgor and the company, to: (i) dispose of the shares which are pledged in his favour; or (ii) appropriate and acquire the shares in settlement of the debt due to them or of part thereof.

Maltese law contains fairly detailed rules regulating the valuation of the pledged shares should the pledgee proceed to dispose of or appropriate them. The primary rule is that in relation to the exercise of the right to dispose of or appropriate the shares, the value of the shares may be established by agreement between the pledgor and the pledgee as long as this is done after notice of default would have been given by the pledgee to the pledgor by judicial act. No prior agreement on the valuation is valid. In the case of failure to reach agreement on the valuation, the fair value for the disposal or appropriation of the shares is to be determined by a certified public accountant or a certified public accountant and auditor appointed by the competent court in Malta on the application of the pledgee.

Once the value is determined (either by agreement or by a certified public accountant and/or auditor appointed by the court) the pledgee may proceed to appropriate or dispose of the shares. If the disposal option is chosen, the pledgee must try to sell the shares at the best price possible and they may not sell the shares at a lower price than that determined as aforesaid. If a sale at such price is not possible, the pledgee should apply to the court to allow them to sell the shares at a lower price, subject to such conditions as the court may deem fit.

Prior to exercising the right to dispose of or appropriate the shares, the pledgee must offer the shares to the other shareholders of the company as follows: (i) if the memorandum or articles of the company lay down pre-emption rights relating to the transfer of shares, then the shares must be offered by the pledgee in accordance with those rights; (ii) if the memorandum or articles do not contain any such

pre-emption rights, the shares must be offered by the pledgee to all the other shareholders of the company in proportion to their holdings. The price must be that established either by agreement between the pledgor and the pledgee, or in case of disagreement, by a certified public accountant and/or auditor appointed by the court on the application of the pledgee. The offer must be kept open for at least ten working days.

In the exercise of their rights, the pledgee may only sell or appropriate such number of shares as is needed to raise sufficient proceeds to repay the debt due – all the remaining shares would have to be released to the pledgor.

A pledgee would never be deemed to be the owner of a vessel whether before or after the pledge of shares is exercised.

#### **2.14 Bearer Shares**

Any type of share may be pledged. It should be noted that bearer shares are not recognised in terms of the Maltese Companies Act.

### **3. Loan Syndications and Transfers**

#### **3.1 Secondary Trading of Shipping Loans**

The transfer/assignment of a mortgage from one creditor to another is possible in terms of Maltese law, provided that a standard instrument of transfer (as found on the flipside to the original mortgage as registered) is completed, signed by authorised representatives of the current creditor and debtor and recorded with the Registry of Ships.

#### **3.2 Sale of a Loan to a New Lender**

The transfer of the mortgage instrument would typically occur pursuant to the sale of a loan/s portfolio by a creditor. This is quite common place in the Maltese jurisdiction, and more so when traditional financiers are seeking to sell off certain 'weak' portfolios in view of regulatory restrictions in this regard.

A mortgagee can also be a security trustee or a collateral agent. The transfer of interest by such trustee or agent would also be subject to the above specified formalities.

#### **3.3 Assignment of a Loan**

In terms of Maltese law, an assignment of a loan portfolio would not be treated as a novation per se. One must make a distinction between the actual mortgage registered and the underlying transaction and security documentation. Many a time, the underlying transaction and security documentation would not be regulated by Maltese law. One would typically expect such instruments to be regulated by the law of the United Kingdom or otherwise the State of New York (depending on who is financing and the different branches of the financier involved). The transfer/assignment of a

mortgage would not typically effect any accrued hardening periods.

#### **3.4 Merging of Mortgagees**

It should be noted that the merger, amalgamation or takeover of a mortgagee by another entity would not be considered as a transfer of mortgage. Such merger, amalgamation or takeover would be recognised by the Registry of Ships and an entry on a particular vessel's record would be made to this effect. The rights under a particular mortgage would automatically be vested in the new surviving entity or successor in title as the case may be.

### **4. Tax Considerations**

#### **4.1 Income Tax**

Any registered owner or bareboat charterer of a Malta-registered seagoing vessel that is involved in the international carriage of goods or passengers by sea for reward, is entitled to a tax exemption on income on all revenue generated solely from such activity, provided that the relevant tonnage taxes are paid over a particular vessel owned or otherwise bareboat charter by such entity.

### **5. Capital Markets**

#### **5.1 Trading Market**

No shipping companies are listed on any active trading market in Malta.

### **6. Bankruptcy**

#### **6.1 Schemes of Administration**

The company recovery procedure (CRP) in terms of Maltese Law provides a company in financial difficulty with an opportunity to rehabilitate its business. In order for the CRP to be initiated, an application must be made to the courts (by the company, the board of directors or creditors of the company representing more than half in value of the company's creditors) to request that the court place the company under CRP and to appoint a special controller to take over, manage and administer the business of the company for a period to be specified by the court, not exceeding 12 months. The court shall accede to the application and place the company under CRP if it is satisfied that the company is, or is likely to become, unable to pay its debts and if it considers that, through the making of the order, the company will survive or the sanctioning of a compromise of arrangement between the company and any of its creditors or members will take place. During the period that the CRP is in force, any pending winding-up application and execution of claims against the company shall be stayed.

A creditor is, therefore, impeded during this period from taking any steps to enforce any claim over the property of the



company or from filing any precautionary or executive act or warrant or commence judicial proceedings, except with leave of court. During the period of the order of the CRP, the company shall continue to carry on its normal activities under the management of the special controller. The special controller may not, without prior express authorisation from the court: (i) engage the company into any commitment of more than six months; (ii) terminate the employment of company employees as they consider necessary for the continuation of the company as a viable going concern; or (iii) sell or dispose of any property of the company.

CRP terminates once it is apparent to the special controller that it would serve no useful purpose for the company to continue with the said procedure or that the affairs of the company have improved to the extent that it is in a position to pay its debts. The special controller will apply to the courts for the termination of the CRP. The court will issue an order for the termination of the CRP and order the company to be wound up by the court if the company has no reasonable prospect of continuing as a viable going concern and will not be in a position to pay its debts in the future.

In terms of Maltese Law, a company has the power to propose a compromise with its creditors or members and the court may, on the application of the company or creditor or member (or liquidator in the case of a company being wound up), as the case may be, order a meeting to be summoned in such manner as the court directs. If the majority of the creditors or members agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, shall be binding.

In the event that a compromise or other arrangement is proposed for the purposes of reconstruction of a company or the amalgamation of two or more companies and that, under the arrangement, the undertaking of the company concerned is to be transferred to another company, the Maltese courts may order the sanctioning of the compromise or arrangement.

The court order shall include a provision for the transfer of the company, allotting or appropriating any shares, debentures, securities or other like interests in that company, continuation of pending legal proceedings, dissolution of transferor company, and any incidental, consequential and supplemental matters necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

### 6.2 Creditors' Rights

Maltese law provides that transactions at below fair value or preferences given during the six months preceding the date of dissolution of a company may be challenged by an interested party. Voidable transactions in this respect could

be any gift that the company makes or similar transaction which the company enters into on the terms that provide for the company to receive no consideration, or transactions entered into for a consideration the value of which is significantly less than the value of the consideration provided by the company. Voidable preferences refer to any preferences given to a creditor, surety or guarantor of the company which has the effect of putting that person into a better position than such person would have had if the preference had not occurred. Any transaction at an undervalue and/or preference will be deemed to be a fraudulent preference and will be rendered null.

In the event that certain transactions preceding the insolvency of a company are voided, a claimant must institute a further action in front of the Maltese courts to subject the preferred creditor to the same liabilities and same rights as if they had undertaken to be personally liable as a surety for the debt to the extent of the charge on the property or the value of his interest, whichever is less. The value of the preferred person's interest shall be determined as at the date of the transaction constituting the fraudulent preference.

Maltese law also provides for a number of other remedies which may be set up as an alternative to the rule of fraudulent preference under the Companies Act. One such other remedy is provided under Article 1144 of the Civil Code in which a creditor may file an action to impeach any act made by his debtor in fraud of the creditor's claims (the *Actio Pauliana*).

The *Actio Pauliana* seeks to place the creditor back in the position prior to the fraud. However, the effects of a successful application of the *Actio Pauliana* do not serve to restore the debtor company's pool of assets from where the creditors will be paid according to their ranking at law, but rather the action benefits only the creditor who seeks to impeach the fraud. When an act giving rise to the fraud alleged by the creditor takes the form of an onerous contractor, the creditor must prove fraud on both parties to the transaction in order to successfully impeach the fraudulent action of the debtor. On the other hand, when the act consists of transfer by gratuitous title, it is sufficient for the creditor to prove fraud on part of the debtor.

It is also relevant to point out that whilst an action for fraudulent preference may be instituted only following the winding up of a company, the *Actio Pauliana* may be instituted at any time, within the two years from the date when the creditor discovers or could have discovered the fraudulent act.

### 6.3 Insolvency or Liquidation Proceedings

In the event that the dissolution and winding-up proceedings of a company are initiated in Malta, then their respective dissolution and winding-up proceedings (or of any of



them, as the case may be) and the enforcement of claims and questions relating to insolvency would be conducted in terms of Maltese law.

In terms of Maltese law, a company may be dissolved and consequently wound up either by the Maltese courts or by the voluntary resolution of the company itself.

A court winding up may be initiated by making a request to the court (hereinafter referred to as the 'Winding-up Application'), either by the company following a decision of a general meeting, or by its board of directors, or by any debenture holder, creditor or contributor. In the event of a Winding-up Application it is claimed that the company is insolvent, the Maltese courts would accede to the request of the applicant once the applicant proves to the satisfaction of the court that either: (i) the debt due by the company has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the company; or (ii) that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company. Following a winding-up order, the Maltese courts will draw up a list of contributories and will cause the assets of the company to be collected and applied in the discharge of the company's liabilities. The court may, before or after it has ascertained the sufficiency of the assets of the company,

make calls on all or any contributory to the extent of their liability, for payment of any money which is necessary to satisfy the debts and liabilities of the company including expenses relating to its winding up.

Liquidation proceedings may also be initiated by resolution of the members of the company (creditors' voluntary winding up). Following a resolution by the company to dissolve the company, the company shall, from the date of dissolution, cease to carry on its business except to the extent required for the beneficial winding up, and any transfer of shares without sanction of the liquidator shall have no effect.

In both a court winding up and a creditors' voluntary winding up, the liquidator will take into their custody or under their control, all the property and rights to which the company is entitled. The liquidator has the power to bring and defend actions and legal proceedings in the name and on behalf of the company, to carry on the company's business as necessary for its beneficial winding up, pay creditors, make compromises or arrangements with creditors, make calls on contributories and effect compromises or arrangements in relation to debts, liabilities and claims of the company, present or future, represent the company in all matters, do all that is necessary to wind up the affairs and distribute the assets of the company.

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