



FACULTY OF LAW
Lund University

Diana Veigule

The Mortgagee's rights to enforce the Mortgage execution

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Prof. Proshanto K. Mukherjee

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I Introduction

Nowadays, most ship acquisition transactions are performed through the finance instruments, such as loan agreements. Whereas parties to this ship finance contracts, from one side, usually, is ship owner as borrower, and, from other side might be, financial institution, as lender – such as banks, funds or private companies. Thus, whatever principal amount of the loan would be finally agreed the lender has to establish a security over its lent funds. Accordingly, the security instrument that has been and is used worldwide in almost all ship acquisition transactions is referred therein as mortgage.

From the legal point of view, ship mortgage is unique security instrument, not only because it empowers the mortgagee with broad range of rights, such as possession, but also because these rights might be realized in, almost, every jurisdiction where the ship trades. Comparing it with civil law hypothec on immoveable property, which confers no immediate rights to possession of the property. However, the broad range of mortgagee’s rights towards the ship shall not be confused with the ownership principle. Thus, for example, under the Roman fiduciary principle: the mortgagee was referred as owner who allows the mortgagor to have the use of the ship but modern ship mortgage statute provides that the mortgagee shall be deemed

not to be the owner¹. Therefore, it may be seen that the ship mortgage and mortgagee's legal status has been changed and so that also its powers when issue of its realization become actual.

Even though, the ship financing involves local laws and regulations, tax law, administrative law, customs law, and domestic and foreign contract law, all these areas of laws referred as civil laws, the ship mortgage is one of the three major contributions of the common law to the law of maritime liens, claims and mortgages². In addition, the ship mortgage, being the security instrument attached to the loan agreement, in some aspects, involves also the maritime law. Thus, it is "hybrid" security instrument because from one side to agree and register mortgage deed parties use, for example, contract and local administrative laws, but from other side, when lender executes its rights against ship owner, the maritime private law or even international laws might be applied.

Moreover, despite the fact that the ship finance market has developed standard security requirements, one of them being commonly used - mortgage deed, each creditor or bank has own additional loan pre-requirements and requests on security, involving, but not limited to, the ship owners' undertakings and liabilities. Thus, implemented into the loan agreement and mortgage deed, and adopted to the jurisdiction of ship mortgage registration state. Therefore, in case of the breach of contractual obligations by the ship owner, the creditors, usually, have already powers to commence appropriate actions. For example, it can force the ship owner to re-pay the loan amount. The procedure of such actions, logically, is governed by the jurisdiction and laws of country agreed under the terms of Loan Agreement or Mortgage. However, as the ship trades worldwide, the procedure of enforcement may likely involve the jurisdiction of other countries - both civil law and/or maritime law. Thus, the mechanism of enforcement may vary from one jurisdiction to other, however, thanks to the International treaties, in some aspects it might be similar.

Taking into account above considered, the security over a ship in a form of mortgage deed has a higher level of creditor's interest protection when it

¹ W. Tetley, "Maritime Liens and Claims", at pp. 474-475

² *Ibid.* 473

has been so recorded by a public authority. The question here arises is the creditor's possibilities to enforce the re-payment of debt if it has not been so recorded.

1.1. Purpose

The author's primarily purpose of master thesis is to research the concept of mortgage as security instrument in ship finance, its forms and characteristics within the maritime law. As one of the intentions, is to address the issue on mortgagee's powers under registered mortgage and non-registered mortgage. Taking as an example the case of m/v SDF, the author will analyze the possible solutions for debt recovery by un-registered mortgagor. Therefore, the appropriate legal principles will be discussed and the common law v. civil law comparison will be presented when issues on performance of best solution and their enforcement discussed, supporting it with the mentioned law case. The great part of the research is intended to be devoted to the enforcement of mortgage execution. Thus, including but not limited to the analysis of instruments for enforcement available to mortgagee (under different jurisdictions) when its debtor is in default, for instance, for non-payment.

1.2. Method

For the master thesis research the traditional legal method is used. The author presents the analysis of law, its application to the facts of the case, compare and discuss it towards the other law cases as well as presents scholar's writings in her work.

1.3. Delimitation

The research of the topic is limited to such extent as does not covers the rights of mortgagor. The analysis of applicable legal principles is presented so far as it impacts the mortgagee's rights to enforce the re-payment of debt. The work is not intended to include all and every aspect of ship mortgage's performance, only to such limits as it would be required when there is default by debtor.

1.4. Disposition

First, the author lists the facts of the case, following the issue of law. That is the essence and grounds for the creditors' claim towards the debtor. Next chapter deals with the identification of applicable law – both under the agreements between parties and other laws of country connected to the dispute. Based on them, the author proposes possible solutions in order for creditor to realize the re-payment of the debt.

Following that, the author research the applicable legal principles for one of proposed solution (maritime claim) and apply them to the facts of the dispute (case). The last chapter of the master thesis deals with the enforcement of claim – its different ways and its execution within different jurisdictions.

Conclusion presents the summary of the research. Mainly, the importance of mortgage within ship finance, its effect and importance of registration, as well as author's view concerning the instruments securing the mortgagee's powers.

Abbreviations

1. The list of the parties and documents

- ✚ Assignment – a Assignment Agreement dated on 21/05/2010 signed between Inter Transit Holding Ltd. as Assignor and Friedman as Assignee (hereinafter referred as “Assignment”)
- ✚ Deed of General Assignments – a Deed of General Assignments of earnings, insurances and requisition compensation dated 19/06/2003 signed between SDF Shipping Co. and Inter Transit Holding Ltd. as addendum to the Mortgage (hereinafter referred as “Deed of General Assignments”)
- ✚ Diana Land – the country, laws of which govern the Loan Agreement and arrest of m/v SDF (hereinafter referred as “Diana Land”)
- ✚ Friedman - Friedman & Partners Ltd. a company incorporated under the laws of the Sweet Land, being assignee, claimant and mortgagee, (hereinafter referred as “Friedman”)
- ✚ Inter Transit Holding Ltd. – a company incorporated under the laws of the Republic of the Milk Islands, being the lender, assignor and mortgagee, (hereinafter referred as “Inter Transit Holding Ltd.”)
- ✚ Invoice – a Invoice Nr. SDF-210510 for the Loan amount and interests payment dated 21/05/2010 signed by Friedman and sent to SDF Shipping Ltd. (hereinafter referred as “Invoice”)
- ✚ Loan – a Loan Agreement dated 25/05/2003 signed between SDF Shipping Co. as Borrower and Inter Transit Holding Ltd., as Lender (hereinafter referred as “Loan”)
- ✚ M/v SDF – a motor vessel SDF a vessel registered under the flag of the Sweet Land with IMO Nr. 190647, GT/NT 2881/1371, multipurpose general cargo type, single deck, built in Germany 1985, having its registered owner SDF Shipping Co. (hereinafter referred as “m/v SDF”)
- ✚ MOA – a Memorandum of Agreement dated on 30/04/2003 signed between SDF Shipping Co. as Buyer of m/v SDF and Due Navigazione as Seller of m/v SDF (hereinafter referred as “MOA”)

- ✚ Mortgage – a Mortgage Deed for the First Preferred Mortgage dated on 19/06/2003 signed between SDF Shipping Co. as Mortgagor and Inter Transit Holding Ltd. as Mortgagee (hereinafter referred as “Mortgage”)
- ✚ NOA - Notice of Assignment dated 21/05/2003 signed by Inter Transit Holding Ltd. and Friedman, and sent to SDF Shipping Co. (hereinafter referred as “NOA”)
- ✚ Reminder – a remainder of unpaid Debt dated 25/06/2010 signed by Friedman and sent to SDF Shipping Co. and its Directors.
- ✚ SDF Shipping Co. – a company incorporated under the laws of Sweet Land in accordance with the International Business Company Act 2007, being the owner of m/v SDF, borrower and mortgagor (hereinafter referred as “SDF Shipping Co.)
- ✚ Sweet Land – the country of domicile of SDF Shipping Ltd. and country of m/v SDF registration (hereinafter referred as “Sweet Land”)

2. General abbreviations

- ✚ EU – European Union
- ✚ UK – United Kingdom
- ✚ MARPOL – International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978
- ✚ SOLAS – International Convention for the Safety of Life at Sea

II Facts in detail

On 8th of April 2003 SDF Shipping Co. has been established in Sweet Land for the single purpose of registration m/v SDF under the flag of SVG.

On 30th of April 2003 the MOA has been signed between SDF Shipping Co. as buyer and Due Navigazione as seller of m/v SDF at the agreed purchase price.

20th of May 2003 was signed Loan Agreement between the SDF Shipping Co., as borrower on the one part AND the Inter-Transit Holding Ltd., as lender on the other part, for the amount equivalent of the m/v SDF purchase price as agreed in MOA, and where it was expressly agreed as follows:

“(a) In accordance with the provisions of the Agreement, the Lender undertook to provide a loan to the borrower in the amount of Two Million United States Dollars (US\$ 2,000,000.00) towards the purchase of the m/v SDF”.

(b) Under the terms of the Agreement, the SDF Shipping Co. was required to sign a Mortgage Deed over the m/v SDF within 3 days after signing the Protocol of Delivery of m/v SDF and the Lender has a right at any time, during the period of Loan to require the Borrower to record the Mortgage.

(c) Under the Clause 3 of the Agreement, the amount was for a period of seven (7) years and by Clause 4 - the rate of interest was agreed at four percent (4%) of the outstanding loan amount per annum.

(d) Under the Clause 7 of the Agreement, the loan amount and interest was to be repaid with interest within five (5) banking days after expiration of seven (7) year period that is by 20th of May 2010. The SDF Shipping Co. as borrower agreed to transfer the aforesaid amounts to the lender's (Inter-Transit Holding Ltd.) bank account in accordance with the lender's invoice.

(e) Under clause 9 of the Agreement, if the SDF Shipping Co. failed to repay the loan amount with interest within ten (10) calendar days, interest would be charged at the rate of Zero Point Zero Six percent (0.06%) per day on the outstanding amount.

(f) In order to fulfill its obligations under the Agreement, the borrower agreed to execute (a) a first preferred mortgage over m/v SDF, after its registration under the Sweet Land's flag in the amount of Two Million United States Dollars (US\$ 2,000,000.00) plus all interest and penalties due at the date of the request by the lender;

(b) a first right to pledge of the receivables from debtors of the borrower; and (d) a first right to pledge for rights and claims arising from the insurances executed on the m/v SDF.”

On 16th of June 2003 the Inter Transit Holding Ltd. has remitted the amount of Loan to the Due Navigazione as Seller of m/v SDF as vessel’s purchase price according to MOA.

On 16th of June 2003 m/v SDF has been delivered to the SDF Shipping Co.

On 19th of June 2003 pursuant to the terms of the Loan, the borrower – SDF Shipping Co. executed a First Preferred Mortgage in favour of the lender – Inter Transit Holding Ltd. Thus, the borrower granted, conveyed and mortgaged unto the lender the whole of the m/v SDF as security for the loan of Two Million United States Dollars (US\$ 2,000,000.00). Additionally, the borrower executed a Deed of General Assignment of earnings, insurances and requisition compensation dated on 19th of June 2003, in fulfillment of its legal obligations under the Agreement. This mortgage is not registered in Sweet Land Maritime Administration; however, the Loan contains the article obligating the SDF Shipping Ltd. as Mortgagor to register said Mortgage in Sweet Land upon receiving the written request from Inter Transit Holding Ltd. as Mortgagee within 30 days.

Furthermore, by an Assignment Agreement (hereinafter referred as “Assignment”) dated on 21st of May 2010, made between the Inter Transit Holding Ltd., as the assignor on the one part and the Friedman & Partners Ltd., as assignee on the other part, whereas the assignor has assigned all claims to the full loan amount plus interest and penalties if owned so, owing under the Loan, and the First Preferred Mortgage by the SDF Shipping Co..

On 21st of May 2010 the Written Notice of the said Assignment was duly served on the SDF Shipping Co. and its registered office at Sweet Land. At the same date, the assignee, pursuant to the Agreement, submitted to the borrower – SDF Shipping Ltd. invoice 210510-SDF in the full loan amount being the amount due and owing under the Loan and Mortgage, which required payment to be made within five (5) banking days after 20th of May 2010, following next months similar invoice and remainder has been sent. The SDF Shipping Co. as borrower has defaulted in paying the debt and as a consequence of the premises the Friedman & Partners Ltd. has suffered loss and damage in amount of Two Million United States Dollars (US\$ 2,000,000.00) plus interest being the amount owed under the Loan and Mortgage as at 19th of June 2010.

On 2nd of June 2010 the Sweet Land Court has granted Freezing Injunction based on the Application of Mrs. Pound (the director and sole shareholder of SDF Shipping Co.) prohibiting any dealing with m/v SDF.

On 13th of June 2010 the Friedman & Partners Ltd. had the m/v SDF arrested at the port of Rotterdam, in order to secure their claim of a first preferred mortgage against the SDF Shipping Ltd. This arrest was based on the right of a first preferred mortgage on the aforementioned vessel by the Friedman & Partner Ltd.;

Following the judgment in interlocutory proceedings of 2nd of August 2010, the District Court of Rotterdam has ordered the SDF Shipping Co. to record the first preferred Mortgage of 19th of June 2003 with the Register or Commissioner for Maritime Affairs of Sweet Land in the name of Friedman & Partners Ltd. within 10 working days from the date of service of this judgment in case of breach penalty within maximum amount 25,000 EUR.

On 12th of August the arrest on m/v SDF has been lifted by Friedman request and mortgage still not registered.

On 15th of September based on the Friedman's Application the Court in Sweet Land has granted a Freezing Injunction prohibiting SDF Shipping Co. any dealing with m/v SDF.

III The issues of law

The basis of the Friedman's & Partners Ltd. claim is that there was a breach of contractual obligations on the part of the SDF Shipping Co. The non-repayment of the loan amount together with interest therefrom within the stipulated time, as it is stated in the Loan Agreement, can amount to a breach of Loan on the part of SDF Shipping Co. As it was mentioned above, in terms of Loan Agreement such a breach obliges the SDF Shipping to pay the Inter-Transit Holding Ltd. a Two Millions Dollars (US\$ 2,000,000.00) plus interest rate equal 4.0% of the outstanding loan amount and plus penalty in 0.06% per each day of delay on the exact outstanding amount due.

The Clause 17 of the said Loan Agreement states that the Lender (Inter Transit Holding Ltd.) have the right to assign all rights and obligations to any 3rd party without prior written consent of the Borrower (SDF Shipping Co.) and that such a 3rd party can claim from the SDF Shipping Co. any amount that is due or might have been due to the Inter Transit Holding Ltd. under the terms of this Loan Agreement.

Consequently, the rights to demand the amount of Two Millions Dollars (US\$ 2,000,000.00), registration of Deed of Mortgage and Deed of general assignment of earnings, insurances and requisition as well as all claims therefrom was assigned by the assignor Inter Transit Holding Ltd. to the assignee Friedman & Partner Ltd. by virtue of Assignment Agreement dated on 21st of May 2010.

Therefor, in the light of above mentioned, the claim (-s) is in relation to the assigned rights to demand the re-payment of loan amount plus all interest and damages therefrom which was due on 20th of May 2010 as well as the registration of the said First Preferred Mortgage, brought forward by the Friedman & Partners Ltd., as assignees against debtor SDF Shipping Ltd.

For this purpose, it would be required a full and solid legal research in which it would be clearly explained the possibilities and solutions for Friedman to enforce a) Mortgage registration and its future execution and/or b) re-payment of said debt.

IV Applicable Law

In order the Friedman & Partners Ltd. can demand from borrower the re-payment of said debt and registration of the Mortgage over the m/v SDF there shall be researched and analyzed the applicable law (-s) that is to say the laws of jurisdiction that apply to the signed Loan Agreement, Deed of Mortgage and Assignment Agreement. In addition, there shall be examined the laws of country where both – Friedman & Partners Ltd. and SDF Shipping Co. are incorporated and the property – m/v SDF is registered, as it might have an important impact on the performance of debtor's duties and the lender's right to enforce such execution.

- a) By virtue of the Clause 21 of Loan Agreement the Parties has expressly agreed as follows:

"The present Agreement shall be governed and regulated in accordance with the laws of the [Diana Land]. All disputes and arguments arising or related hereto, Parties shall settle through negotiations and consultations. If Parties fail to reach an agreement, all disputes shall be settled in accordance with the current Diana Land's law, in the first instance competent court shall be the District Court of

[Malmo].³”

- b) By virtue of Clause 13 of the First Preferred Mortgage there has been agreed as follows:

“13. Jurisdiction and other provisions

For the benefit of the Mortgagee, the parties hereto irrevocably agree that any legal action or proceedings in connection with this Mortgage may be brought in the District Court of [Malmo], [Diana Land] or in the courts of any other country chosen by the Mortgagee, each of which shall have jurisdiction to settle any disputes arising out of, or in connection with, this Mortgage. (...)⁴”

- c) By virtue of Clause 5 of Assignment Agreement it has been agreed as follows:

“ This Agreement shall be construed and enforced pursuant to the laws of [Sweet Land].”

- d) It is known from the facts of case that both companies – Friedman & Partners Ltd. as well as SDF Shipping Co. are incorporated under the laws of Sweet Land. In this respect the International Business Companies Act 2007 of this country shall be mentioned as follows:

“Part XIII, Article 197

(1) For the purposes of determining matters relating to title and jurisdiction but not for the purposes of taxation, the situs of the ownership of shares, debt obligations or other securities of an international business company is in the State.

(2) A Judge of the Court may exercise in Chambers any jurisdiction that is vested in the Court by this Act and in the exercise of that jurisdiction, the Judge may award such costs as he thinks fit.⁵”

- e) It is also known from the details of case that the m/v SDF is registered and fly the flag of Sweet Land. Thus, by virtue of the Sweet Land’s Shipping Act 2004 provisions and the Geneva Convention on the High Seas 1958 which provides:

“The State must effectively exercise its jurisdiction and control administrative, technical and social matters over ships flying its flag.⁶”

In addition, within the concept of ship registration in any state, where the private law

³ See Exhibit No. III “Loan Agreement”

⁴ See Exhibit No. II “Mortgage Deed”

⁵ The International Business Companies Act 2007 of Sweet Land, Article 197

⁶ Geneva Convention on the High Sea 1958, Article 5

principles has to do with adjusting the relations and securing the interests of individuals and settling disputes between man and man⁷. The m/v SDF nationality is very important to note since the Friedman & Partners Ltd. claim to register the Mortgage over this property, and probably its future execution, shall be performed based on the Sweet Land's laws.

V Proposed solutions

Based on the above given facts of the case there now can be identified the solutions concerning the Loan Agreement and the Mortgage. Mainly, the possibilities for lender (Friedman & Partners Ltd.) to get loan amount paid back in full by the borrower (SDF Shipping Co.). Therefore, there shall be analyzed the actions to execute the lender's rights to force the borrower to return the unpaid debt.

5.1. Commercial claim

As the one of the possible solutions for Friedman, is to apply in the Court of Malmö claiming the full payment of loan amount due. This can be done based on the Loan Agreement by virtue of which the Parties has agreed that the governing law of Agreement is Diana Land's law as it was already mentioned in research of applicable law.

Such claim, under the Diana Land law, could be regarded as a commercial claim and would be decided based on the civil law and its procedural rules of the Diana Land accordingly. Presuming that within year or about the court decision is served in accordance with which the loan amount has to be fully paid and is served on the account of SDF Shipping Co. The Friedman & Partners Ltd. receiving such court order has to consider the mechanism of its enforcement, firstly, within the European Union jurisdictions – on the grounds that the Diana Land and its given court order is within EU and that the m/v SDF is mainly trading within European ports. Secondly, how the EU court's order might be executed in non-EU countries? Because it is known that the said m/v SDF and its owning SDF Shipping Co. is registered and regarded domicile of Sweet

⁷ N. P. Ready, "Ship Registration", 3rd Edition, 1998, LLP at p. 6;

Land. Therefore, there shall be done research on the jurisdiction⁸, recognition and enforcement of judgments in civil and commercial matters within the EU and non-EU countries (such as Sweet Land).

Consequently, within the scope of given questions on enforcement of court order there shall be examined - the Brussels Convention 27th of September 1968, the Council Regulation (EC) No 44/2001 (“Brussels I”)⁹, the Regulation 805/2004 “The European Enforcement Order for uncontested claims” and Stockholm Program 2010-2014¹⁰.

The Brussels I Regulations lays down rules governing the jurisdiction of courts in civil and commercial matters. A judgment given in one European Union country is to be recognized in the other EU country without special proceedings, unless the recognition is contested. A judgment is to be enforced in another EU country when, on the application of any interested party, it has been declared enforceable there, The parties may appeal against a decision on an application for a declaration of enforceability. The regulation supersedes the Brussels Convention of 1968, which was applicable between EU countries before the Brussels I Regulations entered into force.

The Brussels Convention provided and Brussels I Regulations too - that territorial jurisdiction is determined by the defendant’s domicile or, if he/she was not domicile in the State addressed, then by the place of enforcement. So, if we have, for instance, a German debtor convicted in his country and latter settled in Spain, with domicile in Malaga and property in Majorca, in accordance with the Brussels I Regulation we can submit the application or claim for recognition and/or enforcement directly in Majorca – the place of enforcement¹¹.

It is known that both companies – lender and borrower are non - EU domiciles, the Loan Agreement signed between them expressly provides that governing law is one of the EU Country’s laws and property is registered in Sweet Land – which is non-EU country.

⁸ As an example of civil law country - Jurisdiction of the Dutch courts in civil and commercial matters is governed primarily by articles 1 to 14 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). These provisions came into force on 1 January 2002 as part of an overall revision of Dutch civil procedure. These jurisdiction provisions were largely modeled on the Brussels Convention and, after 2002 on the Brussels I Regulation, and are partly a codification of the existing Dutch case law;

⁹The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters 1968, (the “Brussels I”)

¹⁰ See <http://eur-lex.europa.eu>

¹¹ The Council Regulation (EC) No 44/2001, (“Brussels I”). Article 39 (2);

*“A defendant **not domiciled in a Member State** is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised.”¹²*

“Section 6 “Exclusive jurisdiction”

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7 “Prorogation of jurisdiction”

Article 23

- 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. (...)*
- 3. Where such an agreement is concluded by parties, **none of whom is domiciled in a Member State**, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.¹³”*

The above quoted to some length extracts from the Brussels Convention I Regulations shows that it would be technically possible but practically difficult for Friedman to bring an action against SDF Shipping in EU country and enforce judgments execution. In addition, in real estate case as mentioned example above seems everything clear from legal point and enforcement of judgment might be executed based on the Brussels I Convention. However, such execution is difficult in case where property is ship – simply not because she fly non-EU country’s flag but that she trades or might be moved from one country to other – which implies the difficulties in procedure when preparing such enforcement execution as they might differ from one country to other. The disadvantage

¹² The Council Regulations (EC) No 44/2001, Official Journal L 012, 16/01/2001, pages 0001 – 0023;

¹³ *Ibid.*

of bringing a claim as commercial for Friedman might be also the fact that property, during one year as the presumed time of court proceedings to receive final judgment, can be easily sold or re-registered to other country so that the beneficial owner escapes from debt obligations and security for Friedman is lost. In this respect, the first issue to be answered is whether a one EU country's Court might ask the other non-EU country's Court to give, for example, an Mareva Injunction so that property is not moved and beneficial owner stays within the same jurisdiction until final judgment of EU Country's court.

In comparison, the Friedman might commence proceedings for debt payment in the defendants' domicile country (in our case non-EU country) so that have security over property – ship that she will not be re-registered elsewhere or sold. Thus, the question is the enforcement of foreign country's judgment in EU country (for example - the Netherlands). In this case, new proceedings have to be commenced by Friedman in the Netherlands for recognition of that decision¹⁴. Jurisdiction in the Netherlands will be exercised by the court of the place where the execution of assets can take place (for example – arrest of ship), if there is no other ground for jurisdiction (such as if the defendant is not domiciled in the Netherlands). This can be considered as the place where the obligation in question (the claim out of the foreign decision for the payment of money) has to be performed, so jurisdiction is granted by article 6(a) of the Dutch Civil Procedure Code. Jurisdiction can also be created because assets are attached under a conservatory attachment. Article 767 of the Dutch Civil Procedure Code then creates jurisdiction for the main proceedings for enforcement of the foreign decision.

5.2. Maritime claim

As the second possible solution for the Friedman and which it decided to realize - is to enforce the SDF Shipping Co. – borrower to re-pay the loan amount through the Mortgage instrument. In this respect it is fruitful to analyze the Friedman's rights under the Mortgage, that is to say the advantages for Friedman given by such security:

“3. Continuing Security

3.01. It is declared and agreed that:

(a) the security created by this Mortgage shall be held by the Mortgagee as a continuing

¹⁴ Dutch Code of Civil Procedure, Article 431 (2);

security for the payment of the Outstanding Indebtedness and the performance and observance of and compliance with all of the covenants, terms and conditions contained in the Loan Agreement and this Mortgage, express or implied, and that the security so created shall not be satisfied by any intermediate payment or satisfaction of any part or the amount hereby and thereby secured. (...).¹⁵

From above quoted to some length Mortgage Article it is clear that the Mortgage is the continuing security for payment of amount agreed under the Loan. That is to say, in the event of default from SDF Shipping Co. side under the Loan (and/or Mortgage as its attached to the Loan), the Friedman has additional powers to:

“6.01. ... to demand immediate repayment of the Loan and payment of all other moneys comprising to the Outstanding Indebtedness in accordance with the provisions of the Loan Agreement and, as and when it may see fit, to put into force and exercise all or any of the rights, powers and remedies possessed by it as mortgagee of the Ship or otherwise and in particular (...).¹⁶”

Taking into account above mentioned it is clear that such security gives a broad range of powers to Friedman - at the status similar to ownership, even not such. The powers of mortgagee in event of default will be researched within the context of Mortgage execution and analyzed as such bellow.

However, in order to bring a claim as maritime claim - seems that the agreed and signed Mortgage is just starting point at a very beginning of proceedings because there come on top the importance and implications of International Conventions as based on them, practically, the Friedman has powers to realize its rights – to demand immediate payment of debt. How can he demand such payment? In this respect, it shall be research and analyzed the following legal issues:

- ✚ The concept of Mortgage in Maritime law
- ✚ The importance of Mortgage registration as well as but not limited to this - application of law to the facts of the case as follows:
 - ✚ If the Mortgage has been designed in accordance with the requirements of the Sweet Land in respect of its form and contents
 - ✚ The legal status of Mortgage before and after its registration in respect of Sweet

¹⁵ See Exhibit No. II “Mortgage Deed”;

¹⁶ *Ibid.*

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- ✚ Non-registered Mortgage – a maritime claim?
- ✚ The legal meaning of term “valid mortgage” in contents of the Articles of Sweet Land Merchant Shipping Act 2004
- ✚ The enforceability of none registered Mortgage as an instrument of security of interests of Lender and Mortgagee.

It is known from the facts of the case that the Friedman has arrested the m/v SDF asking to register the Mortgage and that such arrest is a maritime claim in the sense of article 1 paragraph q of the Arrest Treaty 1952. The Malmo Court decision from 2nd of August 2010, in this respect was:

7.1 “ ... orders [SDF Shipping Co.] to record the First Preferred Mortgage of 19 June 2003 with the Registrar or Commissioner for Maritime Affairs of [Sweet Land] in the name of [Friedman] within ten workdays from the date of service of this judgment;¹⁷ “

For purpose of better performance, it shall be discussed mainly following issues:

- ✚ The implications of said arrest in respect of obligation to register the Mortgage under the laws of Sweet Land and the Diana Land; as well as
- ✚ The Arrest Convention 1952¹⁸ and other related to the Convention (-s) issues, as research may show.

Finally, based on the given details of case it is known that there has been granted to the Mrs. Pounds’ Injunction by Sweet Land Court as follows:

“That the Respondents [SDF Shipping Co. & Friedman] and/or any of their officers, agents, successors and or assigns or by any other person whatsoever be prohibited from dealing with the M/V [SDF] (...) of any shares therein until the Court hears the Claim by the applicant [Mrs. Pound] for relief pursuant to paragraph 67 of the Shipping Act of [Sweet Land] 2004.”

It is clear from the wording of injunction that it might have serious implications on the exiting Mortgage registration. Therefor, it is important to analyze following issues:

¹⁷ See Exhibit I “Judgment”;

¹⁸ The International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952)

- ✚ The instrument of injunction and its enforceability to the *ordinary course of business of the Lender (Friedman)*, its priorities in respect of lender and borrower
- ✚ The implications of injunction on registration of the Mortgage under Sweet Land law and Diana Land law and to compare both countries' law position in this respect.

VI Applicable legal principles

Based on the above mentioned it can be now analyzed the applicable legal principles, thus supporting the Friedman's claim as maritime claim. From previous discussions, it is known that the governing law of Mortgage in question is Sweet Land that the property that is to say - ship m/v SDF over which such Mortgage shall be recorded is also under the jurisdiction of said country and finally, both companies are established in Sweet Land. Thus, taking into account above-mentioned and fact that such Mortgage is not registered, there shall be done research on the concept of mortgage, its different legal status before and after such registration under the governing law and possible its future execution.

Therefore, it is necessary to analyze the legal principles applicable to the legal issues of Friedman's claim. It shall be noted that the Sweet Land has the English legal system and appropriate English case law or principles might be used when supporting position.

6.1. The concept of Mortgage in Maritime Law

The origins of ship mortgage in English law are "generally thought to stem from the use of bottomry bonds. English law has long recognized the right of the master of a vessel to pledge the vessel, by way of a bottomry bond, in circumstances of necessity or distress, in order to secure the provision of funds to enable the voyage to continue. The use of bottomry bonds (and their counterparts – respondentia, where the cargo was pledged) became obsolete many years ago, largely as a result of improved communications.¹⁹" In the UK, they were replaced, from the early 19th century onwards, by a system of ship mortgages²⁰. However, the mortgages shall be distinguished from bottomry. "The bond

¹⁹ G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, pp. 21-37;

²⁰ The first UK Act of Parliament dealing with ship mortgages was in 1825;

becomes void on the total loss – not a constructive total loss – of the vessel or other property which is the object of the bond, in which case the debt will automatically be extinguished. However, the bond attaches to the last plank. A mortgage is different in the sense that it is an outright security for a debt which, as long as it is not otherwise terminated, survives the destruction of the security.²¹ The historical development of ship mortgages will be discussed below - within the concept of title to the vessel.

“Under the English law the modern definition of “mortgage” must be now considered to be a form of security created by or under the term of contract that confers an interest in the property subject to it that is annulled upon the performance of some agreed obligation – usually, but not necessarily, the payment of a debt with or without interest.²² The term “mortgage” and “charge” are now used almost interchangeably²³.

The ship mortgages remains the cornerstone upon which the lenders build a ship finance transaction, despite the availability of different kinds of security. At this point it is essential to mention the main features of ship mortgage, namely²⁴:

- ✚ It gives the lender *in rem* rights against the mortgaged vessel;
- ✚ It gives the lender priority over unsecured creditors of the ship owner;
- ✚ It enables the lender to take possession of the ship in the event of a default by the owner; and
- ✚ It allows the lender to sell the ship to realize funds to satisfy the lender’s debt.

Taking into account above discussion, there come up the question on the legal title to the vessel if she has been mortgaged. That is to say, in the event of default the mortgagee has a right to sell a ship, accordingly, to do so the mortgagee has to have “legal grounds” for such action so to pass a title of ownership to the new owner. In this respect, there shall be analyzed the position of law on the title to the mortgaged vessel, which shall be looked together with the historical development of mortgage by way of security under English law.

²¹ G. M. Gauci “The Rights of a Ship’s mortgagee in English Law”, the Course material provided at lectures, Lund University, Autumn, 2010, pp 161-162;

²² G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, p. 37;

²³ *Re Beirnsstein, Barnett v. Beirnsstein* [1925] Ch 12 per Lawrence, J. at pp. 17-18;

²⁴ In general see: G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, Ch. 3;

“At the beginning of the 17th century the modern form of mortgage developed, under which, although the owner transferred title in the property to the mortgagee, the owner retained possession of the property. (...) The rules, which applied to mortgages on land applied, also to mortgages of chattels and accordingly a mortgage of a chattel such as a ship was created by an absolute transfer of title in the ship to the mortgagee. In the case of chattel, legal ownership was transferred by delivery, but in case of registered ship, legal ownership was transferred by the delivery of a bill of sale and the mortgagee had to register itself as owner of the ship, although the true owner of the ship retained possession and control of the ship. A series of statutes in the early 19th century regulated the position of the mortgagee until the Merchant Shipping Act 1854 introduced the form of statutory mortgage which, on a proper analysis, was a statutory charge on a ship rather than a title transfer mortgage.²⁵” Thus, under the present Merchant Shipping Act 1995, provides that²⁶:

“...where a ship or share is subject to a registered mortgage, then, except insofar as is necessary for making the ship or share available as a security for the mortgage debt, the mortgagee is not treated as owner of the ship or share by reason of mortgage.”

Despite the fact that the mortgagee of a ship is no longer considered in law to be the owner of the ship subject to an equity of redemption, the present legislation makes clear that the mortgagee does possess the essential rights of ownership that are necessary to give effect to the security interest conferred under a mortgage, that is to say – to sell a mortgaged ship. It may be argued that the statutory conferral of an express power of sale would not be necessary, if legal title were transferred, since the holder of title would have an inherent right to sell it, subject of course to the mortgagor’s equity of redemption²⁷. At this point, we can see that the statutory ship mortgage is not mortgage of common law type, but rather a special and in some respect unique statutory form of security.

6.1.1. Types of mortgage

²⁵ *Ibid.* p. 3

²⁶ The Merchant Shipping Act 1995 (UK), the Sub-paragraph 10(a);

²⁷ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, pp. 39-40;

Almost invariably, a ship mortgage will be required to be governed by the law of the flag if it intended to be registered against the vessel. As a result, the form that the mortgage takes will be dictated by the legal system appropriate to the jurisdiction in which the vessel is registered. The requirements of law towards the form of mortgage deed will be discussed later in this work. Broadly speaking, there are six possible types of contractual security interest in a ship²⁸ but for purpose of better performance the author has decided to concentrate on two of them, mainly related to the present case as:

- ✚ Statutory mortgage and
- ✚ Equitable mortgage.

6.1.1.1. Statutory Mortgage

The nature of statutory type of mortgage might be understood, for instance, under the Sweet Land Merchant Shipping Act²⁹ 2004 as well as implemented to it the International Convention on Maritime Liens and Mortgages (Geneva 1993) as the Sweet Land is a contracting party it. By virtue of which the concept of statutory mortgage is referred as instrument of security created in a form prescribed or approved by Regulations. Notably, any such security must be created - by having the registered owner of ship complete and execute a mortgage in the appropriate form. In order to obtain the status of registered mortgage, the mortgage must then be registered with the Register. At this time it become a statutory mortgage which gives the mortgagee the rights provided by the statute³⁰. Despite the fact that the title to the ship remains vested in the mortgagor, the interest of the mortgagee under a duly registered mortgage is legal rather than equitable in nature.

In addition, it is important to mention two alternative forms prescribed in the England. Thus, “the mortgage to secure “Principal Sum and Interest” and the mortgage to secure “Account Current/other obligation”. As a matter of practice, “The Principal Sum and Interest” form is rarely used, securing, as its name implies, only principal and interest, and not any of the other sums, for example, costs, or insurance premiums paid by the

²⁸ *Ibid.* pp. 43-53

²⁹ Merchant Shipping Act 2004, Article 68 (1) and Schedule, Section 74 (F), [Sweet Land];

³⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, p. 43;

mortgagee, which mortgagees will usually wish to be secured. The vast majority of mortgages registered over the British flag ships will, accordingly, be in the account current form.³¹

Deed of Covenants

Within the present discussion on statutory type of mortgage deed it is necessary to have a look at the Deed of Covenants or Deed of General Assignments as it was mentioned above in “Facts in detail” has relation to the present case. “The practice has developed in the UK and related jurisdictions of the owner and mortgagee entering into a separate agreement, normally known as Deed of Covenants [and which is also executed in the present case]. This will be expressed to be collateral to the statutory mortgage and will contain all the protective provisions for mortgagees normally found in the forms of mortgage used in other jurisdictions. The Deed of Covenants is not to be registered at the ship’s registry. However, may well itself contain a charge over the vessel, and if it does, it, as well as statutory mortgage, will in principle be registerable under Section 395 Companies Act 1985 if the owner is a UK registered company, or under any similar statutory provisions in other jurisdiction.³²” The Deed of Covenants may also contain an assignment in favour of the mortgagee of the insurances, earnings and requisition compensation of the vessel. Notably, for example, under the Maltese jurisdiction such Deed of Covenants has been named as Deed of General Assignments and under the Cyprus jurisdiction is registered together with statutory mortgage.

6.1.1.2. Equitable Mortgage

The concept of equitable mortgage has been defined as a mortgage³³:

“... created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract so to do... The essence of any transaction by way of mortgage is that a debtor

³¹ S. Harwood “Shipping Finance”, 3rd Edition, Euromoney’s Book, 2006, at p. 126;

³² G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, Ch. 3;

³³ *Ibid.* p 46

confers upon his creditor a proprietary interest in property of the debtor... and that the proprietary interest is redeemable..."

The equitable mortgage is a contract that operates so as to give rise to a security enforceable in equity in order to carry into effect the apparent intent of parties. It may be seen to exist where for some reasons it is not possible to create a legal mortgage³⁴ that is to say to register it – for example, it is known from the events of case that Freezing Injunction is the reason why SDF Shipping refuse to register the mortgage in question. Its concept is one of the most confusing in English legal parlance, largely because the same term is used to describe several very different types of security. Comparing the statutory mortgage with equitable mortgage where last provide a creditor with only limited security that is to say a priority towards 3rd parties.

Nevertheless, a mortgage that is not registered may be legally valid between the parties and, indeed, enforceable against a subsequent purchaser of the vessel, even if that purchaser had no knowledge of the mortgage because of the lack of registration³⁵. It will, however, in almost all jurisdictions, be postponed to a registered mortgage and may not provide the mortgagee with in rem rights against the vessel. In the UK, and in most other jurisdictions, mortgages take their priority from the date and time of registration. An unregistered mortgage, will, therefore, be postponed to one that has been duly registered, even though (whether or not it is in statutory form) it may create a valid security interest over the vessel³⁶.

Mortgaged Vessel

Within the light of present discussion it is important to mention the concept of mortgaged vessel. It might be seemed as vessel against the security of which a loan has been granted to the vessel's owner, as it also is in present case. The vessel continues trading in the normal manner, unless the mortgage agreement species otherwise. During the time of the loan repayment - the mortgagee has an insurable interest in the vessel to the extent of loan and any interest accruing thereto³⁷.

³⁴ *Ibid.*

³⁵ *Black v. Williams* [1895] 1 Ch 408, see also *Barclay & Co. Ltd. v. Poole* [1907] 2 Ch. 284

³⁶ S. Harwood "Shipping Finance", 3rd Edition, Euromoneys Book, 2006, at pp. 126-127;

³⁷ Robert H. Brown, "Dictionary of marine insurance", 6th Edition

6.1.2. The effect of Mortgage registration

Taking into account above discussed, it can be now analyzed the importance of mortgage deed being duly registered as required by the Statutes of flag State. In *Black v. Williams*, Vaughan Williams, J. explained the effect of registered mortgage as follows:

“...The Legislature has recognized that occasions arise when it is to the interest of the whole community that people should be able to raise money on ships by sale or mortgage, and in the interests of the general public it has therefore provided that registered titles in the statutory form shall have a priority, thus enabling those who are disposed to purchase or lend money upon ships to do so with perfect confidence that their titles will not be over-ridden by priority being obtained by equitable unregistered titles which happen to be prior in point of time, and which, for reasons of their own, the owners of those equitable titles have not thought fit to convert into the legal form, or to register in the way pointed out by the statute.³⁸”

The above quoted to some length view explains also the purpose of the Merchant Shipping Act 1854 (already mentioned above) by virtue of which the creation of ship mortgage was fundamentally changed with its enactment in England so that introduced a statutory form of mortgage³⁹. Thus, compliance with the statutory provisions governing ship mortgages and their perfection by registration is sufficient to create a *prima facie* valid and enforceable mortgage. However, the effectiveness of a ship mortgage does not depend upon whether the ship against which it is created is at sea or otherwise outside the jurisdiction of registration at the time of the creation or registration of mortgage⁴⁰. It is not necessary for the mortgagee to acquire possession of the ship in order for the mortgage to come into effect so as to bind the ship. On the other hand, non-compliance with the statutory requirements may prejudice rights of enforcement, at least with respect to 3rd parties who acquire an interest in the ship⁴¹. Thus, a duly registered ship mortgage, mainly, gives a priority ranking over other claims and so that in event of default – debt recovery, so that might be enforced based on the International Convention on Maritime Liens and Mortgages 1993 or under English law as statutory lien within the provisions of Supreme Court Act 1981, depending on the

³⁸ [1895] 1 Ch 408;

³⁹ Merchant Shipping Act 1854, Section 66;

⁴⁰ *Thompson v. Smith* (1815) 1 Madd. 395, 56 E.R. 145 (V.C.)

⁴¹ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, p. 33

place of execution. The appropriate analyze of this issue will be given bellow when questions on Enforcement is researched.

6.2. Registration of ships under Sweet Land law

The Shipping Act (No 11) 2004 (of Sweet Land) makes provisions for, among other things, the establishment of the registration of ships, the national character and the flag of ships, to regulate the proprietary interests in ships and the liability of ship-owners and to consolidate the law relating to shipping and for incidental and connected purposes. The Act provides⁴² for the establishment of the Register of Ships who shall perform the functions and discharge the duties of register under the Act⁴³ and that the Cabinet may by Order appoint a person to be Commissioner of Maritime Affairs who among other things⁴⁴:

- (a) Shall perform the functions and discharge the duties of Registrar under the Act outside [Sweet Land]; and
- (b) Shall notwithstanding sections 5 and 28 and subject to the general superintendence of the Maritime Administration carry out the administrative duties of the Administration in foreign ports and undertake the general conduct and supervision of all matters relating to the registration of ships under this Act outside [Sweet Land] and be accountable to the government.

It shall be noted that the registration of the ship does not conclusively prove that the registered owner is the true legal owner. The Registrar of Ships is merely *prima facie* evidence of ownership. For most purposes a transcript of register issued by the Registrar is in practice accepted as conclusive evidence of title and of registered mortgages. In this respect it is fruitful to mention the Cl. 8 of Sale-form 87 by virtue of which a seller has to produce a certificate that the vessel is free from registered encumbrances. A transcript of register showing no mortgages will comply with this requirement. The financing bank prior to the ship mortgage registration might require similar document.

6.3. Ship Mortgages under Sweet Land laws

⁴² The Shipping Act (No 11) 2004 (of Sweet Land), Section 12 (1)

⁴³ *Ibid.*

⁴⁴ *Ibid.* Subsection 12 (2);

The creation and efficiency of mortgages in respect of a vessel registered under the Sweet Land flag is governed by section 68 of the Shipping Act 2004 which provides as follows:

Mortgage of ship or share

“68 (1) A registered ship, or a share in any ship, may be made a security for the repayment of a loan or the discharge of any share or other obligation.

(2) The instrument creating any such security referred to in this Part as a “mortgage”, shall be in the form prescribed.

(3) Where a mortgage executed in accordance with subsection (2) is produced to the Registrar of Ships, he shall register the mortgage in the prescribed manner.

(4) A valid mortgage must comply with the following formalities:

(a) the mortgage is endorsed upon the vessel’s documents;

(b) the mortgage is registered as provided in subsection (3);

(c) an affidavit is filed with the record of the mortgage to the effect that the mortgage is made in good faith and without any design to hinder or delay, or to defraud any existing or future creditor of the mortgagor or any person holding a lien of the mortgaged vessel.

(5) There shall be endorsed upon the certificate of registration of a vessel subject to a valid mortgage:

(a) the names of the mortgagor and the mortgagee;

(b) the time and date that endorsement is made;

(c) the amount and date of maturity of the mortgage;

(6) Mortgages shall be registered in the order in which they are produced to the Registrar of Ships for the purposes of registration and he shall enter and sign on each mortgage a statement to the effect that it has been registered by him, stating the date and time of the registration.”

The above quoted to some length Section 68 contains mandatory language requiring “a mortgage” to be in a particular form and for it to be registered as prescribed, in order for it to be valid. Firstly, an instrument must satisfy the requirements as to form in order for it to be recognized under Sweet Land laws as a mortgage on Sweet Land’s registered ship.

There shall be noted that the Commissioner of Maritime Affairs might ask additional documents in case there are court proceedings, such as the Consent to register mortgage from both – mortgagee and mortgagor.

Secondly, if the instrument does not meet these formal requirements it shall not be registered under the Act as a ship's mortgage and consequently, it shall not be treated as a valid ship's mortgage under Sweet Land law. This was a position of legal attorneys of Mrs. Pounds expressed in their legal opinion. However, there shall be argued that Sweet Land laws can not treat the agreed and signed by both Parties and not jet registered mortgage as invalid⁴⁵. Thus, the interpretation of concept of valid mortgage shall include its legal status and enforceability before it is registered in manner prescribed by laws.

In addition, the Commissioner of Maritime Affairs issues various circulars in relation to the requirements for registration of documents pertaining to shipping and the registration of ships under Sweet Land Flag. The most recent circular which was issued setting out "The Procedure for Registration of a Mortgage" in respect of ships is dated on 01/04/2009 and contains information which leave no doubt as to the formal conditions to be satisfied in order for an instrument to be registered as a mortgage as follows namely⁴⁶:

"A mortgage may be registered upon receipt of the following:

- 1. Mortgage Application form completed;*
- 2. Mortgage Deed containing the date and amount of Mortgage, discharge amount and date of maturity signed by both parties – the signatures should be notarized;*
- 3. Affidavit of Good Faith;*
- 4. Recent Certificate of Good Standing of the Mortgagee if same is not a bank;*
- 5. Payment of relevant fees;*

The original Transcript of Register will be released upon receipt of two original Deeds."

By virtue of the Shipping Act⁴⁷ 2004 only where a mortgage is validly registered in accordance with the provisions of this Act it shall constitute a lien upon the vessel in the

⁴⁵ The term VALID - authorized by statute or otherwise having legal effect or force - <http://www.businessdictionary.com/definition/valid.html#ixzz14QdKq1bI>;

⁴⁶ "The Procedure for Registration of a Mortgage" [Sweet Land], 01/04/2009, Cl. 3;

⁴⁷ Section 74 (A) (1) of Act 2004;

amount of the outstanding mortgage indebtedness secured by the vessel. Consequently, where an instrument which is intended to have effect as a mortgage is not registered pursuant to Act and, hence does not constitute a lien upon the vessel the intended mortgagee may nonetheless bring a suit *in personam* against the intended mortgagor for the recovery of the debt or for any deficiency in full payment thereof. This was a position of legal attorney's of Mrs. Pounds given in their legal opinion. In the light of present discussions it is necessary to analyze the concept of lien in Maritime law and its implications on mortgage, so that to find out whether the above attorneys' view is given correctly in respect of the case in question.

6.4. Liens in the ship mortgage context

In the marine context, liens are rights *in rem* against the ship which are not created by contract, although they may arise in connection with work performed under a contract (ex., ship repair, etc.). They arise by operation of law. There shall be mentioned the D. R. Thomas view⁴⁸ in this respect which author finds self-explanatory, as follows:

“At common law a lien is essentially a right to retain possession of chattel pending the discharge of an outstanding obligation incurred in respect of services rendered to the chattel. (...) the right to retain is firmly founded on possession, and on the surrender of possession the right of lien is lost. In contrast an “equitable lien” is a species of equitable charge, which arise by implication of law and by virtue of which the right in equity may be asserted against property.⁴⁹”

“A maritime lien is distinct from both a common law and equitable lien. It is distinct from a common law lien in that it is not dependent on possession. Although similar to an equitable lien to the extent that it arises independently of both possession and agreement, the maritime lien is otherwise distinct from an equitable lien in that it survives into the hands of a bona fide purchaser for value without notice. The maritime lien therefore represents a charge on maritime property of a nature unknown alike to the common law and equity.”

At this point it shall be noted that above referred terms of liens, mainly “common law lien”, “equitable lien” might be synonymous found in other author's opinions. Thus, for

⁴⁸ From hand outs on the “Private Shipping Law” Course, Lund University, October 2010, “Maritime Liens”, Ch 1;

⁴⁹ *Ibid.* pp. 1-5

example, the “common law lien” refers also as “legal lien⁵⁰”. The liens in maritime law is a topic which alone could occupy an entire book, and there is no room to deal with it in any detail here, but the basic characteristics and implications of liens shall be analyzed so far as mortgagee’s interests are involved.

“A mortgage and maritime lien are similar in that under both there is created a charge on a ship which may be enforced against the original owner and any subsequent purchaser. Notwithstanding this similarity the two concepts are quite distinct and unrelated. The charge of mortgagee arises solely by virtue of the mortgage agreement, which must be in form prescribed by statute, whereas the charge of a maritime lienee arises by operation of law, and without any formal requirement, from the moment of the circumstances which give rise to the claim. The right of a mortgagee to pursue his security into the hands of a 3rd party is founded on notice, **which is secured by a public scheme of registration**. The same right of a maritime lienee arises again by operation of law and is independent of notice. (...) The right of a mortgagee under the Admiralty jurisdiction is in the nature of a statutory right of action *in rem*.⁵¹“

Thus, it can be argued that the expressed opinion of the Mrs. Pound’s legal attorney as mentioned already above - that in the situation where mortgage is not registered and so that may not constitute a lien upon the ship – the mortgagee can not claim *in personam* for recovery of debt. Seems to be incorrect because, first of all, the mortgage (registered or not) is not a lien and cannot become as such because it is simply a charge on a ship. In addition, probably the most correct concept of charge being referred as the mortgage or “registrable charge” on ship can be found in the International Convention on Maritime Liens and Mortgages (Geneva, 1993) Article 1 and their ranking in Article 2. Secondly, by virtue of mortgage, mortgagee becomes a statutory lienee so that enjoys a right *in rem*, even with lower priority or restricted. Thus, for example, if the owner fails to pay the claim, the claimant can apply to the court for the sale of the ship and for the payment of its claim from proceeds of sale. An *in personam* liability is incurred by the owner when the claim arises but the ship incurs no *in rem liability* until an *in rem* claim is issued against the ship. The correct analysis of statutory lien (within which is also mortgage under English law⁵²) is that it only gives a procedural remedy, and the lien

⁵⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, p. 44;

⁵¹ *Ibid.* Thomas p. 3; See also W. Tetley “Maritime Liens and Claims”, 2nd Edition, Blais, 1998, Ch 1;

⁵² Section 20 (2) of the Supreme Court Act 1981;

only exists when the *in rem* action is commenced⁵³.

The importance of liens as far as the mortgagee is concerned is the **priority** that certain liens have over mortgages. The mortgagee will need to know what liens have been created against the ship and which of these liens ranks in priority to the mortgage, since this may prejudice the security of the mortgage⁵⁴. Thus, as mentioned already above, there are three main categories of lien:

- ✚ First, possessory liens;
- ✚ second, maritime liens; and
- ✚ third, statutory liens⁵⁵.

Generally, possessory liens and maritime liens rank in priority to mortgages and charges but statutory liens are subordinate to mortgages⁵⁶. In this respect it is fruitful to mention the Prof. P. K. Mukherjee given classification of priority ranking as follows:

“Of those that can be properly characterized as **maritime claims**, the highest priority is afforded to maritime liens. Then come possessory liens, or rights of retention as they are referred to in the Conventions, followed by mortgages and then all other claims, usually referred to as statutory rights *in rem* in English common law jurisdictions.⁵⁷”

Taking into account above quoted passage it can be now summarized that for a lender, the principal significance of a maritime lien is that in most jurisdictions its holder will have priority over claims of mortgagee, whether the maritime lien arose before or after the date of mortgage. The method of determining priorities between mortgage and other liens will be examined within the scope of question on Mortgage Enforcement.

At this point it is fruitful to discuss the application of law to the facts of the case as well as these legal issues already pointed out, taking into account legal principles, as were determined and discussed above.

VII Application of law to the facts of the case

7.1. If the Mortgage has been designed in accordance with the requirements of the Statutes of Sweet Land in respect of its form and contents

⁵³ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, pp. 123-124;

⁵⁴ On Lecture by Prof. P.K. Mukherjee, “Private Shipping Law” Course, Lund University, October 2010;

⁵⁵ Sec. 20(2) of the Supreme Court Act 1981;

⁵⁶ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, p. 120;

⁵⁷ By Prof. P.K. Mukherjee, “Proprietary Interests in Ship”, Lecture/Seminar October 2010, Lund University;

There are no specific requirements concerning the form and contents of the Mortgage except the Circular of Commissioner of Maritime Affairs (01/04/2009) in respect of the procedure of mortgage registration which provides as follows⁵⁸:

“...A mortgage may be registered upon receipt of the following...Mortgage Deed containing the date and amount of Mortgage, discharge amount and date of maturity signed by both parties – the signature should be notarized...”

In respect of this requirements of Commissioner for Maritime Affairs the Mortgage contains a date that is 19th of June 2003, amount of Mortgage Two Million Dollars US\$ (2,000,000.00) payable with interest of 4% per annum, discharge amount and date of maturity that is 20th of May 2010. Moreover, the Mortgage contains the full names of Mortgagor and Mortgagee as required by the Merchant Shipping Act 2004⁵⁹. It is recommended to notarize the signatures on Mortgage – what was done later by both Parties when court so advised (judgment from 2nd of August 2010/Exhibit No. I):

“6.5.2 The statement of [SDF Shipping] that the First Preferred Mortgage can not be registered because the autographs of the pertaining directors have not been legalised does not benefit [SDF Shipping]. The Court is of the opinion that it has not been sufficiently demonstrated that the non compliance with a formal requirement such as the legalisation of the autographs can not be solved in an other way and could therefore prevent the registration of the mortgage. Furthermore, the fact that the autographs have not been legalised is to be considered as a circumstance that is within the scope of risk of [SDF Shipping] and can therefore not be reasonably invoked against [Friedman].⁶⁰”

In comparison, under the English law in order to be registrable a ship mortgage must be in one of two prescribed forms, namely Form ROS 25 (the “Mortgage of a Ship to Secure Account Current etc/Other Obligation”) or Form ROS 30 (the “Mortgage of a Ship to Secure Principal Sum and Interest”).⁶¹ Thus, the form of mortgage already might prescribe its content. Finally, the Friedman shall be aware that during the procedure of mortgage registration additional requirements might come up, for example, the

⁵⁸ The Circular of Commissioner of Maritime Affairs (01/04/2009), [Sweet Land], Item 2;

⁵⁹ Merchant Shipping Act 2004 [Sweet Land,]Article 68 (5);

⁶⁰ See Exhibit No. I

⁶¹ UK Merchant Shipping Act 1995, Regulation 57 and Schedule. 1;

requirement that signatures shall be notarized, etc.

7.2. The legal status of Mortgage before and after its registration in respect of Sweet Land Merchant Shipping Act 2004 and the Common Law

Taking into account above analyzed applicable legal principles, it can be now argued that the m/v SDF became a mortgaged vessel since her delivery to the SDF Shipping Co. that is since 16th of June 2003. Thus, the mortgage, as and if it is not registered under the Statutes of Sweet Land, is considered to be as an Equitable Mortgage AND after signing of the Mortgage Deed on 19th of June 2003 is to be considered as Legal Mortgage with its enforceability as an instrument of securing in respect of the Loan Agreement with expressed intention – purchase of m/v SDF.

Moreover, the fact of Mortgage registration as security instrument gives to the document additional power to be considered as statutory mortgage, already discussed above. Thus, it is authorized by the Statutes of Sweet Land, in particular by Merchant Shipping Act 2004. The said authorization grants to the mortgage the following, but mainly:

- ✚ First priority in respect of other encumbrances/charges on the m/v SDF;
- ✚ The priority ranking, mortgage status, its enforcement and effects are now regulated and governed under provisions of the International Convention on Maritime Liens and Mortgages (Geneva, 1993), as follows:

“ The ranking of registered mortgages, “hypothèques” or charges as between themselves and (...) their effect in regard to 3rd parties shall be determined by the law of the State of registration; however, (...) all matters relating to the procedure of enforcement shall be regulated by the law of the State where enforcement takes place.⁶² ”

- ✚ The mentioned above authorization by the Statutes of Sweet Land is referred as a “valid mortgage” – interpretation of which the Mrs. Pound’s legal attorneys gave in respect of present case – if mortgage is not registered it is not valid. Thus, the unregistered or equitable mortgage is valid and bounding between parties but with lower priority ranking towards the 3rd parties

⁶² International Convention on Maritime Liens and Mortgages (Geneva, 1993), Article 2;

claims (liens or other charges) which might fall under the Geneva 1993 Convention⁶³.

7.3. The legal meaning of term “valid mortgage” in contents of the Articles of Sweet Land Merchant Shipping Act 2004

In order to constitute the meaning of term “*valid mortgage*” within the scope of the Sweet Land Merchant Shipping Act 2004, there shall be investigated the meaning of term “valid” in respect of common business law⁶⁴. Accordingly, the definition implies that “valid” is “authorized by statute” in respect of the statute document. As it might be already presumed – the meaning “valid” does not have any connection with the meaning of “enforceability” of the document. In present case – it is the right of Friedman to claim a payment of debt. Moreover, the valid mortgage in the terms of the Shipping Act 2004 of Sweet Land is the Mortgage which enforceability is considered according to the Shipping Act 2004⁶⁵. However, these Articles do not affect or restrict the enforceability of mortgage as an initial security instrument.

7.4. The enforceability of none registered Mortgage as an security instrument of Mortgagee’s interests

Taking into account the above listed facts of the case, it shall be analyzed the position of mortgagee in the event if the mortgage (for some reasons) is not or will not be registered. However, at this point it shall be noted that detailed research on this issue will be presented when question on Enforcement is discussed. As it was mentioned already above, the unregistered mortgage affects Mortgagee rights to enforce the payment of debt only towards 3rd parties claims and to the extent and with priority as it is governed under the Convention⁶⁶. In this respect there shall be researched the case law whereas if no mortgage deed has been executed and registered, the mortgage created by the deed of covenant will constitute an equitable mortgage on the ship

⁶³ *Ibid.*

⁶⁴ „Valid“ - Authorized by statute or otherwise having legal effect or force - <http://www.businessdictionary.com/definition/valid.html>;

⁶⁵ Merchant Shipping Act (Sweet Land), Articles 5B, 42, 60, 67, 68 – 74;

⁶⁶ International Convention on Maritime Liens and Mortgages (Geneva, 1993)

enforceable against the owner and all 3rd parties except *bona fide* purchaser for value without notice of the mortgage⁶⁷. In comparison, under the English law: “if the ship is not a British ship, the court will apply the law of the country of registration of the ship (the “*lex situs*”) to decide on the validity of the mortgage and will also apply the *lex situs* rather than its own law (the “*lex fori*”) to decide issues of priority among competing mortgages. These being a particular application of the rule that such mortgage are subject to the law of the jurisdiction of registration. This approach differs markedly from approach taken with respect to competing interests other than mortgages, where an English court will apply the *lex fori* to determine the question of priority.⁶⁸”

Taking above discussed, it might be summarized that the mortgage is enforceable as soon as one of the bellow facts has occurred:

- ✚ The creation of equitable charge for the re-payment of the loan;
- ✚ The financing by the 3rd party the purchase of some equity (ship) in favour of the buyer (ship owner) borrowed the money for the such purchase from the 3rd party (lender)⁶⁹;
- ✚ The mortgage deed has signed by the lender and the borrower;

Thus, the enforceability of the mortgage is not connected with its registration or recording in some Registrar.

7.5. Ship arrest

It has been pointed out that Friedman has arrested the m/v SDF at the port of EU country claiming to register the Mortgage in question and debt owned. In this respect, it is fruitful to research the effectiveness of said arrest which shall involve, first, the legal concept of arrest and, second, the research on two main issues, mainly – implication of arrest on obligation to re-pay the debt as well as register the mortgage and related to it International Convention (-s).

7.5.1. The concept of ship arrest

⁶⁷ *Black v. Williams* [1895]

⁶⁸ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, Ch. 7.88;

⁶⁹ The SHIZELLE [1992] 2 Lloyd’s Rep. 444

Ship arrest is the most common way in which maritime claims are enforced worldwide. “Arrest law is both substantive as well as procedural and in that the procedures vary from one jurisdiction to another although there are some common denominators. Arrest of ships in maritime law is purely a civil matter, i.e., it falls within the domain of private law as distinguished from detention under regulatory conventions such as SOLAS and MRPOL, which fall under public law.⁷⁰”

The substantive law of ship arrest is mainly governed by the 1952 Arrest Convention to which over 70 states are parties⁷¹. Under the said Convention the ship arrest definition can be found in following wording⁷²:

“ the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.”⁷³ ”

As the definition implies, the arrest provides security for a maritime claim and can only be exercised through judicial intervention in both civil law as well as common law jurisdictions⁷⁴.

“The purpose of the arrest is two-fold: to obtain security for a claim, and to establish jurisdiction.”⁷⁵ Thus, the ship arrest is a form of pre trial remedy. In general, Art 2 permits the arrest in any contracting state, under the authority of competent court (Art 4) of ships flying the flag of contracting state, for any of the “maritime claims” enumerated in Article 1, 1952 Arrest Convention mainly⁷⁶:

“ “Maritime Claim” means a claim arising out of one or more of the following:

q) the mortgage or hypothecation of any ship⁷⁷ ”.

In comparison, under the UK jurisdiction the interpretation of claims supporting the arrest might be seen in broader terms but mainly:

“Admiralty jurisdiction of High Court

20. (2) The questions and claims referred to in subsection (1)(a) are –

⁷⁰ Lecture by Prof. P. K. Mukherjee, “Private Shipping Law”, Hand out, October 2010, Lund University

⁷¹ *Ibid.*

⁷² Arrest Convention 1952, Article 1 paragraph 2

⁷³ „Notably the definition does not include seizure of a ship for execution of judgment. In many jurisdictions a writ of execution or writ of *feri facias* is the mechanism through which this is done.” – See W. Tetley at page 958;

⁷⁴ Lecture by Prof. P. K. Mukherjee, “Private Shipping Law”, Hand out, October 2010, Lund University

⁷⁵ Berlingieri, A commentary on the 1952 Arrest Convention, page 34;

⁷⁶ See also W. Tetley at p. 958

⁷⁷ “It should be noted that the 1952 Arrest Convention has recently been revised. The objective of the Convention is, *inter alia*, to harmonize the international regime of arrest of ships with the International Convention on Maritime Liens and Mortgages, 1993. The new Arrest Convention of 1999 is not yet in force.” – See P.K. Mukherjee, “Marine Legislation”, at page 196

(c) any claim in respect of a mortgage of or **charge on a ship** or any share therein⁷⁸;

Thus, taking into account the present case and the fact that the mortgage is not registered (and therefore might not be included into the Convention 1952 or Supreme Act 1981), at least in England such un-registered mortgagee might bring an action *in rem* as holding a charge on a ship⁷⁹, as mentioned above.

For the creditors (lenders, mortgagees, etc.) when making decision/choice on the state where ship would be arrested (most probably states of ship's trading area), it is important to analyze and compare the different jurisdictions accordingly. Thus, as already mentioned above, "in the UK, the action *in rem* is the characteristic Admiralty proceeding to enforce all types of marine claims. It tends to be regarded primarily as a **procedural device** to secure the defendant's personal appearance in the suit, rather than as an action against the "wrongdoing ship" seen as person. It differs from an action *in personam*, in that the ship (...) is the defendant, rather than the ship-owner. The availability of the action *in rem* to enforce maritime liens, statutory rights *in rem* and other maritime claims in England is governed by the Supreme Court Act 1981 at Sec. 21(2), (3) and (4). (...) The action *in rem* provides **pre-judgment security for the claim** founds the jurisdiction of the court and usually secures the appearance of the ship-owner. It typically is enforced by the arrest of the *res*.⁸⁰ By contrast in civil law jurisdictions the only purpose of arresting a ship is to **afford the claimant a security for his claim**. For example, it is possible to arrest a vessel in the Dutch jurisdiction⁸¹ in order to obtain security only. The petitioner is not obliged to commence substantive proceedings in the Netherlands regarding the claim itself. It is common practice that arrest of ships is made in the Netherlands in order to obtain security, while the main

⁷⁸ Supreme Court Act 1981, Section 20 and also Shipping Law Handbook, page 13;

⁷⁹ "The fundamental difference between them [mortgage and charge] is that in the case of a common law mortgage, a form of conveyance of title is made to the creditor, whereas in case of a charge, title remains vested in the debtor, but subject to certain rights in favour of the creditor, the most important of which is the right to take possession of the charged property [ship] and sell it." – G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at page 30;

⁸⁰ See W. Tetley pp 977-978

⁸¹ The Kingdom of The Netherlands is party to several international conventions within the maritime field, including the International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952) and the arrest procedure under the Dutch jurisdiction is mainly governed under the Code of Civil Procedure; For publications in English about the Dutch law of ships arrest, see Berlingiere on arrest of ships (3rd ed., 2000) and W. Verhoeven/W. Jarigsmas, "The Netherlands", in Maritime Law Handbook;

arbitration or court proceedings are being conducted elsewhere⁸².

In addition, within the creditors considerations on the choice of country for ship arrest performance, it is fruitful to mention the France jurisdiction respectively. Thus, France has only one procedure or “action” whereby suit may be taken, because there are no writs **in rem** or writs *in personam*. To the simple “action” may, however, be added the *saisie conservatoire* (conservatory attachment) to prevent assets of the debtor from being dissipated⁸³. The arrest of ship in France is subject to particular regulatory provisions, found in Decree no. 67-967 of October 27, 1967 (...). These provisions establish a single procedure – the *saisie conservatoire* (conservatory attachment). Despite there being one procedure, there are two regimes⁸⁴ of ship arrest in France depending on the **type** of ship arrested⁸⁵. As it might be seen, the research and discussions on the ship arrest is very broad and interesting field and shall be investigated separately elsewhere. Therefore, for purpose of detailed analyze on effect of ship being arrested towards a maritime claim, the author has decided to concentrate on implications of such arrest only.

7.5.2. The implications of arrest in respect of obligation to register the Mortgage under the position of civil law jurisdiction

For the purposes of analyzing the effectiveness of ship arrest for account of creditors it is necessary to look at the Court position. At the quoted below to some length extract of Court decision⁸⁶ whereas learned judge has discussed the issues – as whether the arrest shall be lifted on the grounds of un-registered mortgage so that being invalid, based on 1952 Arrest Convention, the Merchant Shipping Act 1982 and the Mortgage Deed⁸⁷.

„Maritime claim

5.4. With the Arrest Treaty 1952 a measure was created to obtain security on the one

⁸² Information kindly provided by Philippine Berman, “Kernkamp Advocaten” law office, Rotterdam;

⁸³ See W. Tetley page 962

⁸⁴ See W. Tetley at page 964: “a) The first regime (Arrest Convention 1952) governs the arrest of seagoing ships flying the flag of a state which is a party to the 1952 Arrest Convention. This includes the arrest of French seagoing ships when there is international factor involved (...) and b) the second (or residuary regime) governs the arrest of French vessels in French port by a French resident. Ships under this regime are subject to the general law of France.”

⁸⁵ See W. Tetley pp 962-964

⁸⁶ See Exhibit No. I

⁸⁷ See Exhibit No. II

hand without needlessly frustrating shipping on the other. For this reason the nature of the claim for which arrest can be placed is limited to the maritime claims defined in article 1 paragraph q of the Arrest Treaty 1952. This entails that [Friedman] can only arrest the vessel based on article 1 paragraph q of the Arrest Treaty 1952 if the claim arises from the mortgage on the vessel. Parties disagree on this issue and a judge will have to render a definitive judgment on the merits of the case in the main proceedings. In light of the aforementioned Arrest Treaty 1952 the Court must assess whether it is sufficiently evident that the judge in the main proceedings – if so requested – will rule that the claim arises from the mortgage on the vessel. If this is not sufficiently clear, than the arrest will have to be lifted already on this ground.

5.4.1. The Court finds that the laws of [Sweet Land] govern the first preferred mortgage now that the vessel was registered there at the time of concluding the first preferred mortgage. That parties intended to have the laws of this legal system govern the first preferred mortgage furthermore follows from article 4.01 paragraph s of that agreement.

*5.4.2. The Court furthermore finds that it is sufficiently clear that **the claim falls under the scope of article 1 paragraph q of the Arrest Treaty 1952. Article 4.01. paragraph s of the first preferred mortgage refers to the Merchant Shipping Act 1982. The Court derives from article 42 paragraph 1 of the Merchant Shipping Act 1982⁸⁸ that the first preferred mortgage is valid even though it has not been properly registered in the pertaining registry and only lacks effect for third parties. According to article 1 paragraph q of the Arrest Treaty 1952 it is not a requirement that a mortgage has effect for third parties. A valid mortgage is sufficient. Therefore the Court finds that the arrest complies with the stipulations of the Arrest Treaty 1952.***

Taking into account the above quoted judge's discussions and decision to continue arrest of m/v SDF, as an example of maritime law practice, there now can be highlighted the main points being regarded as effect (-s) of such arrest. First, by virtue of 1952

⁸⁸ Merchant Shipping Act 1982, Article 42 (1) – “A sale, conveyance, hypothecation, mortgage or assignment of mortgage of any vessel, shall not be valid in respect of such vessel, against any person other than the grantor or mortgagor, his heirs or devisees and persons having actual notice thereof, unless the instrument evidencing such transaction is recorded in the office of the Registrar or of the Commissioner.”;

Arrest Convention, the claim brought by Friedman to arrest the ship has been defined as maritime claim falling under the said Convention⁸⁹. Thus, the arrest can be regarded as lawful. Second, by virtue of Merchant Shipping Act 1982 and Mortgage Deed⁹⁰, the learned judge is in opinion that the mortgage is valid even though the formalities are not performed. Thus, under the “formalities” are understood, for instance, the mortgage registration, authorization of signatures or other elements of mortgage which, if not met, under the 1952 Arrest Convention does not necessarily stipulate the wrongful arrest or invalid mortgage but only lacks effect for 3rd parties.

However, it shall be taken into account that one country’s court decision (in EU country) to register the mortgage after the ship’s arrest does not necessarily imply that the ship – owner will execute such order in other country (for example, non-EU country). Thus, such issue involves the execution of court orders being the subject under the international private law as discussed already above. From author’s point of view⁹¹ it might be seem as gap in the 1952 Arrest Convention – because Convention without the enforcement mechanism lacks harmony and so that, at least in practice, entitles the claimant to bring an action in country where the said court order shall be executed, in our case non-EU country.

It was author’s intention to analyze the 1952 Arrest Convention in detail but so far research has shown that within the scope of arrest implications on obligation to register the mortgage it has been done already to the extent it might have been required.

7.6. Mareva Injunction

The Mareva Injunction was granted for the first time⁹² in 1975 by Lord Denning in *Nippon Yusen Kaisha v. Karageorgis*⁹³ and in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*⁹⁴ known as “The Mareva”. Many decisions⁹⁵ followed confirming the principle.

⁸⁹ Article 1 (q);

⁹⁰ See Exhibit No. II, (4.01 Par. s)

⁹¹ In support to opinion see P. K. Mukherjee, “Maritime legislation”, at pp 151-153;

⁹² For nearly 90 years, *Lister & Co. v. Stubbs* ([1886-90] All E.R. 797 (C.A.)) was the leading authority preventing creditors from obtaining an injunction to restrain a debtor from disposing of his assets or taking the out of the jurisdiction before a final judgment was obtained. See also W. Tetley at p. 983;

⁹³ [1975] 2 Lloyd’s Rep. 137 at p. 138;

⁹⁴ [1975] 2 Lloyd’s Rep. 509;

⁹⁵ See for example: *Rasu Maritima S.A. v. Pertamina*, [1978] Q.B. 644, [1977] 2 Lloyd’s Rep. 397 (C.A.); *The Siskina*, [1979] A.C. 210, [1978] 1 Lloyd’s Rep. 1 (H.L.); *The Assios*, [1979] 1 Lloyd’s Rep. 331 (C.A.);

The Prof. Mukherjee describes it as a “*mechanism* to preserve the rights of a creditor”⁹⁶, thus, Mareva permits the immobilization of any or all of the defendant’s assets within the jurisdiction, although the power does not provide jurisdiction in itself, the defendant’s property remains in his possession at all times. The Mareva gives no security and it entails a damage suit if it is considered by the court to be an abuse of the process of the court or is unjustified.⁹⁷ Nor does it, as a purely *in personam* remedy, provide the applicant with any lien over specific assets of the defendant or any priority over the defendant’s secured creditors, who may seize those assets even after the Mareva injunction is in force.⁹⁸ Jurisdiction to grant the injunction is contained today in the Supreme Court Act⁹⁹:

“The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with assets located within that jurisdiction shall be exercisable in cases where that party is as well as in cases whether he is not, domiciled, resident or present within that jurisdiction.”

In order for a Mareva injunction to be granted, Lord Denning in *Rasu Maritime v. Pertamina*¹⁰⁰ stressed the most important thing that a judge should consider when granting the remedy, namely that it must be just and convenient to do so. Also the applicant for the injunction must show that he has a good arguable case on merits. This open-ended statement may be criticized for a lack of clarity. The most comprehensive interpretation of it was made by Mustill J. in “*The Niedersachsen*”¹⁰¹ where he described a “good arguable case” as:

*“a case which is more than barely capable of serious argument.”*¹⁰²

Lord Denning further developed the requirements for a Mareva injunction, his apparent aim being to fix strict criteria before the remedy is issued so that the rights of the individual debtor would not be prejudiced and the injunction indiscriminately granted.

⁹⁶ P. K. Mukherjee lecture on “Private shipping law “Proprietary interests in ship”, October, 2010;

⁹⁷ W. Tetley at p. 983

⁹⁸ See W. Tetley at p. 983 and *Mercedes Benz A.G. v. Leduck* [1995] 2 Lloyd’s Rep. 417 at p. 424 (P.C.);

⁹⁹ Section 37 (3);

¹⁰⁰ [1977] 2 Lloyd’s Rep. 397 (C.A.)

¹⁰¹ [1983] 2 Lloyd’s Rep. 600

¹⁰² *Ibid.* at 605

In *Third Chandris Shipping Corp. v. Unimarine S.A.*, (“*The Genie*”¹⁰³) he set out five guidelines, which for ease of reference can be listed as follows¹⁰⁴:

1. The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.
2. The plaintiff should give particulars of his claim against the defendant, stating the grounds of his claim and the amount thereof, and fairly stating the points made against it by the defendant.
3. The plaintiff should give some grounds for believing that the defendant has assets here. The existence of a bank account in England is enough, whether it is in overdraft or not.
4. The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient.
5. The plaintiff must, of course, give an undertaking in damages, in case he fails in his claim or the injunction turns out to be unjustified. In a suitable case, this should be supported by a bond or security; and the injunction only granted on it being given, or undertaken to be given.

The Prof. W. Tetley had added to the above list the sixth condition which has been expressed by the Mustill J. in *The Niedersachsen*¹⁰⁵ in respect of foreign corporations:

6. If the foreign defendant is reliable and has assets outside the jurisdiction, then the Mareva injunction will usually not be granted. The key is that there will be no means in or outside the jurisdiction available to comply with the judgment when rendered.

This practice has developed in England as many of parties agree/choose as a place to litigate or arbitrate their disputes under the UK jurisdiction.

Taking into account the above listed conditions to grant by the Courts the Mareva injunction, it is now fruitful to discuss them to such extent, as it may have impact on the present case.

On the general question of the standard which the plaintiff must meet in making an ex parte application to the court for a Mareva injunction, the judge in *Siroplex*¹⁰⁶ said that

¹⁰³ [1979] 2 Lloyd’s Rep.184

¹⁰⁴ See also W. Tetley at p. 987

¹⁰⁵ *Ibid.* p. 988

¹⁰⁶ *Siroplex Trade S.A. v. Comdel Commodities Ltd.* [1986] 2 Lloyd’s Rep. 428

the plaintiff must at all times show good faith disclosing his case fully and fairly. The plaintiff must, for the protection and the information of the defendant, summarize his case and the evidence in support of it by affidavit sworn before or immediately after the application. Bingham J. then proceeds to lay down what precisely the plaintiff must say about his case for the benefit of the defendant when applying for a Mareva injunction. He must identify the crucial points of his case, investigate the nature of the course of action and also disclose all the facts which could be taken into account by the judge in deciding whether to grant the application. Thus, the claim must be a strong one¹⁰⁷.

As it was mentioned above, the Mrs. Pounds has applied and received the injunction on the basis that creditor (Friedman) and/or ex-director has intention to sell the m/v SDF. From author's point of view, the granted injunction shall be discharged now, simply, on the grounds that Mrs. Pound's is sole beneficial owner and director. This situation might be referred also to the fourth condition, mentioned above – “real risk” and is often one on which applicants fall down, is the need for proof that there is a “real danger” that the defendant will remove the assets in question from the jurisdiction or dissipate them within it¹⁰⁸. This involves a large number of considerations but the requirement goes to the very *raison d'être* of the Mareva injunction namely the aim of preservation within the jurisdiction of the defendants' assets which should at all times be available if the plaintiff eventually wins the actions¹⁰⁹.

It is known from the facts of the case that the Mrs. Pounds' injunction has been extended until further court orders without asking some security by the Court. Thus, the fifth requirement for the grant of the injunction is that the plaintiff must give a cross undertaking in damages. This is in the event that the plaintiff's claim turns out to be unjustified or it fails – (it is known from the facts of the case that Mrs. Pound's asked for the stay of proceedings). In certain cases this includes a bond or security attached to the undertaking. In *Commodity Ocean Transport Corp. v. Basford Unicorn Industries Ltd*¹¹⁰. Hirst J. described why cross undertakings in damages are so important. He said¹¹¹:

“If the court considers that the cross undertaker, usually the plaintiff, might not be worth powder and shot it be held that he is obligated to fulfill his cross undertaking, the court can strengthen the undertaking by requiring some sort of security.” Thus,

¹⁰⁷ *Ibid.*

¹⁰⁸ See “*The Genie*”, supra, note 31.

¹⁰⁹ See W. Tetley p 986

¹¹⁰ [1987] 2 Lloyd's Rep. 197

¹¹¹ *Ibid.* 198

this normally takes place when the injunction is granted or extended.

Based on the given facts of the case, the Court granted injunction in favour of Mrs. Pounds as private person against the Friedman and SDF Shipping Co. – Company solely owned and controlled by herself. Thus, it is a very strange and unique situation where one person, even private person, asks the court to prohibit any dealings from herself/himself side (even legal entity) and with assets belonging to the same and so that at the same time, be in dispute at the court with herself.

7.6.1. The instrument of injunction and its enforceability to the *ordinary course of business of the Lender (Friedman)*, its priorities in respect of lender and borrower

The Courts frequently vary or make appropriate orders when the effect of the Mareva injunction has become particularly cumbersome or unfair. In the *“Angel Bell”*¹¹² an order was varied to permit the defendant to pay off a debt owed within the jurisdiction. In permitting the debt to be paid, Robert Goff J.’s rationale was that this kind of transaction in the ordinary course of business was not inconsistent with the underlying policy of the Mareva injunction. Although the purpose of the injunction is to prevent the defendant from removing his assets from the jurisdiction, it does not prevent him from making payments within the jurisdiction to third parties in the “ordinary course of business”. The approach in this case clearly recognizes the need to examine the underlying policy of the injunction which is a constructive approach. Even though, the Friedman cannot be now considered as third party, the injunction has unfair impact on the “ordinary course of his business”. That is to say – because of the Mareva injunction the Friedman is not able to enforce the re-payment of debt by the SDF Shipping, referring to such dealings – as ordinary or daily business of both parties. Seems that the question on priorities between creditor and debtor is lost on the merits of case. Because the debtor (SDF Shipping Co.) is still able to operate the ship (so that earn income) and do not re-pay the due debt. Moreover, the author may suggest that since there is no more any “real danger” in removing the ship from jurisdiction by Friedman, the Mrs. Pound’s injunction is used as “legal” instrument and advantage to not register the said Mortgage. However, there shall be taken into consideration that if Mortgage is

¹¹² [1979] 2 Lloyd’s Rep. 491 (Q.B. (Com. Ct.));

registered it might be moved from jurisdiction by way of selling the vessel, but it is an issue, which shall be answered, most probably, within the court proceedings.

7.6.2. The implications of injunction on registration of the Mortgage under Sweet Land law and Diana Land law and to compare both countries' law position in this respect

Taking into account above considerations it can be now analyzed the impact of injunction on the obligation to register the Mortgage. In this respect it is fruitful to look at the both – civil law and common law countries position when interpretation is made accordingly.

The common law position

Under the Shipping Act 2004 (the “Act”) it is provided¹¹³ that any interested person the Court can make an order prohibiting dealing with a ship. Section 67 of the Act also specifically provides that the Court may, if it thinks fit without prejudice to the exercise of any other power of the Court may discharge the Order (Mareva Injunction) when made, with or without costs. The section clearly contemplates that the person enjoyed or the applicant, Mrs. Pounds, at any time could approach the Court to have the Order discharged. It is clear that Section 67 permits Mrs. Pounds to apply to the Court to have the Order discharged in obedience of the Dian Land Court order. Section 67 of the [Sweet Land] Act reads as follows:

“The Court may, if it thinks fit without prejudice to the exercise of any other power of the Court, on the application of any interested person, make an order prohibiting for a time specified, any dealing with a ship or any share therein, and the Court may make the order on any terms or conditions it thinks just, or may refuse to make the order, or may discharge the order when made, with or without costs, and generally may act in the case as the justice of the case requires.”

Thus, under the common law the section also allows SDF Shipping to apply for the lifting of the injunction in order to be able to comply with the court order of 2nd August 2010, now that the SDF Shipping was controlled by the person who applied for the

¹¹³ Shipping Act 2004 [Sweet Land], Section 67

order, Mrs. Pounds, who at the same time was both director and sole shareholder of SDF Shipping, as it was already mentioned.

By applying for an injunction, or at least by not applying to have injunction lifted, SDF Shipping, or at least Mrs. Pounds has prevented SDF Shipping, which is a company which she owns and controls from registering the mortgage. Under these circumstances the injunction is self-serving and is clearly an attempt to prevent the registration of the Mortgage and so that do not obey the said court order. Therefore, if SDF Shipping would have made a reasonable effort to have the injunction lifted, the registration of Mortgage would have been possible. There are and have been no circumstances beyond the influence of SDF Shipping that stood in the way of the registration of the pertaining first preferred Mortgage.

However, the defendant (Friedman) may apply to the court for the dissolution of the injunction, as may a third party affected by the order¹¹⁴. Dissolution will be granted where the injunction was obtained by fraud or forgery or by misrepresentation or non-disclosure of material facts¹¹⁵.

The civil law position

In this respect there shall be mentioned the Court decision as follows:

“6.5.1 In the opinion of the Court the “order” of the High Court of Justice of [Sweet Land] does not preclude the allowing of the counterclaim. Under 5.4 the Court has already considered that the vessel has been encumbered with a valid mortgage. Registration of the mortgage will not have an effect on the validity of the mortgage. Therefore the Court is of the opinion that registration of the Mortgage does not cause “dealing with the vessel” as reasonably meant in the order. There is no question of “falsely encumbering or selling the Vessel”, as mentioned as reason for the application under (...[Mrs. Pounds’ application to grant injunction]).¹¹⁶”

¹¹⁴ Secured creditors, for example, may seek dissolution of the Mareva injunction, so as to be able to enforce their security. See W. Tetley p 996, endnote 298

¹¹⁵ See W. Tetley at p 996

¹¹⁶ See Exhibit No. I

Thus, it might be seen that the learned Judge goes beyond the effect of Injunction it-self and connects the obligation of Mortgage registration with unnecessarily to lift injunction so that register the mortgage. Moreover, such registration would not constitute the breach of injunction order as would not cause “*dealing with the vessel*” as it is clearly stated in the wording of injunction.

Taking into account above discussed, the injunction, indeed, has an important impact on the Mortgage registration to such extent, necessary and effect if it is granted with intention to not register Mortgage as well as it does not cause damages prohibiting “*ordinary course of business*” of defendants creditors as future legal mortgagee. However, in the light of present discussion, there shall be made reference to the common law position when defendat seeks to lift the injunction. “Such [injunction discharge] will only be granted where it is established that the funds are required for “a purpose which does not conflict with the policy underlying the Mareva injunction”, which is to prevent the defendant from moving his assets out of jurisdiction in order to satisfy a possible future judgment.¹¹⁷”

Thus, as usually injunction is granted so that to freez the assets of defendant – such as bank accounts, etc. But in our case it is a requirement to register the Mortgage. This quoted to some lenght position is not very helpful in present situation as the question of funds and their availability is not an issue. However, by virtue of Mareva order, “the defendant [SDF Shipping] is not prohibiting from dealing with or disposing of any of his assets in the “ordinary and **proper course of business**.”¹¹⁸

For example, this could be contrasted with the position where the charterparty is in existance at the date of the mortgage, to the mortgageeš knowledge, where the rights of the charterer may prevail over the rights of the mortgagee, and an injunction may be granted restraining the mortgagee from exercising its rights in suach a way as to interfere with the charterparty. An injunction will, however, not be granted against the mortgagee if it is shown that, even if an injunction were granted, the owner would not be able, for financial or other reasons, to perform the charterparty¹¹⁹.

Moreover, as it was discussed above, the Courts has established that the plaintiff must have a good arguable case on his cause of action. Having established that, he had to

¹¹⁷ W. Tetley pp. 994-995

¹¹⁸ *Ibid.*

¹¹⁹ *De Mattos v. Gibson* (1858) 2 De G & J 276; *Swiss Bank Corporation V Lloyds Bank Limited* [1979] Ch. 548;

show that there existed a real risk and not merely an illusory fear that the defendant would remove or dissipate his assets¹²⁰ – that is to say ship. Thus, it might support the position of Friedman in such a way that in any scenario the ship owner who, simply, do not want to re-pay the loan amount and at the same time to keep ship would everytime ask to grant injunction prohibiting mortgagee/lender to sell the ship or to take other actions as it was agreed under the Mortgage.

The comparative and critical analysis of the concept of Mareva injunction, its advantages or differences towards other methods such as action *in rem* worldwide or *saisie conservatoire* in France would occupy an entire book, and there is not room to deal with it in any detail here, but the basics and main points of effect of injunction has been given above.

VIII Enforcement¹²¹

From the above analysis of concept of Mortgage Deed it might be noted that the most legal systems automatically confer certain statutory or common law rights on registered mortgagees of ships or in case not-registered - a valid security interest over the ships, and their rights conferred by individual jurisdictions. Enforcement¹²² of ship mortgages is a topic, which alone could occupy an entire book, and there is not room to deal with it in any detail here, but the basic rights, which a mortgagee will invariably look for, either by operation of law or by the express terms of the mortgage, will include those given below. Thus, before considering the remedies and rights available to mortgagee, it is essential to look at the very roots of contract law.

8.1. Concept of contract

Contract law determines the enforceability of the promises of the parties and establishes the body of law for the formation, interpretation, and performance of the contract, as well as for the remedies in the event of the failure of a party to perform the

¹²⁰ C. Hill, "Maritime Law", 6th Edition, LLP, 2003, at page 74;

¹²¹ „*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*” - To know the laws is not to observe their words alone, but their force and power.

¹²² W. Rose "Civil Practice" Blackstone's, Oxford University, 2006, section P, pp. 997-1009;

promise (-s) made¹²³.

In its essence a contract is an agreement which the law recognizes as giving rise to enforceable obligations¹²⁴. "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."¹²⁵ A promise is a commitment or an undertaking that some event will or will not occur in the future. A promise may be made by using express word or it may be implied from conduct or some combinations of words and conduct¹²⁶. Thus, any transactions in which one party makes or both parties make a legally enforceable promise is a contract¹²⁷.

8.2. Promise as condition to enforce

All the principal legal systems in the world distinguish between those promises that create legal duties and those that do not. It seems to be accepted wisdom that we do not wish to enforce every promise made. Therefore, all legal systems have established standards for determining the enforceability of promises. Thus, the most common basis for enforcing promises in England involves the concept of consideration. There shall be noted that under the law of restitution, courts impose an obligation to pay for benefits conferred despite the absence of promise¹²⁸.

In addition to promises, contracts often contain conditions. A condition can be defined as an event, the occurrence or non-occurrence of which gives rise to or extinguishes a duty. It might be helpful to think of promises and conditions in the sense that promises are the basis of actions for breach of contract. The breach of a promise can provide a

¹²³ C. D. Rohwer and A. M. Skrocki, "Contracts", Thomson West, 2006, at page 2;

¹²⁴ See G Treitel, *The Law of Contract* (2003) 1, "A contract is an agreement giving rise to obligations which are enforced or recognised by law."; J Beatson, *Anson's Law of Contract* (OUP 2002) 73, "English law does not regard a bare promise or agreement as legally enforceable but recognises only two kinds of contract, the contract made by deed, and the simple contract. A contract made by deed derives its validity neither from the fact of the agreement nor because it is an exchange but solely from the form in which it is expressed. A simple contract as a general rule need not be made in any special form, but requires the presence of consideration which... broadly means that something must be given in exchange for a promise."

¹²⁵ American Law Institute, Restatement (2nd) of Contracts, Section 1;

¹²⁶ C. D. Rohwer and A. M. Skrocki, "Contracts", Thomson West, 2006, at page 1;

¹²⁷ *Ibid.*

¹²⁸ *Ibid.* pp. 32-39;

right to recover damages or obtain some other remedy. The occurrence or non-occurrence of a condition affects whether there could be breach of a promise at all. For if the promise is subject to a condition, the plaintiff must prove as part of the *prima facie* case that the condition has occurred or been excused. If it has, the promised performance became due and owing. If the condition has not occurred or been excused, then the duty created by the promise was not owing and therefore could not have been breached. Thus, at the present case, under the Loan Agreement and the Mortgage Deed the SDF Shipping Ltd. promised to re-pay the loan amount till 20th of May 2010 and not doing so constitutes the breach of the promise entitling the Friedman to take actions for remedy.

“All jurisdictions recognize the existence of conditions created by the parties. It is the general practice to divide such conditions into two categories, express and implied conditions or terms. Whereas, express conditions exist because they are expressly stated in the terms of contract and created by the parties using such language and terms as – “if”, “subject to”, etc. Conditions are also found in contracts where there is no express language of condition but the terms of the contract clearly indicate that the parties intended that some event must occur before a duty would arise. These are generally referred as implied (in fact) conditions. In addition to these two categories of conditions there are constructive conditions (or “implied in law”) and referred as any term supplied by the court and not based upon the apparent intention of the parties.¹²⁹” Lord Mansfield set forth the scheme for constructive conditions in *Kingston v. Preston* (K.B. 1773)¹³⁰, whereas it is stated:

“There are three kinds of covenants (promises): 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff;(..).”

Many of modern rules are based upon this Mansfield opinion. Thus, under the Mortgage Deed the conditions fall under first quoted category of promises.

8.3. Default

¹²⁹ *Ibid.* pp. 39-42;

¹³⁰ 98 Eng. Rep. 606 (K.B. 1773), 306

Whatever action the mortgagee decides to take in respect of his claim enforcement towards the mortgagor (ship owner), it must first establish that the owner is in breach of his obligations under the Mortgage Deed. These obligations will be discussed in the next chapter and, generally, set out in detail in the mortgage documents, although certain limited obligations are implied by law. Once the default is established, the mortgagee must then consider what powers it has under the mortgage documents or otherwise under the law, thus involving the mortgagee's options and enforcement as will be discussed in the following chapters.

"The meaning of "default" may be understood, in strict terms, as any failure to perform a contractual or other legal duty. In practice, the term "default", when considered with respect to a Mortgage, usually describes a breach by the owner of the terms of the Mortgage. The most obvious default is a failure to pay a sum of money at the time or in the manner or amount agreed between parties. It may also describe a breach of a Collateral agreement between the owner and mortgagee, such as deed of covenants or the Loan Agreement to which the Mortgage relates.¹³¹" It shall be noted that, usually, the creditors seeking to include provisions in Loan Agreement or Mortgage regarding the "cross - default"¹³², thus providing more security for creditor.

8.3.1. Events of default

As it was mentioned above, the events of default, whether by borrower or lender, under the Mortgage Deed or Loan Agreement (See Exhibits No. II - III) may be found there accordingly. However, it shall be noted that under common law there are main three categories of default¹³³. First, a payment default will occur when the owner fails to make a payment due on a contractual payment date. Often the mortgage documents will give the owner a "grace" period, so that if the owner fails to make the payment before the mortgagee may invoke the remedies provided for under the mortgage. Such "grace" period provisions, usually, are included in Loan Agreements where loan amount repayment is scheduled by monthly installments.

Second, a "status" default will occur if an event happens which affects the legal or financial standing of the owner. Thus, it might be changes in owner ship or management

¹³¹ G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at 125;

¹³² Usually, in banking law, refers to the defaults in associated or other transactions of the same borrower;

¹³³ G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at pp. 372 - 373

of ship. In this type of default, the owner will have no right to remedy the default even if it were possible technically to do so.

Third, a “covenant” default will occur when the owner commits a breach of one of the other undertakings in the mortgage documents; if such default is capable of remedy the mortgage documents often will provide that a default will only occur if the owner fails to remedy the defect within a specified period of time.

However, as it was stated above that the Mortgage Deed is related and attached to the Loan Agreement, in present case we can see that by virtue of the Loan Agreement¹³⁴, Article 20 there is listed the events of default and in case one of them occurs the mortgagee might execute his powers referred to in Article 6 of the Mortgage Deed. Moreover, there might be found additional ship owner’s obligations in Article 4 of the Mortgage Deed, thus referred to “daily operation and maintenance of the vessel” breach of which may give a right to the mortgagee to take such actions as prescribed under the Article 5 of the Mortgage¹³⁵. It shall be drawn attention, that powers of mortgagee on event of default (as per Article 20 of Loan Agreement) are referred, mainly, to the “financial” or connected so defaults. Thus, the mortgagee, simply, is not entitled to sell a ship as remedy for every owner’s breach because, for example, the ship owner did not arrange the extension of the P&I insurance when due. For purposes of present discussions, it is fruitful to compare both - the above-mentioned Loan Agreement with other Loan Agreement made and governed under the laws of Republic of Latvia¹³⁶. Thus listed “Events of default” under the Article 22 and remedies available to the Lender under the Article 22.15 and 25 (d) and (e) accordingly. From author’s point of view it is a good example of the Loan Agreement on which the ship owner’s legal attorneys should not agree for signing, simply, on the basis of document construction and wording used.

8.3.2. Effect of default

In the light of above analysis, it is important to know for creditor (Friedman) or most probably for his legal attorneys, the essence of construction the Mortgage Deed and Loan Agreement. So that, simply, to know remedies available to the Friedman, as

¹³⁴ See Exhibit No. III

¹³⁵ See Exhibit No. II

¹³⁶ See Exhibit IV

creditor and mortgagee, in the event of non-performance of debtor's obligations, that is to say in present case – non-payment of debt and not registration of Mortgage. Under the common law the ordinary rules of contract law apply to the Loan Agreement, the Deed of Covenant and Mortgage Deed¹³⁷ and accordingly the promissory terms of the deed of covenant will be conditions, warranties or innominate terms¹³⁸. As it was discussed already a particular term of the contract may be a condition because parties expressly agree, because a statute so provide, or on the basis of reasonable implication upon a proper construction of the contract. "The term "warranty" describes a minor term of contract. In the case of breach of a warranty, the normal remedy is damages, so the party not in default is not released from its own obligations. In general, breach of a condition gives the party not in default the right to treat the contract as repudiated, whereas breach of a warranty gives rise only to a claim damages."¹³⁹

However, in a series of cases¹⁴⁰, it came to be recognized that a particular term might in some respect straddle the two categories of condition and warranty: in some circumstance the effect of the breach would be so substantial that damages would not be a sufficient remedy. Such terms are referred as "innominate"¹⁴¹. Thus, a breach of condition or a breach of an innominate term (the consequence of which are sufficiently serious) will give the mortgagee the right to demand immediate re-payment of the mortgage debt and, if further facilities are available under the Loan Agreement, the right to terminate its obligation to make such facilities available. In contrast, if the breach is a breach of warranty or breach of innominate term (the consequences of which are not sufficient serious) then the mortgagee will not be able to terminate the Loan Agreement and demand immediate re-payment of the Mortgage debt.

The application of such a rule is "obvious in the case of a lending arrangement, because the breach of virtually any provision likely to be found in the contract may be seen to have an impact upon the risk to which the lender is exposed. As damages are not an adequate remedy in such a case, there is a clear need for a rule which allows the mortgagee to treat the mortgage/lending arrangement as repudiated in cases where it

¹³⁷ There may well be other loan or security documents, and the same principles of construction will apply to these documents;

¹³⁸ See G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at p. 126;

¹³⁹ *Ibid.*

¹⁴⁰ *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1963] 2 Lloyd's Rep. 455 (C.A.) and *The "Hansa Nord" Cehave N.V. v. Bremer Handelsgesellschaft m.b. H.* [1975] 2 Lloyd's Rep. 445 (C.A.);

¹⁴¹ D. Bennet, Clyde & Co. presentation on "International Sale of Goods: Remedies", 2nd April 2001 (The 5th annual International Trade & Shipping Law School 2001), London by Lloyd's List Events;

considers its exposure to have been increased, [so as to give the mortgagee an immediate right of enforcement.] Thus, it may be seen that creditors exposure is increased where debtor (ship owner) do not arrange properly the insurance.¹⁴²”

What the law fails to provide in clear terms is now usually rectified by way of express contractual provision. Thus, in practice, every Loan Agreement and Deed of Covenants will provide that, on the occurrence of any event of default, the mortgage debt will become re-payable with or without notice¹⁴³. Accordingly, each specified default will constitute a breach which will give the mortgagee the right to demand re-payment of the mortgage debt and, subject to certain limited exceptions, the courts will give effect to any such agreement between parties. These considerations involve a prompt research on the Civil Procedure Rules, the judgment and its enforcement which will be considered in the following chapter. In *Lombard North Central plc v. Butterworth*¹⁴⁴ Mustill, L.J. discussed the circumstances where a breach of contract by one party will give the other the right to terminate the contract:

“3. Certain categories of obligation, often called conditions, have the property that any breach of them is treated as going to the root of the contract. Upon the occurrence of any breach of condition, the injured party can elect to terminate and claim damages whatever the gravity of the breach.

5. A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach (...).

8. A clause expressly assigning a particular obligation to the category of condition is not a clause which purports to fix damages for breaches of the obligation, and is not subject to the law governing penalty clauses.”

It has been mentioned above that there exists some limited exceptions that is to say – restrictions (whether statutory¹⁴⁵ or found on the terms of Mortgage). The last arise under the common law or general principles of equity. The law against penalties does

¹⁴² *Ibid.*

¹⁴³ See Exhibit No. III

¹⁴⁴ [1987] 1 Q.B. 527 (C.A.) at pp. 535-536;

¹⁴⁵ Consideration must be given to the Consumer Credit Act 1974 where transaction involves a consumer and the Unfair Contract Terms Act 1977 with respect to the exclusions of liability for negligence causing death, personal injury, loss or damage. These Acts has no much relevance to the Ship Mortgage as governs the only where the mortgagee was the manufacturer or supplier of the ship;

not apply because consequences of the event of default are not the payment of damages but the re-payment of the debt¹⁴⁶.

8.4. Mortgagee's options

Where a default occurs the the mortgagee should give or not¹⁴⁷ immediate notice of default to the owner, making clear that the mortgagee neither condones the breach by the owner nor waives its rights of enforcement. If the breach is potentially curable, the mortgagee then has the following options:

First, the mortgagee may require the owner to remedy the default. In certain cases the Deed of Covenant may give the owner a limited time to remedy the default of the mortgagee may impose a time limit within which the owner has to remedy the default. In such a case, the mortgagee has no right to take any further step, provided the default is remedied by the owner within specified time.

Second, the mortgagee may waive the default conditionally or unconditionally.

Third, the mortgagee may take steps to remedy the default itself and demand the cost of so doing from the owner. In present case it is called "Powers of mortgagee to protect security and remedy default" under the Article 5 of the Mortgage¹⁴⁸.

Fourth, the mortgagee may demand the re-payment of the Mortgage debt. If the mortgagee demands re-payment then it must give the owner a *reasonable time* to make the payment demanded, although in many cases it will be obvious that the owner is insolvent and not in a position to pay the amount due¹⁴⁹. However, default occurrence which empowers the mortgagee to demand the re-payment of the loan shall be distinguished from the default of loan re-payment depending on the agreed terms – whether by monthly installments or whether by one full amount re-payment transaction when due.

Fifth, is connected to the fourth mentioned remedy for creditor or obligation of lender to pay full amount but *immediately*, usually, known as the "acceleration" of the debt owing. "A term providing for the acceleration of the unpaid principal amount secured under the mortgage. An acceleration clause providing for the immediate payment of all

¹⁴⁶ *The Protector Endowment Loan and Annuity Co. v. Grice* (1880) 5 Q.B.D. 592 (C.A.), in particular Brett, L.J. at p. 596

¹⁴⁷ See Exhibit No. III, Cl. 20.1

¹⁴⁸ See Exhibit No. II

¹⁴⁹ *The "Halcyon Skies"* (No. 2) [1977] 1 Lloyd's Rep. 22 (Adm), at page 25

interest that would have been payable in the future under the Mortgage will be struck down as a penalty.¹⁵⁰ However, such “acceleration” provisions, usually, is implied into the Loan Agreement when the parties has agreed on the re-payment of the loan amount by monthly installments or significant breach of the Agreement terms, for example, the borrower is declared bankrupt¹⁵¹.

Finally, it shall be mentioned that it is a common practice for ship mortgages to provide that the interest will be payable under the mortgage at an agreed contract rate after default until such time as full payment is finally made. There shall be distinguished between interest which is agreed on principal loan amount and interest which is in addition attached to this sum of amount due to default. Whether it will constitute penalty will depend on the facts of the case¹⁵². However, the ship mortgages sometimes provide for the payment of the higher rate of interest following the occurrence of default. In such a case, the provision for a substantially higher rate of interest could breach the general rule that the law of contract provides for the compensation of the aggrieved party by way of the payment of damages, not for the penalization of the party in default¹⁵³.

8.5. Execution of enforcement

Within the scope of present considerations on the enforcement and its execution, it shall be noted that the term “execution” hereinafter relates only to the enforcement of the security available under the Mortgage – that is to say ship or other assets or property if so mortgaged. It has been already pointed out that if the owner is in default, in most cases, for non- fulfillment of financial obligations then the mortgagee has options, in addition to asking the full re-payment of the loan amount, to execute/perform the enforcement of security whether based on the Loan Agreement and/or Mortgage Deed and/or whether implied by statutes. However, the given options under the Mortgage, in practice, may not be executed and enforced without the related statutes. Thus, in most cases connected to the further enforcement, for example, the enforcement of judgment. Therefore, the present analysis will include also the discussions on the statutes, as case

¹⁵⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at pp. 129-131;

¹⁵¹ See Exhibit No. III, Cl. 20.1 (c);

¹⁵² *Lordsvale Finance plc v. Bank of Zambia* [1996] Q. B. 752

¹⁵³ *Ibid.* 752

may be. The following chapter is designed to focus on the available mortgagee's option to enforce the execution of its security.

8.5.1. Possession

As one of the remedies available for the mortgagee if owner is in default is to take a possession of the vessel. The power to take possession is not conferred by statute but appears to be a residual power conferred by common law. Thus, such power being a legal basis at common law is that a legal mortgage transferred ownership to the mortgagee and possession was one of the incidents of ownership¹⁵⁴. In comparison, if the mortgage was an equitable mortgage then ownership was not transferred to the mortgagee and logically the mortgagee did not have a right to take possession without an order of the court or without obtaining the legal status. But this is a difficult question and shall be answered on the facts and events of each case separately¹⁵⁵. However, usually, an express power to take possession is conferred under the Mortgage Deed¹⁵⁶ or Deed of Covenants. Thus, it will be exercisable as soon as one of the events of default has happened, in our case - Loan Agreement, Article 20. However, the mortgagee's powers to take possession is clear when there is default in payment, the situation is less clear when the owner is in breach of any other undertakings, for example, as per Mortgage¹⁵⁷, where if owner fails to repay the ship, even though the position of mortgagee is set out there – it is unclear how can the mortgagee perform it in practice?

8.5.1.1. Method of taking possession

The explanation of methods available at law might be found in C. Hill's consideration¹⁵⁸. There are two methods of taking possession as follows:

Actual possession

¹⁵⁴ *Keith v. Burrows* [1876] 1 C.P.D. 722, at page 733;

¹⁵⁵ H.W.R. Wade "The Equitable Mortgagee's Right to possession", 1955, 71 L.Q.R. 204;

¹⁵⁶ See Exhibit No. II, Cl. 6.01 (b);

¹⁵⁷ *Ibid.* Cl. 5.02 (b);

¹⁵⁸ C. Hill, "Maritime Law", 6th Edition, LLP, 2003 at pp. 39-40;

This method of possession “involves the mortgagee seizing the vessel through his representative who may actually go on board. In this event, the Master may be dismissed by the mortgagee or he may be retained on board and become the agent of the mortgagee.¹⁵⁹” Thus, the representative of mortgagee, usually, would be an legal attorney and, as above quoted implies, might be executed at the port. Therefore, there shall be noted that the taking of ship in possession might be performed also when she is at the sea but it will be the other method of possession, as follows:

Constructive possession

This method of taking possession is in place when actual cannot be performed, simply, because ship is at sea, as mentioned above. “In this event, the mortgagee may take possession “constructively” by giving notice of his intention to the mortgagors, charterers, underwriters and any other person known to be interested in the vessel. Whatever happens, the mortgagee by his actions must clearly express his intention to take possession.¹⁶⁰” Thus, an act indicating an intention to assume the rights of ownership.

It shall be mentioned that neither of these methods of taking possession is entirely satisfactory unless the owner’s cooperation is forthcoming. Thus, in case of constructive possession “if the master and the owner rejects the notice of possession and the master continues to comply with the orders of the owner, then mortgagee will not have taken possession and will have to wait until the ship reaches port, when it can attempt to take actual possession or obtain a court order from the court having maritime jurisdiction in that port giving possession of the ship to the mortgagee.¹⁶¹”. However, in case where the master and/or owner do not obey the notice of possession, there is possibility that their actions might be subject to the penalty under the civil law procedures or even under criminal law provisions, as case may be.

In most cases the mortgagee will take possession of the ship as a step towards exercising its power of sale. However, “the mortgagee is under no duty to sell the ship as soon as possible and may be postpone the sale until it decides it is in its interests to sell the ship.¹⁶²”

¹⁵⁹ *Ibid.* C. Hill at page 39;

¹⁶⁰ *Ibid.* C. Hill page 39;

¹⁶¹ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at pp. 136-137;

¹⁶² *Ibid.* pp. 137-138;

8.5.1.2. The rights of mortgagee in possession

Once having entered into possession either actually or constructively the mortgagee can operate the ship as the owner, thus it becomes entailed to the following powers:

Earnings

If the earnings have not been assigned to the mortgagee, on taking possession of the ship the mortgagee will have the right to receive all freight, hire and other earnings of the ship, payable after it has taken possession¹⁶³. However, if the earnings have been assigned to the mortgagee, for example, through the instrument of the Deed of General Assignments of Earnings, Insurance and Requisition Compensation (referred as “Assignment”) then the mortgagee has such rights respectively, as follows:

“X Assignment

10.1. In pursuance of the Loan Agreement and in consideration of the Assignee advancing or agreeing to advance the Loan or any part thereof to the Borrower in accordance with the terms of the Loan Agreement (...), the Owner as beneficial owner of the Vessel and with full title guarantee HEREBY ASSIGNS AND PLEDGES AND AGREES TO ASSIGN AND PLEADGE unconditionally and absolutely to the Assignee all it rights, title and interest in and to, whether present or future:-

(i) the Insurances and all benefits thereof (including claims of whatsoever nature and return of premiums);

(ii) any Requisition Compensation;

(iii) the Earnings; and

(iv) all proceeds of sale of and/or relating to the Vessel.¹⁶⁴”

The above quoted to some length extract from the Assignment is self – explanatory.

Charters

The mortgagee may enter into charters on the ship, contracts of carriage and contracts of affreightment for the use of the ship¹⁶⁵. If there is a charter between the owner and a

¹⁶³ *Keith v. Burrows* (1877) 2 App. Cas. 636, at p 656, by Lord Blackburn;

¹⁶⁴ See Exhibit No. V

charterer in existence when the mortgagee takes possession of the ship, then, subject to the mortgagee's right to "disclaim" the charter¹⁶⁶ the charterer will continue in effect as a charter between the mortgagee as owner and charterer. There shall be noted that in such a case the owner remains liable to the charterer for any breach of the charter which occurred prior to the mortgagee taking possession¹⁶⁷.

Insurance¹⁶⁸

The mortgagee should immediately inform the insurers that it has taken possession of the vessel if not already. In case where the mortgagee is not co-assured under the insurances on vessel, or insurances have not been assigned to it, it should ask the insurers that it be named as co-assured on the policies. If the insurers do not agree to this, the mortgagee should place a separate insurance in its own name to cover the risks.

General

In addition to the above discussed it is fruitful to mention that the mortgagee in possession will have also the rights to repair and maintain the vessel and so that is entitled to enter into the contracts with shipyards. Moreover, the mortgagee will be personally liable on all contracts entered into by it not by the owner (prior or after the possession). Thus, the mortgagee acquires the right to pursue claims against 3rd parties which relate to the ship and may also defend claims against the ship.

The rules relating to the enforcement of mortgages were expressed by the Privy Council in *Downsview Nominees Ltd v. First City Corp. Ltd.* as follows¹⁶⁹:

"Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a mortgagee may be exercised although the consequences may be disadvantageous to the borrower."

¹⁶⁵ G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at p. 140;

¹⁶⁶ *Law Guarantee and Trust Soc. V. Russian Bank for Foreign Trade* [1905] 1 K.B. 815 (C.A.).

¹⁶⁷ G. Bowtle and K. McGuinness "The law of ship mortgages", LLP, 2001, at p. 139;

¹⁶⁸ F.D. Rose "Marine Insurance Law and Practice", LLP, 2004;

¹⁶⁹ [1993] A.C. 295 at p. 312;

Therefore, the mortgagee is under the duty to act reasonably when exercise its powers and will be liable to the owner if it acts in an imprudent or reckless manner but always subject to those limitations it may act in such manner as he considers will maximise its recovery. The liabilities of mortgagee are separate topic and will not be dealt with here any more.

8.5.2. Receivership

There are no special rules of law governing the receivership of ships beyond those rules which apply to the holder of a ship mortgage when acting personally, and thus the law governing the receivership of ships is essentially the same as under the general law of debtor and creditor¹⁷⁰. As noted above, when owner is in default, the mortgagee may decide to appoint a receiver rather than take possession of the vessel itself. Thus, the Deed of Covenants could generally give the mortgagee such powers of appointment. As an example, there might be mentioned following extract from Deed of General Assignments¹⁷¹:

“8. Attorney

8.1. The Owner hereby irrevocably appoints and constitutes the Assignee (with power to appoint sub-attorneys), for the Security Period, as the Owner’s true and lawful Attorney with full power (in the name of the Owner or otherwise) to ask, require, demand, receive, compound and give acquittance for any and all moneys and claims for moneys due and to become due to endorse any cheque or other instrument or orders in connection therewith and to file any claims and to take any action or institute any proceedings which to the Assignee may seem to be necessary or advisable to recover such amounts or pursue such claims and otherwise to do any and all things which the Owner itself could do in relation to the Assigned property and/or Vessel; provided however that such power shall not be exercisable by or on behalf of the Assignee until there has been an Event of Default.”

In comparison, under the English law the wordings are as follows:

“12.4. After an Event of Default the Mortgagee may appoint a receiver of the Ship, the Earnings and the Insurances. The receiver shall be the agent of the Owner who will be

¹⁷⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 142;

¹⁷¹ See Exhibit No. V, CL. 8;

responsible for his remuneration and for all his acts and omissions and for all contracts entered into by the receiver. (...).¹⁷²”

It shall be noted, that the above quoted to some length extracts differs in the wording in such a way as confusing the reader in the terms used – *Attorney* and *Receiver* whereas the receiver is an agent. The purposes of such appointment are also different, thus in first the owner appoints mortgagee to be his Attorney whereas in second version the mortgagee has right to appoint receiver/agent. Therefore, the right interpretation is very important when there is an event of default encouraging mortgagee to execute his powers when it enforces security.

However, if no such power is included in the Deed of Covenant then the mortgagee, at least under the common law, may have statutory power to appoint a receiver under the Law of Property Act 1925¹⁷³. The powers and duties of the receiver will depend on the terms of its appointment which is done, usually, in writing. As above mentioned extracts imply, the main duty of the receiver will be to take possession of the ship and to collect all earnings due to the owner but not yet paid. Thus, acting on behalf of mortgagee, the receiver will also have a right to enter into a charter contracts, arrange insurance and other important steps to maintain the good operation of the vessel¹⁷⁴. From author’s point of view the powers of mortgagee to appoint the receiver might be seen as advantage for mortgagee when event of default occurs and appropriate steps have to be taken immediately. Because, form one side, there are not so many creditors (usually banks) who have a departments able to carry out the daily business of shipping. From other side, the mortgagee shall be confident in receiver – whether private person or legal entity to delegate the financial control of its security.

8.5.3. Foreclosure

“ A mortgagor has an equitable right to redeem the security by paying off what is owing even after default on his part and subsequent entry into possession by the mortgagee. So as to give the mortgagee the power to extinguish this right to redeem by the mortgagor, the common law allowed a mortgagee to bring an action for foreclosure. “Foreclosure” means the action of foreclosing, that is to say proceeding to extinguish the

¹⁷² G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 142;

¹⁷³ Section 101 (1) (iii);

¹⁷⁴ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 144;

right of redeeming the mortgaged property.¹⁷⁵ In comparison, it is fruitful to mention other view whereas:” The term “foreclosure” describes a procedure by which all the mortgagor’s rights in property subject to a mortgage are shut out. A decree of strict foreclosure is an order of a court of equity which determines the amount due under a mortgage, orders its payment within a stipulated time, and provides that, on default of such payment, the mortgagor’s right and equity of redemption will forever be barred (i.e. foreclosed).¹⁷⁶ Thus, under the Mortgage Deed it might be agreed as follows¹⁷⁷:

“6.01. (a) to exercise all the rights and remedies in foreclosure and otherwise given to the mortgagees by the provisions of the laws of [Sweet Land] and all applicable laws of any other jurisdiction including applicable law of Loan Agreement.”

As it is known from the facts that the Mortgage is not registered, therefor, it is essential to look at the position of such non-secured mortgagee’s right of redemption. In the case of statutory ship mortgage or a legal or equitable charge against a ship, the mortgagee has no legal title in the ship and therefore cannot apply for an order for foreclosure. In *Comstock v. Harris* it was observed¹⁷⁸:

“... mortgagees cannot become owners by virtue of their mortgage, for the remedy is not by foreclosure but by sale.”

8.5.4. Arrest

The concept of ship arrest has been analysed and discussed already. Therefor, the author has decided to concentrate on the arrest procedure only when mortgagee decides to enforce its claim against ship owner when last is in default. Thus, in order from Friedman to know the scenario of possible difficulties which may arise from such arrest, it would be fruitful to go through the procedural rules, mainly, under the common law and civil law.

Common law procedure

¹⁷⁵ C. Hill “Maritime Law”, at p. 39;

¹⁷⁶ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 150;

¹⁷⁷ See Exhibit No. II, Cl. 6.01. (a);

¹⁷⁸ (1887) 13 O.R. 407 per Proudfoot, J. at p. 413

“The arrest procedure is a remedy as of right, rather than being discretionary¹⁷⁹. The procedural rules governing the arrest of a ship are set out in a Practice Direction to the Civil Procedure Rules¹⁸⁰. The following is summary of the procedure. The mortgagee must issue an *in rem* claim in the Admiralty and Commercial Court Registry. The details of the claim should be set out in the claim form or included in a separate document. The *in rem* claim form, together with the “Response Pack”, may be served by the Admiralty Marshal or his substitute, or may be served by the claimant. The mortgagee will usually apply for the issue of a warrant of arrest at the same time as it issues *in rem* claim. In order to arrest the ship, in England, the mortgagee has to file an application and a declaration in the form of an affidavit setting out the details required by the rules. The declaration in an action to enforce a mortgage will state¹⁸¹:

- the date and parties to the mortgage;
- the name, port of registration and official number of the ship;
- the details of the registration of the mortgage, if registered;
- the amount of the loan or other obligation secured;
- the rate of interest payable on the loan;
- a statement of the amounts due and payable under the mortgage;
- the default in payment by the owner.

On receipt of these documents and payment for the prescribed fee, the Admiralty Marshal will issue the warrant of arrest and arrange for the ship to be arrested. Once the ship has been arrested it remains in the custody of the Admiralty Marshal until it is released or sold by the court, and anyone who attempts to interfere with Admiralty Marshal’s custody will be guilty of contempt of court. The mortgagee will not be able to exercise a power of sale while the ship remains under arrest. However, it may apply to the court for an order for the sale of the ship. Such an application may be made either before judgment or after it. The order made by the court is an order for appraisal and sale¹⁸². Thus, following the procedure of sale – survey, ship’s valuation, etc. The transfer of legal title to the new ship owner would be through the Admiralty Marshal’s

¹⁷⁹ *The Varna* [1993] 2 Lloyd’s Rep. 253 (C.A.)

¹⁸⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 152;

¹⁸¹ *Ibid.*

¹⁸² *Ibid.* p. 157;

Bill of Sale free of all encumbrances which is delivered to the buyer by the Admiralty Marshal.

Once the ship has been sold by such way, there have to be settled the priorities as between and to the following ranking¹⁸³:

- First, Admiralty Marshal's costs and the legal costs of the mortgagee or other arrestors;
- Second, maritime lien claims, except where lien attached after a possessory lien arose, in which case the possessory lien rank first;
- Third, possessory lien claim – in practice, there can only be one claimant who was exercising a possessory lien at the time of the arrest;
- Fourth, mortgages and charges on the ship;
- Fifth, statutory lien claimants, that is those claimants who have claims referred to in Sec. 20 of the Supreme Court Act 1981; and
- Sixth, the balance of the fund will be paid to the owner.

The rules governing priorities are to be found in the decisions of the Admiralty Court, although the court still retains a discretion to vary the order. However, the order of priorities in English Admiralty law is similar to the order of priorities in the International Convention in Maritime Liens and Mortgages (Geneva 1993)¹⁸⁴.

Civil law procedure

In this respect there has been given an opportunity to the author to research the said procedure within The Netherlands jurisdiction from the practical perspective. Thus, taking into account that the Netherlands is party to the Arrest Convention 1952, as it was discussed already above.

“Arresting a ship in the Dutch jurisdiction¹⁸⁵ is a relatively straight forward matter, and can be arranged quickly and at a reasonable cost. The petitioner must be represented by a Dutch lawyer admitted to the bar. The arrest petition should be submitted at the District Court of the port where the ship has called or is expected to arrive, like Rotterdam, Amsterdam, IJmuiden or Moerdijk. Ships heading for Antwerp in Belgium

¹⁸³ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 159;

¹⁸⁴ See Article 5.1.

¹⁸⁵ The research on practical information on the Dutch law procedure when arresting the ship was kindly advised and supported by the *Mrs. Philippine Beerman*, legal attorney at the Kernkamp Advocaten law firm, The Netherlands;

can be arrested on the roads of Flushing (Vlissingen).

The petition may be filed prior to the vessel entering the port. The petition must contain the following information:

- ✚ a brief description of the claim and the legal basis thereof;
- ✚ the name and domicile of the Applicant and the Respondent;
- ✚ the name of the vessel;
- ✚ the place of registry of the vessel;
- ✚ an estimate of the amount of the claim, and;
- ✚ a description why the claim is enforceable against the vessel.

Documents supporting the allegations are not mandatory, but should ideally be available. A well presented case with available supporting evidence increases the probability of obtaining and maintaining an *ex parte* arrest award. A ship arrest petition is an *ex parte* request to the Court. Usually no oral hearing takes place and the defendant will not be heard. The Ship Owner or any other interested party may, however, apply for a hearing to be held on short notice, if he wishes to dispute that the conditions for obtaining arrest are satisfied. Such a hearing will normally be scheduled within a few days.

If the District Court grants the petition for arrest, the court will issue an arrest order. The decision is usually issued within twenty-four hours after receipt of the petition. The arrest order is then served upon the Master of the vessel by the Bailiff, thus effecting the arrest. The Port Authority and the Pilots Association are also informed, in order to prevent a vessel from fleeing from the arrest. It is not necessary for the petitioner to issue any formal Power of Attorney when instructing legal counsel in The Netherlands in connection with an arrest application. In some jurisdictions such Power of Attorney must be submitted to the court, duly notarized and legalized. This may be a time critical factor when preparing for an arrest. There are no substantial fees payable to the court in connection with an arrest. The petitioner may, at the discretion of the court, be required to post security for wrongful arrest. This is not standing practice, but can sometimes play a role, for example upon request of Owners at a hearing following the

arrest.”

Thus, after the ship has been arrested the ship owner may claim its allegations in respect of arrest or to satisfy the mortgagee’s claim. In first scenario, the parties may appeal this decision (usually, the High Court of Hague) where the Judge will decide their claim (-s) on the very merits of the arguments and evidences provided. The rules governing the claim procedure are set out in the Civil Code of the Netherlands.

Based on the above mentioned, it can be now concluded that the mortgagee would not perform its rights to take possession of the ship, to bring the action for foreclosure, or to execute the arrest of the mortgaged vessel. Simply, because the expenses, which may incur the mortgagee during the procedures to perform said rights, might be even much more higher than the amount of claim itself. Therefore, the author is in opinion that the mortgagee would use its rights only if he really thinks that the amount is maximum closed to the value of the security –vessel. However, whatever claim amount would be, seems, that the mortgagee should go through mentioned above procedures in order to enforce the payment of the debt. Thus, whatever outcome of these proceedings would be, their final step and may be aim, in most cases, is to sell the mortgaged vessel to recover the debt. Therefore, in the light of present discussion, it is essential to look at the mortgagee’s power to sell the vessel at the following chapter.

8.5.5. The right of sale

It has been already pointed out that the mortgagee’s principal remedy in case of default by the owner is to sell the ship. This can be performed whether through its powers of sale under the Mortgage Deed OR through the court sale. Thus, a mortgagee under a registered mortgage enjoys an express statutory power of sale. As an example might be mentioned the Sweet Land’s laws, as country of ship registration¹⁸⁶:

“72. Mortgagee not owner and mortgagee’s power of sale.

¹⁸⁶ Shipping Act 2004 [Sweet Land], Sec. 72;

(2) Subject to subsection (2), every registered mortgagee shall have power, if the mortgage money or any part of it is due, to sell the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money.”

Exactly the same wording can be found under the English law¹⁸⁷. The other issue arise when the mortgagee is not a holder of registered ship mortgage, as it is in present case. In such a case the mortgagee will only have a power of sale if it has a legal mortgage in which title has been transferred to it. Thus, it being implicit that a transfer of title to the mortgagee confers a power of sale even in the absence of an expressed power of sale in the Mortgage Deed. However, such an implied power of sale can only exist where legal title has been transferred to the mortgagee¹⁸⁸. If legal title has not been transferred to the mortgagee and the mortgage has not been executed as a deed, then the mortgagee under unregistered mortgage does not enjoy such a power of sale and therefore must apply to the court for an order for sale.

For purpose of better performance, it is necessary to refer to the expressed power of sale agreed under the Mortgage Deed¹⁸⁹:

“ 6.01. (f) to sell the Ship or any share or interest therein with or without prior notice to the Owner, and with or without the benefit of any charter party, and free from any claim by the Owner (whether in admiralty, in equity, at law or by statute) by public auction or private contract, at such place and upon such terms as the Mortgagee in its absolute discretion may determine, with power to postpone any such sale, and without being answerable for any loss occasioned by such sale or resulting from postponement thereof and with power, where the Mortgagee purchases the Ship, to make payment of the sale price by making an equivalent reduction in the amount of the Outstanding Indebtedness in the manner referred to in Clause 7.01.”

It shall be pointed out that the above quoted to some length extract gives the mortgagee a very broad range of powers if he decides to sell the vessel – with or without prior notice to the owner. Moreover, as above extract implies there shall be discussed the method of sale in the following chapter.

¹⁸⁷ Paragraph 9 of Schedule 1 of the Merchant Shipping Act 1995;

¹⁸⁸ *Re Morrill* (1886) 18 Q. B. D. 222 (C.A.) at pp. 232-235;

¹⁸⁹ Exhibit No. II, Cl. 6.01 (f);

Meanwhile, it is important to notice that in the case of equitable charge the chargee will have no power of sale (even if the charge documents purport to confer such power on the mortgagee). Therefore, the mortgagee will have to apply to the court for an order for sale to enforce its security.

8.5.5.1. Method of sale

Unless there is a restriction in the Mortgage documents, a mortgagee may sell the vessel whether by private sale or by public auction. Thus, a restriction may be imposed on the power of sale, for example, by requiring that any sale shall be by public auction which would be unusual method of sale. Where the mortgagee decides to sell the vessel by private sale/contract, it will instruct a firm of ship brokers to find a buyer. The terms of sale will be agreed subject to contract and the buyer will then pay a deposit. As in ordinary ship sale transactions, when the ship is ready for delivery, the mortgagee will give notice of readiness to the buyer and then deliver possession of the vessel and hand over a bill of sale executed by the mortgagee to the buyer against payment of the balance of purchase price. Following that, the mortgagee shall present to the Registrar of Ships the Bill of sale so that the discharge of mortgage may be recorded, and if new owner wish to re-register ship in other country, the registration of the ship closed¹⁹⁰. However, such a sale will be subject to any prior mortgages and liens ranking in priority to the mortgagee, unless these have been discharged from the proceeds of sale. In English law, it is only maritime liens and statutory liens in respect of which an *in rem* claim has been issued which are enforceable against a vessel after a sale. Thus, if there has not been agreed warranty, the buyer will have a right to an indemnify against the mortgagee for amount eventually claimed by such 3rd parties.

If and when the mortgagee decides to sale the vessel at auction (with or without judicial supervision), ideally, with the right to bid at auction, it shall first “hold” the vessel in its custody. This might be done through the instruments of arrest or actual possession, as discussed above. After the final price is accepted at the auction, the following steps are, usually, the same as ordinary sale of vessel. In this respect, there shall be mentioned advantages and disadvantages of selling the vessel at auction. First, from one side this method has advantages for new owner because a judicial sale will generally give the buyer a clean title to the vessel – free of liens and other encumbrances, a fact that will

¹⁹⁰ G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 146;

no doubt be reflected in the price. A judicial sale will “clear off” all maritime liens and other claims, where on private sell, the new owner and as consequence mortgagee may be challenged by 3rd interested parties. Second, by judicial sale the benefit of removing any requirement for warranty by the mortgagee. Third, it also avoids the possibility of a claim by the owner for damages for breach of the mortgagee’s obligations to obtain, for example, the best price of vessel¹⁹¹.

The disadvantage of judicial sale (court sale) is that the sale price will almost always be less than the open market value of the ship that might be obtained on the private sale¹⁹². However, it is the mortgagee who, based on each situation separately, shall choose the method of selling of the vessel.

The several jurisdictions now accept the concept of “hybrid” sales¹⁹³, which have the advantages of both private and judicial sales. With hybrid sale, the mortgagee is able to find a purchaser (as with private sale) but the sale itself will be carried out through the court and, like a judicial sale, will ensure that the buyer obtains a clean legal title, free of encumbrances, maritime liens and other claims. The main requirement for the sale to be carried out through the court is that the sale price should be the market value of the vessel.

8.5.5.2. Application of proceeds of sale

A key question to resolve in any case involving the realization of a mortgage security is the order in which the proceeds derived from the sale of vessel are to be applied, and the identity of those who are entitled to participate in distribution that is to be made. The mortgage documents will, usually, set out the order of application of proceeds of sale¹⁹⁴.

The normal contractual order for the application of the proceeds of sale of vessel by a mortgagee is as follows¹⁹⁵:

- First, the mortgagee will have to pay, as it was mentioned already, any prior mortgages, any maritime liens and possessory liens and any statutory liens in

¹⁹¹ S. Harwood, “Shipping Finance”, at pp. 128-129;

¹⁹² G. Bowtle and K. McGuinness “The law of ship mortgages”, LLP, 2001, at p. 152;

¹⁹³ S. Harwood, “Shipping Finance”, at pp. 128-130;

¹⁹⁴ In case the mortgage documents does not provide such order, then in England, statutes – Section 105 of the Law of Property Act 1925;

¹⁹⁵ G. Bowtle and K. McGuinness “The law of ship mortgages”, p. 149;

respect of which an in rem claim has been issued¹⁹⁶. For example, the crew wages, etc.

- Second, the mortgagee will apply the balance in payment of the costs of the sale to the extent these have not already been paid. The mortgagee will then apply the fund in payment of the interest and principal amount due under the mortgage and all other amounts payable to mortgagee on behalf of the owner (e.g. insurance premiums, etc.)
- Third, the balance payable to the owner.

¹⁹⁶ *The "Monica S"* [1967] 2 Lloyd's Rep. 113 (Adm); If the Arrest Convention 1999 is ratified and incorporated then this position may change;

Conclusion

Taking into consideration the above researches, the author comes to the following conclusions.

There is reliable and harmonized system of financing of vessels purchasing with instrument of mortgages has established in the shipping business as a result of its development during last two centuries. This system consists of the International Conventions and National Statutes protecting the rights of lender, and provides security realization mechanisms in case of occurrence of events of default by debtor. However, as the creditor's main task is to prevent the occurrence of the default by the debtor and receive the full re-payment of the loan amount together with interest therefrom, as the Loan Agreement prescribes it. The security mechanism of mortgaged object (vessel) does not give a guarantee that the principal loan amount will be paid in full, due to the possible sharp fluctuations in the market value of the mortgaged vessel.

The default of companies occurs, mostly, when there is a crisis in economy and as a result together with market usually falls also the market price of the vessel. Therefore, the creditor has two following purposes and tasks. First task, is to minimize the default risks and so that, ideally, to make risks null. This might be performed through the regular monitoring and control of financial conditions of debtor's company. Accordingly, such creditor's rights shall be incorporated into the Loan Agreement. Thus, the provisions of the Loan Agreement shall list the mandatory financial documents and forms of financial reports which debtor is obligated regularly to present to the creditor during the all time of Loan Agreement. From author's point of view, in order to minimize the risks of default, the provisions of Loan Agreement shall also include the creditor's right to interfere in to the ship's management, if the indexes of financial reports would not match with those agreed under the contract. In author's opinion, there are some practical methods of lenders control - the financial transactions connected with the mortgaged object – vessel, shall be performed through the accounts of creditor, creditor's right to nominate the management company which will operate and maintain the vessel to be agreed in the loan agreement, the long-term employment of the mortgaged vessel such as, for example, the long-term time charter with first class charterers at the rate allowing for debtor the reliable re-payment of the loan amount to be concluded by ship owner.

The second aim for the lender to be establishing of the additional security against possible losses due to falling down of market value of the mortgaged vessel. This additional security instruments (additional to mortgage) insure the creditor in situations when the market value of the vessel has fallen below the unpaid debit. As the additional security instruments might be – deposit (for such sum allowing to continue payment of the loan for 3-6 months), additional movable or immovable property mortgaged for benefit of creditor (such kind of mortgages shall be attached to the principal loan agreement). As an option, there might be agreed with creditor such additional security instruments as - shares, bonds, obligations and other financial instruments used in ordinary course of business on market. In case the lender finances several vessels by opening of credit line, the cross-default provision has to be agreed in the loan agreement. The private and corporate guarantees issued by borrower in favour of lender are also to be considered. The best solution for lender and borrower to use and incorporate maximum of above mentioned security instruments in the Loan Agreement. This would give to the lender the possibility to choose the right one, which will be the most effective in each particular situation.

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- ✚ <http://eur-lex.europa.eu>