

Ship Finance 2021

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Ship Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China and Russia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Lawrence Rutkowski of Seward & Kissel LLP, for his continued assistance with this volume.



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Panama

Jorge Loaiza III

Arias, Fábrega & Fábrega

DUE DILIGENCE

Demonstrating title or legal ownership

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

Ownership documents must be registered at the Public Registry of Vessels (PRV) of the Panama Maritime Authority in order to become effective in relation to third parties. A certificate from the PRV is the usual document used to show ownership.

Liens

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

As with ownership documents, recordable liens – mostly naval mortgages – must also be registered at the PRV, and thus a search of the PRV would be the means of determining whether there are any liens recorded over a vessel.

- 3 How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

Apart from mortgages, court orders from the Panamanian courts or a promise to sell, there would be no direct means of ascertaining the existence of such other obligations.

Public registry searches

- 4 Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

The Panama Public Registry Office (PPR) is the public office where corporate entities must be recorded to acquire their legal status with regard to third parties and where searches can be made for such purposes.

- 5 Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

Generally, the identity of and powers that may be granted to the directors and officers under a company's articles of incorporation or amendments could be ascertained by searching the PPR. General powers of attorney that are recordable could also evidence the authorised signatories.

The shareholders or similar interest holders and other authorised, but non-recorded authorisations, would have to be verified by inspecting the share register or minute books, respectively, which are private in nature and would require a judicial order to be disclosed in the case of corporations. In relation to limited liability companies, the partners would be evidenced on records at the PPR.

Debt obligation

- 6 What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

Generally, subject to what the articles of incorporation may provide (and which must be recorded at the PPR), the board of directors or similar body of the entity would have to provide for such authorisation. This is without prejudice to any broad or general powers of attorney granted in favour of a third party or members of the board or officers, or similar parties within the governing bodies of the company or entity; and that, in the case of obligations of third parties, the shareholders' consent may be required.

Obligations of foreign lenders

- 7 Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

Not necessarily; in particular, if the funds are to be used outside Panama for companies or other entities or persons not residing or carrying out business in Panama.

REPAYMENT

Central bank and regulatory approval

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

There is no central bank and there are no currency exchange controls per se in Panama, and the US dollar is legal tender. Most international commercial transactions are made in US dollars.

Usury laws

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

Law 5 of 1933 (Law 5) and Law 4 of 1935 (Law 4) set out certain limits on the maximum level of interest chargeable. However, pursuant to article

223A of the Code of Commerce of Panama, interest on transactions perfected, consummated or with effects outside Panama is expressly excluded from the application of such limits. Further, Law 4 has also been abrogated in relation to onshore transactions and the same may be argued with respect to Law 5.

In any case, however, a maximum of 2 per cent per month exists pursuant to a decree of the National Banking Commission, and interest above that could be deemed usury as a matter of public policy. Therefore, it is arguable that a local court enforcing a foreign judgment obtained against a Panamanian corporation may limit the scope of the judgment if it involves interest payable at a higher monthly rate than 2 per cent.

Withholding taxes

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

Generally not, but it is also a matter of determining whether the proceeds have been used to generate taxable income in Panama.

REGISTRATION OF VESSELS

Eligibility for registration

11 | What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?

The definition of 'vessel' is broad, and offshore drilling rigs, mobile offshore drilling units and other offshore structures, such as floating production, storage and offloading units and mobile offshore drilling units, may be registered. Law 57 of 2008 provides the following definition of a vessel:

Any vessel engaged in the transportation of cargo or persons; pontoons, dredgers, floating docks, oil drilling platforms or any other hulls engaged in or which may engage in maritime trade, as well as any other structure recognised as a vessel by the Panama Maritime Authority.

The effect of the registration is to allow the vessel to fly the Panamanian flag and to grant it the protection of rights under the laws of Panama, as provided in Law 57 of 2008.

12 | Who may register a vessel in your jurisdiction?

Pursuant to article 3 of Law 57 of 2008, regardless of nationality and provided the prescribed formalities and requirements are complied with, any individual, corporate entity or a combination of these may register a vessel.

Registry for international shipping operations

13 | Is there an alternate registry for international shipping operations?

No. The Panama Maritime Authority's Directorate General of Merchant Marine (Digemar) maintains a single register regardless of the place of operation or nationality of the owners of a vessel. Vessels are classified as engaged in either coastal or internal service; or international service, which includes vessels that do not operate in Panamanian ports or territorial waters.

There are also special categories within the register, such as temporary registration, dual registration for vessels under bareboat charter and pleasure boats.

SHIP MORTGAGES AND OTHER LIENS OVER VESSELS

Types of ship mortgage

14 | What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?

Under Panamanian law the naval mortgage may secure any type of obligation, be it an existing, simple, conditional, contingent or even future obligation. For example, unadvanced tranches, rotating credit facilities, obligations subject to alternative currency or multi-currency clauses and other types of complex financing may generally be secured without the need to execute or register supplementary deeds when the conditions occur or the future obligation is perfected.

In addition, from a Panamanian law perspective the naval mortgage can secure obligations of third parties (ie, other than those of the owner).

The law contemplates mortgage agreements; this implies the execution of an agreement by both parties.

When drafting a mortgage agreement, lawyers will incorporate provisions relating to the operation of the vessel as regards the intent contained in the financing documentation, as well as other matters relating to the legality and proper operation of the vessel and any special remedies availing to the mortgagee under Panamanian law.

Required form

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

The law provides for the following essential requirements (article 260 of Law 55 of 2008), which include:

- the names and domiciles of the mortgagor and mortgagee;
- the fixed or maximum amount of the principal or of the obligation secured;
- the dates of payment of principal or of compliance of the obligations secured, and of interest, or the method to determine such dates, except when the obligation secured is payable on demand or is a conditional or future obligation;
- if subject to interest, the agreed rate or the method for computing the same must be stated. The rate may be stated with reference to a specific market, costs of funding, fluctuating elements or floating formulas; and
- a description of the mortgaged vessel, in the terms of its registry certificate or licence number, radio call signs (if assigned), register tonnages (gross and net) and measurements (length, width and depth).

Registration of mortgages

16 | Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

The Public Registry of Vessels is the organisation with which ownership documents and naval mortgages, as well as their cancellation, amendment or assignment and other recordable encumbrances can be registered.

Registration has the effect of making the document effective in relation to third parties (ie, rights or obligations are owed toward all).

17 | Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

The law requires that the mortgage states the fixed or maximum amount of the principal or of the obligation secured.

It is not necessary to attach the debt instrument, but the mortgage must provide for the terms required under article 260 of Law 55.

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

The party named as the mortgagee in the mortgage would be deemed to have the rights to enforce the mortgage in respect of the obligations secured.

The concept of obligations in favour of a group in solidum secured by a naval mortgage could also be deemed subject to the agreement or legal relationship between the creditors or lenders under such an obligation. Therefore, when an agent, security agent or security trustee is so appointed and then enters the mortgage agreement, the underlying relationship, even if subject to foreign law, should be accepted in respect of the actions that would be carried out by the mortgagee, but maintaining the rights of the mortgagee as exclusive in respect to other creditors or lenders who are not. While the rights of the mortgagee would be deemed in rem against the vessel, those of the other creditors or lenders would be deemed in personam against the mortgagee. In other words, while the rights of the mortgagee would be in accordance with Panamanian law with regard to the mortgage, the relationship of agency or security trust between the mortgagee and the other creditors or lenders would be deemed as ruled under the laws that are chosen to govern such relationships among them and to determine the rights and obligations that arise between them in respect to, for instance, the proceeds from the enforcement of the mortgage.

Filings on transfer

19 | If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?

Generally, and depending on the drafting of the mortgage as to such changes, a change in lender who is not the mortgagee could be made without further filings, so long as the obligation secured subsists notwithstanding the change.

20 | If the mortgagee transfers its interest to a new lender, agent or trustee what filings are required? Is the mortgagor's consent required?

An assignment of mortgage must be in writing, and to be effective against third parties must also be registered.

The consent of the mortgagor would be required if the mortgage agreement so provides.

Maritime liens

21 | What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?

Under Panamanian law, a vessel is subject to arrest as an asset of the owner, for debts or for enforcement of maritime liens. Under article 244 of Law 55, the following are listed as maritime liens against vessels:

The following maritime credits shall enjoy a lien against the vessel and shall concur in respect to its price in the order of preference expressed in this article, to wit:

1. *Judicial costs incurred in the common interest of maritime creditors.*
2. *Expenses, indemnities and wages for aid and salvage.*
3. *Wages, compensations and indemnities of the master and crew members.*
4. *The naval mortgage.*
5. *Amounts due to the Panamanian government for the annual tax and rates of the vessel.*
6. *Wages and stipends due to stevedores and other wharfmen engaged directly by the owner, operator or master of the vessel for the loading and unloading of the vessel.*
7. *Compensation for damages caused by fault or negligence.*
8. *Contributions to general average.*
9. *Amounts due on obligations incurred for the necessities and supplies of the vessel.*
10. *Amounts taken in bottomry over the hull of the vessel and its apparel for supplies, equipment and tackle if the contract were entered into and executed prior to departure of the vessel from the port where such obligations were contracted; and the insurance premiums.*
11. *Wages of pilots and watchmen and expenses of conservation and custody of the vessel, its apparel and supplies.*
12. *Indemnities due to shippers and passengers for failure to deliver the cargo or effects loaded or for damage thereto, attributable to the master or crew.*
13. *The price of the last acquisition of the vessel and interest due.*

22 | What maritime liens rank higher than a mortgage lien?

Law 55 provides that the following liens rank higher than a mortgage lien:

- judicial costs incurred in the common interest of maritime creditors;
- expenses, indemnities and wages for aid and salvage; and
- wages, compensations and indemnities of the master and crew members.

Non-mortgage liens

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

Under certain circumstances a promise of sale can be recorded as a limitation to the right to sell.

There are no other express recordable liens (per se) in the law.

'Foreign' flag vessels

24 | Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?

Generally, a foreign mortgage would be registered against a vessel of foreign registry. The Code of Maritime Procedure (Law 8 of 1982) provides for special proceedings for enforcement of mortgages, and the procedure is similar for vessels of Panamanian and foreign registry.

Enforcement of mortgages

- 25 | What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?

The procedure includes arrest of the vessel, filing a complaint together with the petition for arrest and evidence regarding the registration of the mortgage and amount overdue for the purposes of enforcement.

An interlocutory sale would be available if the complaint is not answered in a timely fashion (ie, within 30 days of the arrest, which would have the effect of notification of the complaint) and where the vessel is deemed abandoned or that it may be lost if not promptly sold. On average, the process of judicial sale takes between three and six months.

Costs for the arrest are calculated depending on the area in which the vessel is kept while being arrested. The plaintiff would bear such costs of maintenance, which would be requested from time to time by the court's marshal. Upon requesting the arrest, a liability bond of \$1,000 and initial marshal's costs would have to be posted with the court.

Sale by mortgagee

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

It is possible to agree in a naval mortgage that the mortgagee may sell the vessel out of court in the case of default. Such sale would only extinguish the mortgage lien under which it was made.

Default under mortgage

- 27 | Will the courts of your jurisdiction enforce mortgage provisions stipulating the appointment of a receiver on default under the mortgage?

Panamanian courts may have to assess whether the appointment of a receiver would be compatible with an enforcement per se of the mortgage, since by law the marshal would be deemed as depository of the vessel, which for purposes of enforcement of the mortgage would have to be, in principle, arrested by the court before which enforcement is being sought, to begin with. The law provides that a third party, at the request of the marshal, may be appointed as depository of the asset subject to arrest.

Limitations on rights of self-help

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

Panamanian law provides for ample powers that could be granted in the mortgage. Limitations would be mostly for liability caused by wilful misconduct or reckless disregard, which would not be deemed waived by contract.

Duties to owner or third-party creditors

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

If the mortgagee were to take possession of the vessel or exercise rights to sell the vessel out of court proceedings, the mortgagee would be deemed liable to the owner to the extent that the same has not been excluded in the mortgage (except for wilful misconduct or reckless disregard) and under general rules of liability for damages caused to third parties, including creditors, if the vessel is deemed affected in

its value in relation to such creditors and in detriment of their potential claims.

In the event of a non-judicial sale, if such powers are allowed in the mortgage, the law provides that the mortgagee would have to notify the owner and any other registered mortgagees of its intention to so sell the vessel.

COLLATERAL

Finance leases

- 30 | May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?

Financial leases may be recorded and there is a special law for this type of contract.

- 31 | May finance leases be recharacterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

Commercial law principles provide that in determining the nature of a commercial contract the intent of the parties shall prevail.

It is, therefore, advisable to draft relevant contracts on a case-by-case basis with proper assurances to prevent possible challenges, depending on the type of operation of the vessel in question.

Security interests

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

Such security interests would be created and perfected pursuant to an assignment agreement. Panamanian law requires further that the debtor be notified.

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

The enforcement of security interests arising against a vessel under the law or contract, other than those arising from per se security instruments and that are not eligible for registration, would have to be claimed before a court of law in connection with a debt of the owner or otherwise arising from applicable laws.

- 34 | How is a security interest over a deposit account established? How is a security interest perfected?

This would have to be effected through a pledge agreement and, in principle, a depository, which could be the pledgee, appointed to keep control of the pledged account.

General rules for pledges are contained in the Code of Commerce and the Civil Code.

On the other hand, pursuant to Law 129 of 2013, the requirements for mortgages over movable or chattel property, including cash, are more flexible, which would, in principle, allow the mortgagor the use of the asset subject to the mortgage. Thus, it may also be a matter of practicality to ensure an efficient security instrument in relation to cash deposits.

- 35 | How are security interests in non-vessel collateral enforced?

By suing the owner or grantor and attaching assets of its property.

Share pledges

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

This would have to be created through a pledge agreement and, in principle, a depository, which could be the pledgee, appointed to keep control the pledged shares.

This kind of security is commonly seen in financings, and how the pledgor may exercise certain rights over the shares may be regulated in the pledge agreement. To that end, it is recommended practice that the officers and directors of the corresponding corporation keep a copy of the pledge agreement and make relevant notations in the share register of the corporation as appropriate.

37 | Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

In principle, no such risk would exist other than if the pledged shares have been issued partially unpaid (when possible) or have been subject to another type of security affecting the shares. Generally, a pledge asset would be excluded from a concursus in favour of the pledgee.

TAX CONSIDERATIONS FOR VESSEL OWNERS

Domestic taxation

38 | Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?

The Panamanian tax system is territorial. Accordingly, the income from owners of vessels engaged in international trade is not subject to income tax. Likewise, for income derived from coastal trade, income tax shall apply. The flat rate (subject to alternative calculation depending on the income) would be 25 per cent.

Tonnage tax

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

In the case of vessels registered as being engaged in international trade, the registration charge and annual tax and other similar rates are calculated on the bases of the gross and net tonnages and the type of vessel. However, we would not consider this as an alternative to income tax.

Tax incentives

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

There are no tax incentives per se. The income tax applicable depends on the place of operation. There are special reductions in the registration charge and annual tonnage tax and rates for vessels that are:

- new builds;
- less than five years old;
- registered as part of a group or an already registered group; and
- have no record of port state control detentions.

Other tax provisions

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

Panama has special petroleum free trade zones created by law, which will apply to vessels engaged in such operations.

INSOLVENCY AND RESTRUCTURING

General scheme of reorganisation or insolvency administration

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

Yes. Pursuant to Law 12 of 2016 (Law 12) effective as of 2 January 2017, a new regime of reorganisation and insolvency rules replaced the former bankruptcy provisions of the Code of Commerce.

Foreign court rulings

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

Generally, there are provisions in Law 12 to cooperate with and assist in foreign insolvency proceedings.

Model Law on Cross-Border Insolvency

44 | Has your jurisdiction adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law?

Law 12 takes into consideration cross-border insolvency and provides for certain rules to unify the process. Likewise, Law 51 of 2015 (Law 51) provides for certain conflict of law rules to determine the relevant forum, although this still refers to bankruptcy.

Order of priority

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

Secured obligations would be preferred, and other obligations that can be classified by date, under a public deed, final court or arbitral judgment or a private instrument certified by notary, would be paid in a creditors' reorganisation or liquidation concursus in preference to all other unsecured obligations, ranking among themselves in the order of their dates, with the oldest in preference to the more recent.

Security provision by vessel owner

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

Panamanian law provides that a mortgage may be granted to secure the obligations of third parties.

As part of the enforceability of the mortgage, the mortgagee would have to provide evidence of the secured obligation being defaulted.

Law of fraudulent transfer

47 | Is there a law of fraudulent transfer that permits a third-party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

The law provides certain circumstances in which a mortgage granted to cover existing debts, so as to give the secured creditor preference over other existing or subsequent obligations, may be disregarded.

Petitions by creditors

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

Law 12 and the Code of Civil Procedure provide for the rights of a creditor to request insolvency and further liquidation, without prejudice to a possible reorganisation process. For such purposes, the creditor would have to prove that the credit is overdue on the corresponding debt agreement or, otherwise, prove the failure of the debtor to fulfil its obligations under the debt agreement.

Model Netting Act

- 49 | Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)? If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

The Model Netting Act has not been adopted. Any netting rights or similar claims corresponding to unsecured creditors in respect to debtors in reorganisation, insolvency or liquidation proceedings would have to be approved before the competent court trying the same.

Otherwise, claims under an ISDA master agreement could be included as part of the obligations secured under a naval mortgage and be claimed in rem against the vessel.

UPDATE AND TRENDS**Current developments**

- 50 | Are there any emerging trends or hot topics that may affect shipping finance law and regulation in your jurisdiction in the foreseeable future?

There are no updates at this time.

Coronavirus

- 51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There has been a comprehensive review of health measures and safeguard regulations since the start of the pandemic. These cover all aspects and laws, both in the public and private sector.

Special powers have been given to the Ministry of Health, which has a preponderant role when it comes to dictating policies that cover not only health, but economic decision-taking and legislating, both at the Executive and Legislative Branches.

The variations have been continuous and changing constantly in accordance with the circumstances. This includes working hours of businesses, including local banks and of other financial institutions as well as the Panama Maritime Authority, ports and airports, but keeping the essential services to the international community and trade at almost full capacity.

Procedures have been adopted to facilitate transactions and the Panama Maritime Authority, more particularly electronic issuance of documents and filings, which have made the same even more efficient than pre-pandemic.

Likewise, regulations have been in place to facilitate repatriation of seafarers, for instance.



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There have also been special arrangements and moratoriums on tax, leasing laws and fiscal filings, as well as regulations allowing arrangements between banks and other financial institutions with their clients, to assist in the suspension of payments of principal or interest, or both, to attempt to halt the deterioration in the economy and the loss of jobs and reductions in salaries, which have greatly affected the stability of the people in general.

As to best practices, we can recommend to procure, as possible, the implementation of mechanisms that can avoid much physician interaction and to seek more efficient procedures in the realisation of business activities, always in accordance with the safety parameters that are being adopted from time to time as to have a better overall economic recovery.

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