

# WHO IS TO BE SERVED FIRST: BANK OR CHARTERER?

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# Mortgage

Main features:

- proprietary interest in the vessel
- registration

- Registration

- The International Convention on Maritime Liens and Mortgages 1993- *„to improve conditions for ship financing”*

*„The law of the State of registration shall be determinative for the purpose of recognition of registered mortgages...and registrable charges”*

- *„...mortgages effected and registered in accordance with the law of the State in which the vessel is registered.”*

- Standard wording: Mortgage shall be governed by, and construed in accordance with, the laws of „*State of registration*”.

# Charter/bareboat charter

Main features:

- equitable jurisdiction-contract
- Bareboat charter: *“During the charter period the vessel shall be in the full possession and at the absolute disposal for all purposes of the Charterers and under their complete control in every respect.”* (BIMCO Barecon 2001)

# Defaults

- Defaults and parties' rights under the mortgage are governed by the law of the „*State of registration* (Art. 16 (a) of the Convention), regardless of bareboat charter registration in a different registry.
- Defaults and parties' rights under the bareboat charter are governed by the law of the bareboat charter agreement.

# Cont'

## Typical mortgagor's (shipowner's) defaults under mortgage

- non-payment
- inability to perform
- breach of covenants
- impairment of bank's security
- exposing of the vessel to maritime claims

# Cont'

## Typical defaults under charter/bareboat charter

- shipowner's default: delay in delivery; depriving charterer from the use of the vessel
- charterer's default: non-payment of hire; breach of trading restrictions and insurances; breach of duty to maintain and repair the vessel



# Rights and remedies

- Mortgagee's rights and remedies arising from mortgage agreement and governed by State of registration:
  - arrest, possession and sale of vessel
- Charterer's rights and remedies arising from charter/ bareboat charter agreement and governed by the law chosen by the parties:
  - termination of charter, damages

# Who is going to be served first?

Mortgagee's and charterer's actions in case of shipowner's/charterer's default

# Law

## Applicable laws:

- laws of the vessel's flag;
- International UN Convention on maritime liens and mortgages 1993;
- lex fori (enforcement)
- civil law/common law (dispossession/in rem proceedings against the vessel, sale)

A Chancery & Common Law  
Mixture.



# Mortgagee's interference

Whether the mortgagee entitled to interfere with the performance of a charterparty?

# The „Myrto”

- The “Myrto” [1977] 2 Lloyds Rep. 243, (“the relevant English authority on this area of law”)
  - whether the contract impairs the mortgagee's security?
  - whether the mortgagor is impecunious or willing and able to perform the contract?

# Con't

- Justice Brandon decision has become "the general rule (under English law)": where the shipowner makes a contract with a third party for the employment of the mortgaged vessel; and (i) the contract does not impair the mortgagee's security; and (ii) the shipowner is willing and able to perform the contract; then the mortgagee is not entitled, by exercising its rights under the mortgage (e.g. by arresting the vessel), to interfere with the performance of such contract".

# Older cases/knowledge

- charter made before the mortgage

*De Mattos -v- Gibson (1858)*- no knowledge of charter, mortgagee free to act.

- charter made after the mortgage

*Collins -v- Lamport (1864)* - mortgagee not entitled to interfere with a charterparty made after the mortgage unless a threat to the mortgagee's security.



# Charterer's remedies

Charterer's remedies in case of mortgagee's wrongful actions (tort): injunction; court order for the release of the vessel; damages.

Tort: bank's interference must be without lawful justification or by unlawful means.

# Safety nets

- Knowledge/notice
- Priority agreement

THANK YOU!