

SHIP FINANCE

Marshall Islands



Ship Finance

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Quick reference guide enabling side-by-side comparison of local insights into ship finance issues, including in each jurisdiction due diligence; repayment; registration of vessels; ship mortgages and other liens over vessels; collateral; tax considerations for vessel owners; insolvency and restructuring considerations; and recent trends.

Generated 10 August 2023

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DUE DILIGENCE

Demonstrating title or legal ownership

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

Marshall Islands law establishes the requirements for a vessel owner to demonstrate and affirm the facts of direct ownership of a vessel coming into the Marshall Islands flag. Although these requirements do not address ultimate or intermediate tiers of ownership, such as identification of parent entities in ownership structures, amendments to the Marshall Islands Associations Law that became effective in November 2017 require all Marshall Islands corporations, partnerships, limited partnerships and limited liability companies that are not publicly traded to maintain records of their ultimate beneficial ownership, and if they are non-resident domestic entities, to produce these records if requested by certain Marshall Islands authorities (eg, the Business Corporations Act (BCA), section 80, as to corporations, and the Limited Liability Company Act, section 22, as to limited liability companies). The same amendments require domestic Marshall Islands corporations that have issued bearer shares to record the ultimate beneficial ownership of such bearer shares with the registered agent for non-resident domestic entities for such bearer shares to maintain their validity (BCA, section 80(3)(c)).

To register a vessel in the Marshall Islands, the owner must 'furnish proof satisfactory to' the Commissioner or any Deputy Commissioner of Maritime Affairs demonstrating, among other things, the ownership of the vessel (the Documentation and Identification of Vessels Act, section 208). Section 209(1) of the Documentation and Identification of Vessels Act requires that a written oath by sworn affidavit be submitted by an owner or owner's authorised representative for registration 'declaring [. . .] the name and residence of any other owner and his citizenship, each owner's proportion, and the name of the affiant and his citizenship'.

Whenever a vessel operating under the Marshall Islands flag is sold or transferred, section 225(1) of the Documentation and Identification of Vessels Act requires that the sale or transfer be evidenced 'by a written instrument in the nature of a bill of sale to which is attached a true copy of the vessel's latest Certificate of Registry'. For registration of a newbuilding, the registrant must provide a builder's certificate from the shipbuilder, certifying, among other things, that the builder constructed or directed the construction of the vessel, the person for whom it was built and the date of delivery (see the Documentation and Identification of Vessels Act, section 226).

Law stated - 31 March 2023

Liens

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

The only maritime liens that can be recorded against a vessel in the Marshall Islands registry are preferred mortgage liens, which can be found by searching the record, or more practically, by requesting a certificate of ownership and encumbrance with respect to the vessel from the office of the Deputy Commissioner of Maritime Affairs. Marshall Islands law does not provide a vehicle for the registration of other maritime liens.

Law stated - 31 March 2023

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?

One can determine whether there are any preferred mortgage liens registered against a specific vessel by searching the record, or more practically, by requesting a certificate of ownership and encumbrance from the office of the Deputy Commissioner of Maritime Affairs. A lien or charge against a vessel arising from something other than a preferred mortgage need not be filed under Marshall Islands law. There is no filing office for such liens to be registered or recorded. Security interests, liens, charges or other encumbrances may be granted by an owner or disponent owner over charter hire, freights and other earnings of a vessel or other collateral, such as stock and other ownership interests, as credit support in a ship finance transaction. These are usually recorded in the domicile of the assignor or pledgor, for example, as charges registered in the assignor or pledgor's company register or as financing statements filed under the Uniform Commercial Code in the United States.

Law stated - 31 March 2023

Public registry searches

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 obligor's due organisation can be determined by reviewing certified copies of its organisational documents and company records, including, for example, its certificate and articles of incorporation and by-laws, in the case of a corporation, and its certificate of formation, in the case of a limited liability company. The obligor's good standing can be determined by obtaining a certificate of goodstanding as to the obligor from the Trust Company of the Marshall Islands, Inc, through International Registries, Inc.

Law stated - 31 March 2023

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?

Marshall Islands law does not require the identities of equity interest holders, directors, officers or authorised signatories to be disclosed in a public registry. In ship finance transactions, this information is often made available in officer's certificates. Additional information and supporting documentation are often required to be disclosed in ship finance transactions, including, in the case of corporations, share transfer ledgers, shareholder resolutions electing directors, and board resolutions appointing officers.

Law stated - 31 March 2023

Debt obligation

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?

Each Marshall Islands corporation is empowered to guarantee the obligations of others unless specifically limited in the BCA or in the articles of incorporation of the corporation (BCA, section 15(g)) provided the guarantee is in furtherance of its corporate purposes. If that is not the case, or to avoid the 'corporate purposes' issue entirely, section 16 of the BCA allows a corporation to issue a guarantee, regardless of whether it is in furtherance of its corporate purposes, by obtaining the affirmative vote of the holders of a majority of the corporation's outstanding shares at a

shareholders' meeting, the written consent of all shareholders, or if the corporation's articles of incorporation so provide, the written consent of the holders of a majority of the corporation's outstanding shares (see BCA, sections 16 and 67). The same procedure can be used to authorise the corporation to secure the guarantee with a grant of a security interest in corporate property (see BCA, sections 16 and 67).

Law stated - 31 March 2023

Obligations of foreign lenders

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?

There is no requirement that a foreign lender qualify to do business in the Marshall Islands to extend credit to Marshall Islands persons in respect of vessels registered under the Documentation and Identification of Vessels Act. Lenders seeking to make loans internally in the territory of the Marshall Islands must comply with local laws affecting banks and other business operations.

Law stated - 31 March 2023

REPAYMENT

Central bank and regulatory approval

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

There is no such requirement in Marshall Islands law with respect to non-resident domestic borrowers repaying loans outside the Marshall Islands. Section 310 of the Preferred Ship Mortgage and Maritime Liens Act permits obligations secured by a preferred mortgage to be denominated in any unit or units of account or currency as the parties may agree.

Law stated - 31 March 2023

Usury laws

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

Section 312 of the Preferred Ship Mortgage and Maritime Liens Act specifically provides that 'a Preferred Mortgage may secure such interest, including interest on interest, on an obligation secured by the mortgage as the parties may agree'. This provision is based on a similar provision in the US Commercial Instruments and Maritime Liens Act. See 46 USC section 31322(b). Bearing in mind that few Marshall Islands-flagged vessels in foreign trade are arrested and foreclosed upon in the Marshall Islands, it will generally fall to the jurisdiction in which a vessel is arrested to foreclose a preferred mortgage to determine whether section 312 would be enforceable or against public policy in the place of arrest. We know of no reported cases in which a court has upheld a usury defence in the face of provisions such as section 312 of the Preferred Ship Mortgage and Maritime Liens Act.

Law stated - 31 March 2023

Withholding taxes

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

There are no withholding taxes imposed by the Marshall Islands on the repayment of principal or the payment of interest to non-resident lenders. This is not surprising, as most, if not all, non-resident domestic corporate income is exempt from income tax (see the Business Corporations Act, section 12).

Law stated - 31 March 2023

REGISTRATION OF VESSELS

Eligibility for registration

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?

Pursuant to the Domestic Water Crafts Act 1992, as amended, the Marshall Islands has one registry for vessels operated exclusively within Marshall Islands waters. Vessel documentation for seagoing vessels engaged in foreign trade is done through Part I of the Documentation and Identification of Vessels Act. This registry is considered an open registry, sometimes referred to as a flag of convenience.

Section 203 of the Documentation and Identification of Vessels Act sets out minimum threshold requirements for registration under the Act. Any seagoing vessel engaged in foreign trade is eligible, as are decked commercial fishing vessels of at least 24 metres in length, commercial yachts of at least 24 metres and private yachts of at least 12 metres. Additionally, there is a maximum vessel age limit of 20 years (see section 203(e)), which can be waived under certain conditions. Section 203 also permits the registration of vessels under construction, provided the registrant has title to the vessel under construction and there is no restriction against such registration in the jurisdiction in which the vessel is being built.

The Maritime Act does not define the term 'vessel'. Instead, section 113 of the Maritime Administration Act contains a provision that adopts the non-statutory general maritime law of the United States as the general maritime law of the Marshall Islands to the extent that it does not conflict with any other provision of Marshall Islands law. The term 'vessel' in United States maritime law, once a part of the general maritime law of the United States, was codified in the mid-19th century, so that the United States statutory definition of 'vessel' may be useful or even persuasive, but is not a definite part of Marshall Islands law. Mobile offshore drilling units have been registered as vessels under the Documentation and Identification of Vessels Act.

Law stated - 31 March 2023

Who may register a vessel in your jurisdiction?

Under section 203 of the Documentation and Identification of Vessels Act, a vessel may be documented if owned by a citizen or national of the Marshall Islands or by a foreign maritime entity qualified in the Marshall Islands. Entities formed under the Associations Law (including the Business Corporations Act (BCA)) are considered nationals. Qualification as a registered foreign maritime entity is achieved under Division 13 of the BCA. These provisions allow foreign entities, otherwise empowered under their home jurisdictions to own vessels, to apply for the registration of, register and then document Marshall Islands-flagged vessels. Section 119(2) of the BCA and its implementing Maritime Regulations require applicants to state, among other things, the nature and powers of the applicant, the

address of its principal place of business and the names and addresses of its management. As a practical matter, the threshold for qualification is not significant and numerous Marshall Islands vessels are documented in the names of qualified foreign maritime entities.

Law stated - 31 March 2023

Registry for international shipping operations

Is there an alternate registry for international shipping operations?

The dominant registry in the Marshall Islands is the open international registry. The Documentation and Identification of Vessels Act governs the registration and mortgaging of vessels in foreign trade. This registry dwarfs the purely domestic vessel registry in the Marshall Islands, which is regulated by the Domestic Water Crafts Act 1992, as amended. The international registry requires that the owner of a Marshall Islands vessel be a Marshall Islands citizen, national or qualified foreign maritime entity (the Documentation and Identification of Vessels Act, section 203), but imposes no citizenship requirements on the ownership of such an entity.

Law stated - 31 March 2023

SHIP MORTGAGES AND OTHER LIENS OVER VESSELS

Types of ship mortgage

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?

The Marshall Islands follows the American model of ship mortgages, unifying the essential features of a mortgage grant with covenants, representations, warranties, events of default and other provisions. While there are requirements to establish a preferred mortgage, there is no required form as such. A Marshall Islands preferred mortgage is flexible enough to secure any obligation of the mortgagor debtor. A preferred mortgage may secure a term loan, future advances and contingent obligations, including guaranties, swap obligations and other obligations, under present commitments or agreements (the Preferred Ship Mortgage and Maritime Liens Act, section 309).

Under the financing charter provisions enacted in the Marshall Islands in March 2013, the Marshall Islands registry became the first registry to permit the registered owner in a financing charter to record the financing charter as a type of preferred mortgage. These provisions, as further amended, allow the registered owner, typically a financial institution or affiliate, to hold title and be deemed a preferred mortgagee up to 'the maximum aggregate of the nominal amount of all charter hire payments, termination payments, and purchase or put option amounts which could under any circumstances be due and payable under such financing charter, exclusive of any interest, indemnities, expenses, or fees' (the Preferred Ship Mortgage and Maritime Liens Act, section 302A).

Section 302A of the Preferred Ship Mortgage and Maritime Liens Act permits financing structures similar to those used for aircraft and railcar net lease financing. As of December 31, 2022, the Marshall Islands had recorded 257 financing charters as preferred mortgages pursuant to these provisions.

Law stated - 31 March 2023

Required form

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

There is no required form of Marshall Islands preferred mortgage, as such. Marshall Islands mortgages follow the

American model, similar in some respects to what a red-ensign system might include in a deed of covenants. There are, however, elements that must be included in a Marshall Islands mortgage for it to be deemed a 'preferred mortgage.' These elements are more particularly described in the Preferred Ship Mortgage and Maritime Liens Act.

Law stated - 31 March 2023

Registration of mortgages

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?

All instruments of 'sale, conveyance, hypothecation, mortgage or assignment of mortgage of any vessel' as well as financing charters are recorded and maintained in the central office of the Marshall Islands Maritime Administrator, in the United States, or by its duly authorised agent elsewhere (the Preferred Ship Mortgage and Maritime Liens Act, sections 302(1) and 302A(1)). A vessel mortgage or financing charter is not valid against any person other than the mortgagor or the charterer, his heirs or devisees and persons having actual notice thereof until the mortgage or financing charter is so recorded (see the Preferred Ship Mortgage and Maritime Liens Act, sections 302(1) and 302A(1)). The Maritime Administrator or its duly authorised agent shall record each such vessel mortgage and financing charter in an index showing, among other information, the name of the vessel, the names of the parties, the date and time that the vessel mortgage or financing charter was received for recordation and the amount or amounts secured (see the Preferred Ship Mortgage and Maritime Liens Act, sections 302(3)) and 302A(1)). As a practical matter, the functions of the Maritime Administrator are delegated to and performed by the Commissioner of Maritime Affairs and various deputy commissioners in New York, London and elsewhere around the world. However, the central repository of all document filings related to vessels is in the United States.

Law stated - 31 March 2023

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?

Section 302(3)(e) of the Preferred Ship Mortgage and Maritime Liens Act requires that a mortgage state 'the amount or amounts of the direct or contingent obligations [. . .] that are or may become secured by the mortgage.' In the case of revolver facilities or committed facilities not fully drawn at closing, the mortgage may either be stated as the maximum amount that may be outstanding at any time or as the 'aggregate of all possible advances' (the Preferred Ship Mortgage and Maritime Liens Act, section 309). Only indebtedness incurred on or prior to the maturity date or date of termination of a preferred mortgage made 'pursuant to agreement' shall retain its status and ranking as a preferred maritime lien, and a preferred mortgage made 'by agreement' must set forth, in addition to other terms and conditions, the maturity date or a statement of the date of termination if it is other than the maturity date (see the Preferred Ship Mortgage and Maritime Liens Act, section 309). There is no stated requirement to attach and file a copy of the agreement creating the obligation secured. However, as a matter of practice, parties do normally attach the form of or a copy of the executed note, credit facility, guaranty or other evidence of the secured obligation.

Law stated - 31 March 2023

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

Mortgages are generally registered in favour of a security trustee acting on behalf of lenders in all transactions in which

more than one lender is or may become party to the credit agreement that the mortgage is intended to secure.

Law stated - 31 March 2023

Filings on transfer

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?

By use of the security trustee, transfers of the underlying debt positions need not be registered in the Marshall Islands registry.

Law stated - 31 March 2023

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

The filing of an instrument transferring the mortgagee's interest is not required to maintain the validity of the mortgage, but should be done to avoid difficulties and delays in establishing the assignee's right to foreclose on the mortgage at some future time. Marshall Islands law does not require the consent of the mortgagor for the assignment of a mortgage, but the mortgagor and mortgagee may agree that the mortgagor's consent is required.

Law stated - 31 March 2023

Maritime liens

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?

The Preferred Ship Mortgage and Maritime Liens Act recognises certain maritime liens over vessels, including, among others, maritime liens for damages arising out of tort, crew's wages, general average, salvage, necessities and certain other expenses, fees and costs (eg, the Preferred Ship Mortgage and Maritime Liens Act, sections 318 and 319).

Other than in the case of vessels operating only in the Marshall Islands, it would be highly unusual to arrest a Marshall Islands- or foreign-flagged vessel under the jurisdiction of the Marshall Islands High Court. It is doubtful that any significant number of Marshall Islands-flagged vessels engaged in foreign trade ever call at the Marshall Islands during their service life.

A maritime lien creditor's ability to arrest and foreclose on a vessel in satisfaction of a lien on or an amount owed in respect of an associated or sister vessel will depend on the law of the jurisdiction in which the vessel is arrested, the nature of the lien and the relationship between the vessels.

Law stated - 31 March 2023

What maritime liens rank higher than a mortgage lien?

Although rankings may vary from jurisdiction to jurisdiction, section 318 of the Preferred Ship Mortgage and Maritime Liens Act, which may or may not apply depending on where lien enforcement is sought, states that a preferred mortgage would have priority over all claims except preferred maritime liens for:

- damages arising out of tort;
- certain 'unpaid tonnage taxes, fees, penalties and other charges' (the Documentation and Identification of Vessels Act, section 238(3));
- crew's wages;
- general average;
- salvage (including contract salvage); and
- 'expenses and fees allowed and costs taxed by the court'.

In addition, and depending on the jurisdiction in which lien enforcement is sought, any maritime lien claim for necessities against a vessel could have priority over or be subordinate to the lien of a preferred mortgage on such vessel regardless of when the preferred mortgage was recorded.

As between mortgages, the rule is 'first in time, first in right,' subject to any consensual subordination or intercreditor arrangement between mortgagees.

Law stated - 31 March 2023

Non-mortgage liens

May non-mortgage liens be recorded over a vessel?

Only preferred mortgage maritime liens can be recorded against vessels in the Marshall Islands registry. There is no facility or procedure for filing evidence of any other type of lien, maritime or otherwise, against a vessel. In practice, lawyers may file charges in a company's register or file Uniform Commercial Code financing statements against a foreign owner. Such filings are only in the nature of 'belt and braces', and are usually not expected to be relied upon.

Law stated - 31 March 2023

'Foreign' flag vessels

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?

Section 317 of the Preferred Ship Mortgage and Maritime Liens Act provides that foreign mortgages, hypothecations or similar charges 'created as security upon any documented foreign vessel' are also recognised in the Marshall Islands courts as 'preferred mortgages' if they are 'duly and validly executed and registered' under the laws of the nation in which the foreign vessel's ownership is documented. Marshall Islands law does not distinguish between preferred mortgages on Marshall Islands vessels and foreign preferred mortgages on foreign vessels either in terms of mortgage foreclosure procedures or in the ranking and priority of liens. Differences might arise, however, depending on the jurisdiction in which the liens arose. This goes more to the question of whether a maritime lien is recognised in the place it is claimed to have arisen, such as a bunker lien, which is not universally recognised.

Law stated - 31 March 2023

Enforcement of mortgages

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?

Other than in the case of vessels operating only in the Marshall Islands, it would be highly unusual to arrest or foreclose on a Marshall Islands- or foreign-flagged vessel under the jurisdiction of the Marshall Islands High Court. It is doubtful that any significant number of Marshall Islands-flagged vessels engaged in foreign trade ever call at the Marshall Islands during their service life.

Law stated - 31 March 2023

Sale by mortgagee

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

The Preferred Ship Mortgage and Maritime Liens Act is silent on whether a mortgagee may sell a vessel privately in the Marshall Islands and what effect that would have on claims against the vessel. Section 318 of the Preferred Ship Mortgage and Maritime Liens Act provides that the sale of a vessel in an in rem suit in the Marshall Islands High Court would terminate all pre-existing claims on the vessel. The proceeds would be applied in payment of claims of creditors.

Section 316(2) of the Preferred Ship Mortgage and Maritime Liens Act does provide that a preferred mortgage on a Marshall Islands vessel may be enforced 'in rem in Admiralty or otherwise in any foreign country in which the vessel shall be found' and defers to the enforcement procedures in the country of arrest.

Generally speaking, a vessel will be 'free and clear' of all liens and claims whatsoever following an arrest and foreclosure sale in a public auction overseas. In the United States it is possible, but highly unusual outside of the bankruptcy context, for a mortgagee to arrange the sale of a vessel privately after arrest subject to confirmation by a federal court. It is unclear at best whether such sales, even if valid in the United States, would be given wide recognition in other countries.

Law stated - 31 March 2023

Default under mortgage

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

Section 316 of the Preferred Ship Mortgage and Maritime Liens Act provides that the lien of a preferred mortgage may be enforced in rem against a vessel in the Marshall Islands courts and also provides for in personam action against a shipowner on default of a preferred mortgage on a Marshall Islands vessel. This section also specifically permits the initiation of in rem proceedings in foreign courts. Any request for the appointment of a receiver would be grounded in the law of the forum in which the vessel is arrested or there is jurisdiction over the person of the shipowner. So, for example, a Marshall Islands vessel might be arrested in the United States under 46 USC section 31325(b)(1) and a US District Court, acting under 46 USC section 31325(e)(1), might 'appoint a receiver and authorize the receiver to operate the mortgaged vessel'.

Law stated - 31 March 2023

Limitations on rights of self-help

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

Most nations insist on the sale of arrested vessels by or through specialised courts, admiralty or otherwise, as a predicate to the discharge of all liens and encumbrances. Resort to self-help remedies as an aid in advance of foreclosure has long been in use in many countries in the enforcement of ship mortgages, including Marshall Islands

preferred mortgages. Inasmuch as Marshall Islands law adopts the non-statutory general maritime law of the United States (see the Maritime Administration Act, section 113), the exercise of self-help remedies pursuant to a mortgage cannot breach the peace.

Law stated - 31 March 2023

Duties to owner or third-party creditors

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

Marshall Islands law states the notice requirements for the arrest and foreclosure of vessels by the Marshall Islands High Court. Section 316(1) of the Preferred Ship Mortgage and Maritime Liens Act provides that:

'In addition to any notice by publication, actual notice of the commencement of suit shall be given by the libellant, in such manner as the Court directs, to the Master, other ranking officer, or caretaker of the vessel, and to any person who has recorded a notice of claim of an undischarged lien upon the vessel, unless after search by the libellant satisfactory to the Court such person is not found within the [Marshall Islands]. Failure to give such notice shall not constitute a jurisdictional defect, but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit.'

The provision does not indicate where the libellant might search for any recorded notice of such a claim, and the Preferred Ship Mortgage and Maritime Liens Act, which provides for the registration of vessels and recordation of mortgages, does not provide for the recordation of claims of liens.

Law stated - 31 March 2023

COLLATERAL

Finance leases

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

Since early 2013, Marshall Islands law has permitted the recordation of financing charters and elevated their status to a species of preferred mortgage. Section 302A of the Preferred Ship Mortgage and Maritime Liens Act provides that a bareboat or demise charter can be registered for recordation by either the documented owner or the charterer. For the charter to be registered, the charter must be signed and acknowledged by both parties; include the name and official number of the vessel, the date of the charter and the names and addresses of both parties; and state, among other things, the total 'nominal amount of all charter hire payments and termination payments, termination payments, and purchase and put option amounts which could under any circumstances be due and payable under such financing charter, exclusive of any interest, indemnities, expenses, or fees.' Merely registering or recording a document as a financing charter does not make it a financing charter. A court asked to enforce a registered financing charter could determine based on the evidence that the charter is not a financing charter or does not create a security interest in favour of the documented owner under applicable law.

Section 302A also allows a documented owner under a financing charter to mortgage the vessel under more conventional mortgages. In this manner, if a charter is found not to be a 'financing charter' and, therefore, does not create a mortgage lien on the vessel, at least the conventional mortgage would secure the debt on the vessel.

Law stated - 31 March 2023

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?

A court could determine that a charter registered as a 'financing lease' is not in fact a financing lease because of its economic characteristics and thereupon recharacterise the charter as a true lease, operating agreement or otherwise, leaving the documented owner to be characterised as the true owner and not a secured party. If the documented owner is found to be a true owner, its claim to the vessel would fall behind all creditors. In any case in which this result would seem to be a significant risk, the parties should structure the transaction at the outset to include back-leverage secured by conventional preferred mortgages, however, the concerns that drove the creation of section 302A of the Maritime Act 1990, as recodified at section 302A of the Preferred Ship Mortgage and Maritime Liens Act, as amended, came from the opposite direction – the fears of a titleholder that his or her charter would be recharacterised as an unperfected security interest.

Law stated - 31 March 2023

Security interests

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

These security interests are rarely created or perfected under Marshall Islands law, but are more often created under the law of another jurisdiction and perfected by filing or other action in the jurisdiction in which the pledgor is organised or deemed located. With regard to charter hire, earnings and other revenue streams, a financial institution, lender or lessor would generally require the payment of all receipts into a designated account controlled by the secured party. This usually, but not always, includes notice of the assignment to the payment obligor, such as a charterer, and the payment obligor's acknowledgement of the pledge.

Law stated - 31 March 2023

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

This will depend on a number of factors, including the nature and location of the collateral or the pledgor with respect to the collateral. In no case is the filing location likely to be in the Marshall Islands. International shipping operating under the Marshall Islands flag will use money centre banks to deposit escrowed funds and to collect charter hire and freights. These types of property will not touch the Marshall Islands. Under the Uniform Commercial Code in the United States, pledges of shares or limited liability company interests issued by Marshall Islands shipowners can be perfected by the delivery of certificated shares or interests into the possession or control of the secured party. In the United States, there are also provisions for filing financing statements with respect to certain collateral owned by pledgors not present in the United States.

Law stated - 31 March 2023

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

Security interests in deposit accounts are rarely created or perfected under Marshall Islands law unless the account is maintained with a bank in the Marshall Islands. These security interests are most often created under the law of another jurisdiction and perfected under the law of the jurisdiction in which the deposit account is located through a pledge and some form of account control agreement in which the pledgor, the deposit bank and the secured party agree that funds in the deposit account will not be released from the account without the consent of the secured party. In the United States, a financing statement may be filed in the jurisdiction in which the debtor is deemed located for the purposes of the Uniform Commercial Code.

Law stated - 31 March 2023

How are security interests in non-vessel collateral enforced?

The method of enforcement will vary according to the collateral type, the jurisdiction in which the collateral is found and the powers that the collateral owner has contractually granted to the secured party in the remedies provisions of the loan, pledge or guaranty documents. The remedies will normally include self-help remedies by statute or by contract as well as foreclosure through the courts, followed by public auction or another approved sale method.

Law stated - 31 March 2023

Share pledges

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

Pledges of shares or other equity interests are established by a pledge agreement. The pledge agreement is usually accompanied by the delivery of the original certificates evidencing the pledged securities to the secured party together with signed and undated blank instruments of transfer and undated resignation letters from the board or other management body. If the securities are not certificated, provisions prohibiting the subsequent issuance of certificates are usually included in the pledge agreement or in a separate uncertificated securities agreement. Pledges of shares or membership interests issued by Marshall Islands entities are commonly required in connection with loans made to Marshall Islands shipowners.

Law stated - 31 March 2023

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?

There is a risk of exposure when the pledgee assumes, in one way or another, the active management of the company whose shares have been pledged. The law that determines that liability will often be that applicable to the underlying tort or civil wrong, whether in connection with a vessel disaster, fraudulent conveyance, defaulted statutory obligation or some other basis for liability.

Law stated - 31 March 2023

TAX CONSIDERATIONS FOR VESSEL OWNERS

Domestic taxation

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

Income earned by non-resident entities (either domestic or foreign) from any source, including the operation of Marshall Islands-flagged vessels registered under the Documentation and Identification of Vessels Act, is exempt from Marshall Islands taxation (see the Business Corporations Act (BCA), section 12). Section 12 of the BCA provides that a non-resident domestic or foreign corporation, partnership, trust, unincorporated association or limited liability company shall be exempt from:

'[A]ny corporate tax, net income tax on unincorporated businesses, corporate profit tax, income tax, withholding tax on revenues of the entity, asset tax, tax reporting requirement on revenues of the entity, stamp duty, exchange controls or other fees or taxes other than those imposed by sections 8 [fees on filing articles of incorporation and other documents] and 9 [annual registration fee] [of the BCA].'

See also the Marshall Islands Revised Partnership Act , section 73, and the Marshall Islands Limited Partnership Act, section 73.

Law stated - 31 March 2023

Tonnage tax

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

There is a tonnage tax on vessels registered in the Marshall Islands. However, the tonnage tax is not paid to gain an exemption from income tax, which generally does not apply to non-resident domestic or foreign companies.

Law stated - 31 March 2023

Tax incentives

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

Income earned by non-resident entities (either domestic or foreign) from the operation of Marshall Islands-flagged vessels registered under the Maritime Act is exempt from Marshall Islands taxation (see BCA, section 12; see also the Marshall Islands Revised Partnership Act, section 73, and the Marshall Islands Limited Partnership Act, section 73).

Law stated - 31 March 2023

Other tax provisions

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

To assist the European Union and the Organisation for Economic Cooperation and Development in their efforts to limit the use of preferential tax regimes, the Marshall Islands Registrar responsible for non-resident domestic entities promulgated the Economic Substance Regulations, 2018 (as amended, the ESR).

The ESR apply to all non-resident Marshall Islands corporations, partnerships, limited partnerships and limited liability companies unless their businesses are centrally managed and controlled from outside of the Marshall Islands and they are tax resident outside of the Marshall Islands, and to all Marshall Islands foreign maritime entities whose businesses

are centrally managed and controlled in the Marshall Islands, unless they are tax resident outside of the Marshall Islands (relevant entities) (the ESR, sections 2(s) and 4). The ESR require that relevant entities engaged in certain relevant activities, including the ownership, operation or chartering of Marshall Islands-flagged vessels, satisfy an economic substance test in relation to those activities (the ESR, sections 2(u) and 4). Although special provisions apply to relevant entities engaged in certain businesses, including pure equity holding companies, a relevant entity will generally satisfy this test if:

- the relevant entity is directed and managed in the Marshall Islands in relation to each relevant activity in accordance with the ESR;
- having regard to the level of each relevant activity carried out in the Marshall Islands, the relevant entity has an adequate number of qualified employees in the Marshall Islands, has an adequate physical presence in the Marshall Islands, and has an adequate amount of expenditure incurred in the Marshall Islands; and
- the relevant entity carries out core income-generating activity in the Marshall Islands in relation to each relevant activity in accordance with the ESR (see the ESR, section 4(2)).

A relevant entity that violates this economic substance test can be liable for a fine of up to US\$50,000, revocation of its formation documents and dissolution, or both, and a relevant entity that violates the economic substance test for two or more consecutive financial periods can be liable for a fine of up to US\$100,000, revocation of its formation documents and dissolution, or both (the ESR, section 7).

Each non-resident domestic Marshall Islands corporation, partnership, limited partnership and limited liability company, as well as each Marshall Islands foreign maritime entity, is required to submit an annual economic substance declaration to the Registrar not later than 12 months after each anniversary of its incorporation, organisation, formation or registration occurring after 1 July 2020 (the ESR, section 6; section 12 of Guidance and Frequently Asked Questions on Economic Substance, published by the Registrar on 17 October 2019, as amended; and ESR FAQs – What Is the ESR Report Deadline? by International Registries, Inc).

Law stated - 31 March 2023

INSOLVENCY AND RESTRUCTURING

General scheme of reorganisation or insolvency administration

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

No, the Marshall Islands has no such procedure. We understand that it has an internal procedure in the nature of an assignment for the benefit of creditors, but that it is not adequate to work through a shipping insolvency when worldwide jurisdiction over the debtor's assets is critical to success.

Law stated - 31 March 2023

Foreign court rulings

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

There is not much jurisprudence to say definitively, but it is believed that the Marshall Islands would respect such orders assuming the proceedings were not conducted in a manner that violates public policy.

Law stated - 31 March 2023

Model Law on Cross-Border Insolvency

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

Yes, see the UNCITRAL Model Law on Cross-Border Insolvency Implementation Act .

Law stated - 31 March 2023

Order of priority

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

The order of priority among creditors is not apparent because no significant bankruptcy proceedings have occurred or are expected to occur in the Marshall Islands and the statutory infrastructure for bankruptcy is not present.

Law stated - 31 March 2023

Security provision by vessel owner

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

A Marshall Islands corporation may guarantee the obligations of another entity or provide a security interest in the corporation's property, including a mortgage over the corporation's vessels, to secure the obligations of another in furtherance of the corporate purposes of the corporation, or if not in furtherance of its corporate purposes, by obtaining the affirmative vote of the holders of a majority of the outstanding shares in the corporation at a shareholders' meeting, the written consent of all shareholders, or if the corporation's articles of incorporation so provide, the written consent of the holders of a majority of the outstanding shares (see the Business Corporations Act (BCA), sections 15(g), 16 and 67). The same procedure can be used to authorise the corporation to secure the guarantee with a grant of a security interest in corporate property (see BCA, sections 16 and 67). A lender or other guaranteed party should take care that any such guaranty or grant of security is grounded in the guarantor's corporate purposes and approved by shareholders. The guaranty or grant should recite with some particularity the relevant corporate purposes, if any, and related business interests and the reliance of the guaranteed party or secured party on the guaranty or security grant.

Parties relying on the security interest in collateral should also be aware that other creditors of the security interest grantor could make arguments that the grant of a security interest could in certain circumstances constitute a fraudulent conveyance, especially when there is no demonstrable benefit to the grantor and the assets of the grantor prove insufficient to satisfy other creditors of the grantor.

Law stated - 31 March 2023

Law of fraudulent transfer

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 applicable law of fraudulent conveyance is not likely to be that of the Marshall Islands. Since a challenge based on a fraudulent conveyance will no doubt come from an adversely affected creditor, the applicable law might be that of the jurisdiction in which the transfer took place or its effects occurred. A number of bankruptcy cases begun by Marshall Islands companies have been filed and conducted in the United States, and the United States law of fraudulent conveyances might apply. The commercial civil law of the Marshall Islands is, in any event, largely consistent with United States law. In the unlikely event that a creditor challenged a transfer as fraudulent, there is no reason to believe the analysis or result would be different than that which would occur in United States courts.

Law stated - 31 March 2023

Petitions by creditors

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

This chapter is confined to the activities of non-resident Marshall Islands shipping companies doing business with creditors around the world; it is highly unlikely that the troubled debtor or its pursuing creditors would resort to the courts of the Marshall Islands. The overwhelming evidence is that bankruptcy and insolvency proceedings in which survival or reorganisation is sought are brought in United States Bankruptcy Courts by the filing of either a voluntary petition by the debtor or an involuntary petition by a group of creditors.

Law stated - 31 March 2023

Model Netting Act

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?

Close-out netting is thought to be enforceable in the Marshall Islands under general principles without the need for specific legislation, but as of March 31, 2023, a bill was being considered by a committee of the Nitijela, the legislative body of the Republic of the Marshall Islands, that would enact the 2018 ISDA Model Netting Act with certain modifications. The current regime in the Marshall Islands is thought by some to be netting-friendly, so even in the absence of specific legislation, it is likely that close-out netting rights are enforceable.

Law stated - 31 March 2023

UPDATE AND TRENDS

Current developments

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

As of 31 March 2023, two bills that would amend the Maritime Act had been passed by the Nitijela, the legislative body of the Republic of the Marshall Islands, and were awaiting certification before becoming law. These amendments would, among other things, facilitate the sale of Marshall Islands-flagged vessels and the filing of preferred vessel mortgages, and allow the Maritime Administrator to strike a vessel from registration in the Marshall Islands following receipt of evidence that the vessel has engaged in illegal activity or actions against the interests of the Republic of the Marshall Islands or the Maritime Administrator. A bill was also being considered by a committee of the Nitijela that

would enact the 2018 ISDA Model Netting Act with certain modifications.

The author would like to acknowledge the contributions of John Geager to this chapter.

Law stated - 31 March 2023

Jurisdictions

	Brazil	Basch & Rameh Advogados Associados
	China	KaiRong Law Firm
	Cyprus	Chrysses Demetriades & Co LLC
	Italy	Dardani Studio Legale
	Japan	Yoshida & Partners
	Malta	Dingli & Dingli Law Firm
	Marshall Islands	Vedder Price PC
	Nigeria	Tumba & Tumba
	Panama	Arias, Fábrega & Fábrega
	Singapore	Haridass Ho & Partners
	Sweden	HFW
	Turkey	ECC Law
	United Arab Emirates	HFW
	United Kingdom	HFW
	USA	Seward & Kissel LLP