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SHIP MORTGAGE: A COMPARATIVE STUDY OF ENGLISH AND EMIRATI LAW

A Hassan M
College of Law UAEU, a.hassan@uaeu.ac.ae

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SHIP MORTGAGE: A COMPARATIVE STUDY OF ENGLISH AND EMIRATI LAW

Cover Page Footnote

Associate Professor Commercial and Maritime Law, College of Law UAEU

**SHIP MORTGAGE A STUDY OF
ENGLISH AND EMIRATI LAW**

Dr. Abdulla Hassan
Associate Professor
Commercial and maritime law,
College of Law
UAEU

Abstract:

Maritime exploitation requires large sums of money. It is the means or methods resorted to by ships companies to obtain the necessary funds for maritime exploitation is mortgage of the ship. The UAE Maritime code addressed the maritime mortgage in articles 97 to 114.

This research aims to shed light on the maritime mortgage system under UAE law by comparing it with the English law which is considered the most advanced law in this area.

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INTRODUCTION

Maritime credit nowadays is not confined only to ships' mortgages. The big shipping companies have other means of procuring credit than to mortgage their vessels. Thus, they may resort to the issue of debenture, or to the increase of their capital, or to the offer of securities on their assets like shares, real property etc. On the other hand, the evolution of the shipbuilding industry makes modern vessels a synthesis of all up to date technical and scientific achievements. Thus, the value of such ships is increased to the extent that sometimes they represent a considerable percentage of the assets of even the big shipping companies. Mortgages of ships are a quite frequent practice to secure either loans, or current accounts.⁽¹⁾

It is evident, therefore, that mortgages of ships are, if not the exclusive, yet the main source of credit of the smaller shipowners, and that they will continue to be so for a long time to come.⁽²⁾

(1) The best summary of methods of securing financial advances was given by Roskill LJ in *The Panglobal Friendship* [1978] 1 Lloyd's Rep. 368, 371:

"The bank advances to one or more owning companies a large sum of money. It of course requires security. It will take a mortgage on the ship for that security. It may take other mortgages on other ships for the same security. If the ship, as often happens, is about to be time chartered, then the bank will take an assignment of the time charter in order that the bank as assignee can benefit from the time charter in order to reduce the mortgage debt. In addition it will almost invariably in my experience take an assignment of insurance policies and P and I Club cover in order that in the event of total or partial loss of the ship the bank as the lender may be suitably secured."

(2) The need for unification of ship mortgage laws was materialized via three different conventions. First convention was from 1926, *International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages* where the concept of mortgages and maritime liens on the international level is recognized. Subsequent to 1926 Convention, the 1967 Convention of the same name did not gain international acknowledgment; the final convention was the *International Convention on Maritime Liens and Mortgages 1993*. The 1926 Convention has been widespread in the Mediterranean countries and

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The object in view in writing this article has been two-fold. First, to provide a study of the English law relating to ships' mortgages.⁽³⁾ Secondly, to present the outlines of the United Arab Emirates law of ships' mortgages, and compare them with the respective English provisions.

The United Arab Emirates (hereinafter **UAE**) has a long and proud maritime tradition, however, comparatively speaking, it remains a relatively young admiralty jurisdiction with continuously evolving maritime practices.⁽⁴⁾ As a result, some laws and established legal principles or practices differ from those of other maritime jurisdictions such as English jurisdiction.

This article examines in the main, issues arising from ship mortgage⁽⁵⁾ such as its nature and creation, the rights and obligations of the mortgagor and mortgagee, the methods of protection of the mortgagee's rights. It will also examine the priority or otherwise of the ship mortgage.

1. NATURE OF THE SHIP MORTGAGE

1.1 ENGLISH LAW

The nature of a ship mortgage under English law was examined in *Downsview v First City Corp*,⁽⁶⁾ in which Lord Templeman said:

"A mortgage, whether legal or equitable, is security for repayment of a debt. The security may be constituted by a conveyance, assignment or demise or by a charge on any interest in real or personal property...The owner of property entering into a mortgage does not by entering into that mortgage, cease to be the owner of that property any further than is necessary to give effect to the security he has created.⁽⁷⁾ The mortgagor can mortgage the property again and again. A

northern Europe; however, it was declined by the common law countries. United Arab Emirates has not ratified any these Conventions.

(3) Under English law a mortgage could be said to be 'any charge by way of lien on any property for securing money or money's worth', see Hill, *Maritime Law*, 5 Ed. 1998 at p.27

(4) The UAE has been ranked among the top 15 maritime nations by the United Nations Conference on Trade and Development and the UAE Government is working on plans to transform the shipping industry into one of the country's major economic sectors.

(5) Ship mortgages are today distinctive contractual transactions, with voluminous documentation including the loan agreement, the mortgage, deed of covenants, assignments of earnings, assignments of insurance policies, guarantees, pledges or charges on other assets and the like depending on the circumstances of a particular transaction. The sophistication of their development has reached a level, which requires special expertise in financial markets. See Goldrein, I (ed), *Financing ships and shipping companies*, in *Ship Sale and Purchase*, 4th ed., 2003, LLP, Chapter 5.

(6) [1993] AC 295 (PC), p. 311.

(7) A ship is considered under English law as a chattel. Prior to the *Merchant Shipping Act 1854*, which introduced the form of a statutory charge on a ship for the protection of the mortgagee, the law of land mortgages applied also to mortgages of chattels. This meant that a mortgage on a chattel involved a

second or subsequent mortgage is a complete security on the mortgagor's interests subject only to the rights of prior encumbrances."

Under English law, there are two kinds of ship mortgages: the statutory/legal mortgage and the equitable mortgage.

The statutory mortgage is one which complies with the statutory requirements set out in the *Merchant Shipping Act 1995* (hereinafter **MSA 1995**), Schedule 1 (Private Law Provisions for Registered Ships), at para 7:

- (1) A registered ship, or share in a registered ship, may be made a security for the repayment of a loan or the discharge of any other obligation.
- (2) The instrument creating any such security (referred to in the following provisions of this Schedule as a 'mortgage') shall be in the form prescribed by or approved under registration regulations.
- (3) Where a mortgage executed in accordance with sub-paragraph (2) above is produced to the registrar, he shall register the mortgage in the prescribed manner.
- (4) Mortgages shall be registered in the order in which they are produced to the registrar for the purposes of registration.

The "equitable mortgage" said Lord Templeman "is a contract which creates a charge on property, but does not pass a legal estate to the creditor. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to a actual assurance, and is enforceable under the equitable jurisdiction of the court..."⁽⁸⁾

Thus, a legal mortgage can only be on a "registered ship", duly entered on the central registry of shipping.⁽⁹⁾ Whereas an equitable mortgage is

transfer of the legal title in the chattel to the mortgagee, and this was effected by delivery. The transfer of the legal title in a registered ship was done by the delivery of a bill of sale to the mortgagee, who took steps to register his ownership interest in the ship under the statutes for the Registration of British Vessels 1823-1825. This method was, however, changed by the *Merchant Shipping Act 1854* and the subsequent Bills of Sale Act 1878, which regulated the mortgages on chattels, other than ships. Ships were excluded from this Act.

(8) *Downsview v First City Corp*, [1993] AC 295 (PC), p.311.

(9) Historically there had been an obligation to register a British ship if it qualified as such. This was specified in s 2 of the *Merchant Shipping Act 1894* which stated in sub-paragraph (1) that "[e]very British ship shall, unless exempted from registry be registered under this Act". Exemptions were specified in s 3: "ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom, or on the rivers or coasts of some British possession within which the managing owners of the ships are resident", and "ships not exceeding thirty tons burden and not having a whole or fixed deck, and employed solely in fishing or trading coastwise on the shores of Newfoundland or parts adjacent thereto, or in the Gulf of St Lawrence, or on such portions of the coasts of Canada as lie bordering on that gulf". The

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primarily used by owners of foreign ships which are not allowed to register their mortgage by the virtue of the *MSA 1995*. It also applies to unregistered vessels, vessels in construction as well as the chartered vessels.

1.2. UAE LAW

In UAE law regarding the real security system is different. It distinguishes between (a) hypothec of immovable with registration,⁽¹⁰⁾ and, (b) pledge of movables with delivery.⁽¹¹⁾ A hypothec does not transfer the possession of the property; it can only be placed on immovables. A pledge requires the transfer of possession and it can only be placed on movables.

As in English law⁽¹²⁾ a ship is considered to be a chattel *sui generis*.⁽¹³⁾ Consequently, hypothec of a ship is an exception to the general rule, subject to which, pledge with delivery of possession is the unique form of real security applying to chattels.⁽¹⁴⁾ Thus, in the strictest sense, "ship mortgages" in UAE should be called "ship hypothecs"; however, the *Emirati Maritime Code 1981*

obligation of registration was repealed. by the Merchant Shipping Act 1988, and the registration legislation is now contained in the Merchant Shipping Act 1995, and in the Merchant Shipping (Registration) Regulations 1993. A mortgage on property of a company registered in England and Wales is further subject to s. 395 of the Companies Act 1985.

(10) See *Emirati Civil Code 1985*, article 1399:

(*Free translation*) A hypothec is a contract whereby a creditor acquires, over (property) allocated for the satisfaction of his debt, a right *in rem* whereby he shall take precedence over ordinary creditors and creditors subsequent in rank to him in the satisfaction of his right out of the proceeds of such (property), in the possession of whomsoever it may be.

(11) See *Emirati Civil Code*, article 1448:

(*Free translation*) A pledge is a contract giving rise to a right to retain the property in the hands of the creditor by way of security for a right which may be recovered there out in whole or in part in priority over other creditors.

(12) See Alison Clarke, *Interests in Goods, Chapter 26*, 1998 at pp. 663, 666 ;*Keith v. Burrows* [1877] 2 A.C. 636.

(13) *EMC 1981*, article 12 provides that:

(*Rough translation*) A vessel shall be deemed to be a chattel, to which the provisions pertaining to chattels shall apply, save insofar as there is any stipulation in this Law making any provisions relating to real property applicable thereto.

However, unlike most other chattels, ships are registerable.

(14) Under the civil law, only immovables can be hypothecated. Movables may not be hypothecated for two reasons: first, the hypothecated object may disappear, and secondly, it would be difficult to give notice to third parties that a right of preference has attached to the movable object. Though a ship is a movable (and defined as such by article 12 of the *EMC 1981*, these two reasons have been legislatively overridden in the case of a hypothec on a ship.

It has been pointed out that, since the identity and ownership of such a valuable item as a seagoing ship are subject to continual verification, the danger of the ship "disappearing" is less acute. As for notice to third parties, the fact that each ship is registered in a home port (where registry books may be consulted) gives interested parties the means of finding out whether any charges exist against the ship.

(hereinafter *EMC 1981*) uses the word "mortgage" instead of "hypothec."⁽¹⁵⁾ The reader, however, should always bear in mind the basic substantial and technical differences between the terms in English and UAE law. UAE law recognises only one type of ship mortgage. The mortgage, under UAE law does not confer a proprietary right on the mortgagee of the mortgaged vessel, but constitutes a burden in realty on the vessel, the property of the mortgagor giving power to the creditor (the mortgagee) to sell the vessel, to the extent that the same is burdened by the mortgage, by public auction in order to satisfy preferentially his claim from the proceeds of such a sale.

2. WHO MAY MORTGAGE AND TO WHOM

2.1. WHO MAY BE A MORTGAGOR

2.1.1. ENGLISH LAW

Under English law only the registered owner of a ship or share therein has the right to grant a valid mortgage on the ship or share therein.⁽¹⁶⁾

(15) During the negotiations of International Convention on Maritime Liens and Mortgages 1993 UNCTAD and IMO have referred to the civil law concept as hypothec, however, some of civil law countries such as Spain and France have translated the term of hypothec in official documents as mortgage (see Lennart Hagberg (ed), *Handbook of Maritime Law, Vol, III: Registration of Vessels and Mortgages of Vessel*, International Bar Association..

(16) *Merchant Shipping (Registration of Ships) Regulations 1993, SI 3138, s. 7:*

Persons qualified to be owners of ships to be registered on Part I of the Register

(1) The following persons are qualified to be the owners of ships which are to be registered on Part I of the Register:--

(a)

(i) British citizens; or

(ii) non-United Kingdom nationals exercising their right of freedom of movement of workers or right of establishment;]

(b) [British overseas territories citizens];

(c) British Overseas citizens;

(d) persons who under the British Nationality Act 1981 are British subjects;

(e) persons who under the Hong Kong (British Nationality) Order 1986 are British Nationals (Overseas);

(f) bodies corporate incorporated in a [EEA State];

(g) bodies corporate incorporated in any relevant British possession and having their principal place of business in the United Kingdom or in any such possession; and

(h) European Economic Interest Groupings being groupings formed in pursuance of Article 1 of Council Regulation (EEC) No 2137/85 and registered in the United Kingdom.

(2) A person who is not qualified under paragraph (1) to be the owner [of a ship registered on Part I of the Register] may nevertheless be one of the owners of such a ship if:

(a) a majority interest in the ship (within the meaning of regulation 8) is owned by persons who are [so qualified under paragraph (1)], and

(b) the ship is registered on Part I of the Register.

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If the registration of a ship, or any share or shares therein, is in the joint name of several persons, all must join in the transfer to give a valid title of mortgage.⁽¹⁷⁾ The duly authorised agent of the owner or joint owners has the same power as his principal.

The mortgagor himself need not always be the borrower. A shipowner may grant a mortgage on his vessel in favour and in security of a third person's debt.⁽¹⁸⁾

2.1.2. UAE LAW

The right to mortgage a ship belongs to the owner⁽¹⁹⁾ and co-owner.⁽²⁰⁾ In the *EMC 1981*, the right of a co-owner to mortgage his share is made conditional upon the consent of a majority of the owners having at least three quarters of the shares (i.e. the value of the ship).⁽²¹⁾

The holders of 4/5 of the ship's shares may mortgage the whole vessel. The same right belongs to the holders of 3/4 of the shares. If such majority cannot be achieved, the matter may be referred to the civil court within its jurisdiction the ship registry is to issue a decision considering what is best for the joint owners.⁽²²⁾

(17) *MSA 1995*, Sched 1, para 1. For part-owners see *The Royal Arch* (1857) Swab. 269; 166 E.R. 1131, at 1140, per Dr. Lushington "A part-owner may mortgage his own shares, but he cannot mortgage those of his co-owners without their consent."

(18) A mortgage may be created, e.g., in favour of a bank on a vessel as security for a mortgagor's obligations to such bank arising out of a guarantee given by that bank of that mortgagor's indebtedness to a third party and, although the mortgage may be limited in amount, it is not usual to specify such amount in the mortgage because the bank would also wish to secure under the mortgage other moneys that might become owing to it from the owner, such as liabilities incurred by the bank in the protection of the security constituted by the mortgage. Thus any limitations would usually be set forth in the deed of covenant.

(19) See *Emirati Civil Code 1985*, article 1401/1:

(Free translation) The (mortgagor) must be the owner of the (property) hypothecated, and capable of making dispositions thereover.

(20) *EMC 1981*, article 76 provides that:

(Rough translation) Any co-owner may dispose of his share. Nevertheless, he shall not be permitted to mortgage it save by the consent of the majority stipulated in Article (98).

(21) *EMC 1981*, article 98 provides that:

(Rough translation) If the vessel is co-owned, it may be mortgaged in toto by the agreement of a majority of the owners having at least three quarters of the shares.

In contrast, a co-owner has the right to sell his share in the ship, notwithstanding the objection of the other co-owners. Further, a co-owner may validly transfer his share as a security to his creditor, without any consent on the part of remaining co-owners.

(22) See *EMC 1981*, article 98:

(Rough translation) If the vessel is co-owned, it may be mortgaged in toto by the agreement of a majority of the owners having at least three quarters of the shares. If there is no such majority, it shall be permissible to refer the matter to the civil court which has jurisdiction in the area of the Registration Office of the vessel for a decision in accordance with the interests of the joint owners.

The agent of the owner has the right to mortgage, if he has been expressly authorised to do so. Valid authorisation is given only in the form of a written document before a notary public.⁽²³⁾

The ship may be mortgaged in favour of a third party⁽²⁴⁾

A ship under construction can be mortgaged. But the mortgage can only be granted by the owner, that is the builder, and the transfer of property is not completed, unless otherwise agreed, except when the ship is received after trials.⁽²⁵⁾

2.2. WHO MAY BE A MORTGAGEE

2.2.1. ENGLISH LAW

As a general rule the mortgagee of a British ship need not be a British subject. He may be an alien, because until he takes possession, the mortgagor remains the owner of the ship or shares therein.⁽²⁶⁾

2.2.2. UAE LAW

Any person or legally constituted entity can be the mortgagee of a UAE ship. It is not necessary that the mortgagee be a UAE nationality because until he takes possession, the mortgagor remains the owner of the ship or shares therein.

3. THE CREATION OF THE MORTGAGE

3.1. ENGLISH LAW

Where a registered ship or share therein is mortgaged, in order that the

(23) *Emirati Civil Code 1985*, article 1402 reads:

(Free translation) It shall not be permissible to hypothecate the property of a third party save with the consent of the true owner by a notarised instrument.

(24) *Emirati Civil Code 1985*, article 1401/2 provides that:

(Free translation) It shall be permissible for a (mortgagor) to be theguarantor providing a pledge in favour of a (third party).

(25) *EMC 1981*, article 101 provides that:

(Rough translation) It shall be permissible for a vessel to be mortgaged while it is still in course of construction, but before the mortgage there must be a proclamation from the relevant Maritime Office in the port in the area of its jurisdiction in which the vessel is being constructed, setting out the length and other dimensions of the vessel, its approximate tonnage, and the address of the yard or place in which it is being built.

English law does not allow the ship in the process on construction to be enlisted in the ship registry; however, one can rely on unregistered mortgage that can be construed without specific formalities by depositing certificate of ship construction or mortgage agreement.

(26) Chorley & Giles' *Shipping Law*, 1987, pp. 26, 27. See also *The Aurora* (1800) 3 Ch. Rob. 133; 165 E.R. 412, at 414 per Sir W. Scott: "If they are to be considered as owners and foreigners there would be a fraud committed on the British Navigation Act. The ship ought to have been converted into a Portuguese vessel, and documented as such. But we must look to the form of instrument. The nature of the contract is a sort of collateral security intended to operate till the assignment of the vessel could be made absolute to them. It is at present not an actual assignment but a security for a debt."

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mortgagee may acquire a legal interest and the protection afforded by the *MSA 1995*, such mortgage must comply with two conditions. (a) The instrument creating the mortgage must be in the form prescribed by the *MSA 1995* and (b) This instrument must be recorded in the register.⁽²⁷⁾

3.1.1. THE MORTGAGE DEED

An instrument creating a legal mortgage on a British ship needs to be in one of the two forms⁽²⁸⁾ prescribed by the *MSA 1995*.⁽²⁹⁾ The first is Form ROS "Mortgage of a ship to secure Account Current etc/Other Obligation" and the second is Form ROS 30 "Mortgage of a ship to secure principal Sum and Interest."

Hence, ship mortgages are usually drawn in two parts: a registerable document containing only the details required for registration at the Registrar of Ships, and a collateral loan agreement.⁽³⁰⁾ The latter expresses the rights and obligations of the mortgagor and mortgagee that are not controlled by statute. Typically the mortgagor is bound, inter alia:⁽³¹⁾

- .to pay the principal and interest on schedule,
- .not to impair the validity or ranking of the mortgage,
- .to maintain the vessel in a seaworthy condition and to operate it safely,

(27) The *MSA 1995*, Sched 1, provides by para 7:

- (1) A registered ship, or share in a registered ship, may be made a security for the repayment of a loan or the discharge of any other obligation.
- (2) The instrument creating any such security (referred to in the following provisions of this Schedule as a "mortgage") shall be in the form prescribed by or approved under registration regulations.
- (3) Where a mortgage executed in accordance with sub-paragraph (2) above is produced to the registrar, he shall register the mortgage in the prescribed manner.
- (4) Mortgages shall be registered in the order in which they are produced to the registrar for the purposes of registration.

(28) Any attempt to use any other method could result in the registrar's refusal to register it.

(29) The prescribed form of a ship mortgage applies only to mortgages granted on registered ships. There is no prescribed form for a mortgage of an unregistered ship, which does not come within the provisions of the *MSA 1995*. However, unregistered ships are not common nowadays.

(30) The validity of this practice has been questioned in *The Benwell Tower*, (1895) 8 Asp. 13, where it was held that a reference in a mortgage deed to a collateral instrument was not invalid and did not affect the mortgage itself. In course of giving judgment Bruce J. said at p. 18:

"Although a registered mortgage of a ship is required to be in a particular form, or as near as circumstances permit, a mortgage to secure on account current is not invalid by reason of the detailed stipulations of the mortgage being contained in a separate instrument and not appearing in the mortgage itself. Commission stipulated by letter is allowed, on ground that the letters created a valid collateral agreement, which was not void because it was not in the statutory form, or as clogging or otherwise affecting the redemption."

(31) See Meeson, *Ship and Aircraft Mortgages*, 1989 at pp. 61-75.

- .to report any casualties to the vessel,
- .not to do anything that would imperil the vessel's registration,
- .not to transfer or demise charter the vessel without consent,
- .to keep the ship adequately insured, and
- .to permit the mortgagee, on reasonable notice, to inspect the vessel.

The loan agreement also defines the circumstances in which the mortgagor will be regarded as defaulting and the mortgagee may take possession of the ship in realization of his or her security.

3.1.2. REGISTRATION

The completion of a legal mortgage is effected by the registration of the mortgage in central register of shipping by the "registrar" (i.e. Registrar General of Shipping and Seamen).⁽³²⁾ Registration makes the agreement between mortgagor and mortgagee public. This is the principle of publicity which was invented for the security of the subsequent transactions. Indeed, a mortgage agreement is binding *inter partes*. But for the sake of credit, any incumbrance on a ship ought to be publicly advertised, so that a prospective creditor may have the opportunity before entering into contractual relations with the shipowner to know the legal position of the vessel exactly.

So, when a mortgage is executed by the mortgagor, the mortgagee has a valid mortgage as between himself and the mortgagor. This means that registration is not compulsory, or a condition of the validity or operative effect of the mortgage *inter partes*.⁽³³⁾ However, the existence of the transaction is not necessarily known to anybody, and the shipowner is to all appearances still the reputed unrestricted owner of the ship. As unregistered mortgage is not a legal but an equitable one,⁽³⁴⁾ and further, *bona fide* third parties are not at all affected as such mortgage will rank after registered subsequent mortgages⁽³⁵⁾ Thus a

(32) Sects. 8(2), 23(1) and Schedule 1, para 7(3) of the *MSA 1995*.

(33) Chorley *,op.cit.* p. 60.

(34) Alison Clarke, chapter 3 of Norman Palmer & Ewan McKendrick eds., *Interests in Goods*, Lloyd's, London, 1993 at pp. 78-79. See also Schedule 1, para. 1(2) of the *MSA 1995*.

(35) See *Black v Williams* (1895) 1 Ch 408. Debentures were issued by the company in statutory form under a trust deed executed by the mortgagors on 8 November 1889. Mortgages, also in statutory form, were created on three steamers and then registered, on 15 June 1891. Later, two remaining steamships, mortgaged under the debenture deed were transferred to company M and registered. Mortgages were created subsequently in favour of the company M and registered. In accordance with the agreement (debenture deed), the company executed mortgages of the vessels in favour of the trustees. The mortgages, given or transferred to the corporation M, were all registered before the mortgages given to the trustees. It was held that the mortgage in the statutory form, which had been registered, was to be preferred to the title

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mortgagee is not protected against the possibility of the owner obtaining further advances on the security of the same ship, or as against an act of bankruptcy committed by the owner.⁽³⁶⁾

But when the mortgage is registered then the mortgagee will have the privileges granted by the *MSA 1995*. Thus, a registered mortgage is not affected by any act of bankruptcy committed by the mortgagor after the date of the registration. From the date of the registration the mortgagee is protected against all subsequent registered mortgagees or purchasers of the ship, and against any equitable charge.⁽³⁷⁾ This is illustrated in *Barclay & Co. Ltd., v. Poole*,⁽³⁸⁾ where there was a sale of shares by a managing owner of a ship to other part-owners, who were to apply the purchase money in discharging the vendors' debt to the ship, and pay the balance to the debtor. The shares were forthwith transferred to the purchasers by registered bill of sale. After the transfer, but before the purchase money had been paid, the purchasers received notice of an unregistered mortgage existing prior to the contract. It was held that, according to Merchant Shipping Act, 1894, s.56,⁽³⁹⁾ the registered owner was able to enter into a valid contract of sale, and therefore the purchasers' contractual right to apply part of the purchase-money in discharge of the vendor's debt to the ship, took precedence over the prior unregistered mortgage.

Further, in *The Two Ellens*⁽⁴⁰⁾ the registered vessel was mortgaged to B as security for the repayment of a \$5,000 debt. The mortgage was duly registered

of the debenture holders. The debenture holders had a prior equitable title and were entitled to get that converted into a legal title in the statutory form and be registered, but they had chosen not to do so. Vaughan Williams J gave the rationale of the law as it stood:

The Act of Parliament was passed for the benefit of commerce, and in order that English ships might be easily dealt with by English shipowners. The legislature has recognised 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 overridden 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 legal form, or to register in the way pointed out by statute."

Cf. The Shizelle, [1992] 2 Lloyd's Rep. 444, where an unregistered mortgage on a small yacht (a vessel not required to be registered under the Merchant Shipping Act) was held to be a legal mortgage at common law, rather than an equitable mortgage, and therefore to be enforceable even against *bona fide* third party purchasers for value who were unaware of the mortgage when they bought the vessel.

(36) *McEntire et al. v. Crossley Bros., Ltd.*, [1895] A.C. 457 at p. 461 (H.L.).

(37) See Hill, *op.cit* p. 32.

(38) [1907] 2 Ch 284.

(39) Which gives power to a registered owner to dispose absolutely of his ship, subject only to restrictions appearing in the register book to be vested in third persons.

(40) (1872) LR PC 161.

under the MSA 1854. Subsequently, in February 1868, by order of the master who was also a part-owner of the vessel, ship-repairers did work and provided supplies to the vessel to put her in a seaworthy condition. In July 1868, B transferred the mortgage to C in the prescribed form. The transfer was made without valuable consideration and was not registered." C took possession of the vessel on behalf of B, the registered mortgagee. The ship-repairers instituted an action against the ship to recover the amount due to them for the necessaries supplied and work done on the ship. C (the assignee of the mortgagee) intervened. At the time, however, the vessel was already under arrest by the crew for unpaid wages. When the vessel was sold by court order, the proceeds were insufficient to payoff the mortgage and the debt to the ship repairer. The question was which of the unsatisfied claims took priority: the assignee of the mortgagee or the necessaries man (the ship-repairer)?

The Privy Council, affirming the judgment of the court below, held that the assignee of the mortgagee was entitled to have his mortgage debt satisfied before the ship-repairer, who did not have a maritime lien, was paid out.

It should be observed, that the register of mortgages is not conclusive as to the existence or validity of the mortgage and the court is at liberty to look behind the register to the real character of the transaction, and to treat an absolute bill of a sale conforming with the statutory provisions as a mortgage. But such mortgage is not a legal one. It may be equitable. Thus, in *The Innisfallen*⁽⁴¹⁾ an action for restraint was brought by the plaintiff claiming to be a co-owner. The court held that he was in fact a mortgagee and refused to grant the order. Dr Lushington said:

The Plaintiff swears that the arrangement was that, until payment, the vessel should continue the absolute property of his firm, and that the arrangement was insisted upon in lieu of a mortgage, in order that the Plaintiff should, as actual part-owner, exercise control over the movements of the vessel, to which, as mortgagee, he would not be entitled. The result of the Plaintiff's contention would be, that he was not exactly an absolute owner, not exactly a mortgagee, but that for some purposes he was an absolute owner, and for others a mortgagee. Now without going to the length of saying that the Court would in no case recognise such an agreement, so involved, as it were, wheel within wheel, I shall hold that the Court will not recognise it unless it is clearly proved, and definite, and complete in all its parts.

(41) (1866) L.R. 1 A. & E. 72.

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So, too, in *The Keroula*⁽⁴²⁾ shares in a ship were transferred as security for a loan and upon the loan not being repaid, the holders of the shares applied for an order of restraint claiming to be co-owners. The court held that it was entitled to look behind the register to the true nature of the transaction, which it held to be a mortgage or shares and accordingly refused to grant the order.

In *Burgis v. Constantine*⁽⁴³⁾ a mortgage had been executed in blank by the registered owners and then subsequently completed by the mortgagees who had registered it. The court held that the document was a nullity and the registration was therefore void.

A slight difference between the mortgage and the register in the name of the ship is of no consequence if there is no doubt as to the identity of the ship. In *Bell v. Bank of London*⁽⁴⁴⁾ the owner and builder of an unfinished ship executed a mortgage in the name of *The City of Bruxelles* whereby 64/64th shares⁽⁴⁵⁾ were mortgaged to the bank. Upon completion of the ship she was registered in the name of *The City of Brussels* and on the following day the mortgage was registered. The owner subsequently became bankrupt. In an action by his assignees against the bank, it was held that if prior to registration an owner executes an instrument which if it were executed after registration would pass an interest, then it is sufficient that it is in fact registered. Furthermore, as the mortgage deed was prior to registration the name of the ship in it was irrelevant because her identity was not in dispute:

"but Bruxelles and Brussels are substantially the same, and it is not necessary to give an opinion as to what would have been the effects if the names had been different. The mortgage is entered on the register as a mortgage of the City of Brussels. It was the mortgage of that vessel under the name of the City of Bruxelles."⁽⁴⁶⁾

REGISTRATION UNDER THE COMPANIES ACT

Sometimes an additional registration is required. Thus, if a mortgage is created by a corporation, it must be registered as a charge under the *Companies Act, 2006*, Sect. 860 provides:

(1) A company that creates a charge to which this section applies must deliver the prescribed particulars of the charge, together with the instrument (if

(42) (1886) 11 P.D. 92.

(43) (1908) 2 K.B. 484 (C.A.).

(44) (1858) 3 H. & N. 730.

(45) Regulation 2(5) of the 1993 Registration Regulations provides for property in a ship to be divided into 64 shares.

(46) (1858) 3 H. & N. 730, per Pollock C.B.

any) by which the charge is created or evidenced, to the registrar for registration before the end of the period allowed for registration.

(7) This section applies to the following charges—

(h) a charge on a ship ..., or any share in a ship,

3.2. UAE LAW

UAE has no prescribed forms for a ship mortgage. The only formal requirement is that the instrument that creates the mortgage should be in the form of a notarial deed⁽⁴⁷⁾ and the mortgage is acquired by registration of the said instrument.⁽⁴⁸⁾

3.2.1. THE MORTGAGE DEED

The mortgage deed should take the form of a notarial deed.⁽⁴⁹⁾ Any other form of instrument makes the mortgage null and void.⁽⁵⁰⁾ Since the *EMC 1981* does not specify the rights and obligations of the mortgagor and mortgagee, the mortgage itself must deal with these areas in some detail. The parties are free to insert whatever provisions they wish. A mortgage deed contains:

(1) The description and particulars of the ship,

(2) The names of the mortgagor and mortgagee.

(3) The money lent, the rate of interest, and the date of maturity.⁽⁵¹⁾

(47) See *EMC 1981*, article 99:

A mortgage shall be made by an official deed...

(48) *EMC 1981*, article 102 reads:

The mortgage shall be recorded in the Ships Register ...

(49) To be notarised by public notary.

(50) See *EMC 1981*, article 99:

A mortgage shall be made by an official instrument, otherwise it shall be void.

(51) In UAE it is a condition for registration of a mortgage that it refers to a fixed amount. In theory, a mortgage may be granted by a mortgagor only after value is given. In this regard it is sufficient if the mortgagor acknowledges the existence of the debt or the extending of credit facilities prior to the granting of a mortgage. Proof that the mortgagor has in fact received a loan or credit facilities is not a precondition to registration of the mortgage.

In English law, in the case of a principal sum and, interest mortgage, a debt must exist prior to the creation of the mortgage because the prescribed form states that the mortgage is granted in consideration of a specific sum of money lent on the day of the creation of the mortgage by the mortgagee to the mortgagor. In the case of an account current mortgage, the mortgagor is required, by the prescribed form, to recite that an account current exists between him and the mortgagee. At first view this would seem to indicate that there must be an existing debt. However, although the point has never been decided by the English courts, the view generally held is that the absence of a debt at the time of the creation or, for that matter, the registration of a mortgage, would not render the mortgage void or unenforceable in respect of future indebtedness, provided such future indebtedness arose as a result of the operation of the loan agreement and/or deed of covenant which, according to the terms of the mortgage, regulate the account current.

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(4) A declaration of the mortgagor that he is granting a mortgage on the ship or share therein, in favour of the mortgagee and his assignees.

(5) A declaration of the mortgagor that he is the owner of the ship.

3.2.2. REGISTRATION

A ship mortgage must be registered in UAE in order for it to have effect towards a third party.⁽⁵²⁾ Any mortgage will be registered in the ships' register⁽⁵³⁾ at the port of registration of the vessel, or with the consul of the UAE if the mortgage is made while the vessel is abroad.⁽⁵⁴⁾ If the mortgage is made on the vessel while it is in under construction, it must be registered in the register of ships at the area in which it is being built.⁽⁵⁵⁾ In order to effect the mortgage, an official copy of the mortgage deed must be submitted to the Maritime Inspection Office, accompanied by two lists signed by the applicant for registration containing in particular the following:⁽⁵⁶⁾

- (a) The name, surname and nationality of each debtor and creditor, together with their places of residence and their occupation.
- (b) Date and type of contract.
- (c) The amount of the debt as shown in the contract, and if the mortgage is being effected against more than one vessel the schedules must specify the amount of the debt relating to each of them. If the mortgage is against a vessel and other property, the schedules should specify the

(52) This means that registration, as under English law, is not compulsory, or a condition of the validity or operative effect of the mortgage *inter partes* provided that the mortgage is in an official deed. However, for the sake of credit, any incumbrance on a ship ought to be publicly advertised, so that a prospective creditor may have the opportunity before entering into contractual relations with the shipowner to know the legal position of the vessel exactly.

(53) This means that a mortgage cannot be registered unless the ship itself is registered.

It is not permissible for a ship to fly the flag of the UAE unless that ship has been registered pursuant to the *EMC 1981*. However, there are certain categories of ships that are exempt from registration (such as certain fishing and pleasure boats). Additionally, and unlike certain flags of convenience, registration of tankers more than 10 years old is prohibited. The *EMC 1981* sets out detailed procedures for the registration of ships.

(54) *EMC 1981*, article 102/1 provides that:

(Rough translation) The mortgage shall be recorded in the Ships Register in the office of the port where the vessel is registered. If the vessel is mortgaged while it is being outside the UAE the mortgage shall be recorded with the consul of the UAE, or with the consul of the State if the mortgage is effected while the vessel is abroad.

(55) *EMC 1981*, article 102/2 provides that:

(Rough translation) If the mortgage is effected on the vessel while it is being built, it must be recorded on the Ships Register in the Registration Office of the port where the construction is taking place.

(56) See *EMC 1981*, article 103.

amount of the debt secured by the vessel.

- (d) Conditions relating to interest on the debts, if any, and conditions of settlement.
- (e) The name and description of the mortgaged vessel, the date and number of the certificate of registration, or the construction report on the vessel from the relevant office in accordance with Article 101, and its registration number on the register for the place of construction.
- (f) The chosen address of the creditor within the area of the Registration Office in which registration has been effected.

4. SCOPE OF THE MORTGAGE

4.1. ENGLISH LAW

4.1.1. SHIPS

i - Statutory mortgages

A legal mortgage can be created only in respect of a registered ship or a share in a registered ship.⁽⁵⁷⁾

The meaning of the word "ship" includes every description of vessel used in navigation.⁽⁵⁸⁾ English decisions affirmed the vessel status of craft such as barges,⁽⁵⁹⁾ floating cranes⁽⁶⁰⁾ and a "reclamation dredger".⁽⁶¹⁾ A "flotel" has also been found to be a "ship",⁽⁶²⁾ as has a jack-up oil rig.⁽⁶³⁾ On the other hand, such

(57) See Hill, *op. cit.*, at p. 29

(58) *MSA 1995*, sect. 313. It is a question of fact whether a vessel is "used in navigation" and particular regard is to be had to what use she has been, and is now, put. In *European and Australasian Royal Mail v. P. & O.* (1866) 14 L.T. 704, a vessel which had formerly been registered, but which had had all masts, spars and rigging removed except for her lower masts and standing rigging and was moored fore and aft with two anchors and which had been used for the past four years as a coal hulk was held no longer to be a "ship" but to have become a mere chattel, a floating coal hulk. In *Southport Corporation v. Morris* [1893] 1 Q.B. 359, an electric passenger launch used exclusively on a small artificial lake was held not to be "used in navigation" and thus not to be a ship. In *Weeks v. Ross* [1913] 2 K.B. 229, a motor boat used exclusively in the River Exe between Exeter and a lock, beyond which a canal connected via further locks with a tidal estuary, was held to be a ship.

(59) *The Mac*, (1882) 7 P.D. 126 (C.A.); *The Mudlark*, [1911] P. 116.

(60) *The Titan v. The Benwood*, (1923) 14 Ll.L.rep. 483.

(61) *Marine Craft Constructors Ltd. v. Erland Blomquist (Engineers) Ltd.*, [1953] 1 Lloyd's Rep. 514.

(62) *Addison v. Denholm Ship Management*, [1997] LC.R. 770 (E.A.T. Sc.). A "flotel" is semi-submersible structure, consisting of a platform attached by legs to pontoons, whose purpose is to provide accommodation for workers required during the construction and hook-up of fixed offshore oil and gas installations, and which also contains offices, workshops and storage areas. See Meeson, *Admiralty Jurisdiction and Practice*, 2 Ed., 2000 at pp. 29-30.

(63) *Perks v. Clark*, [2001] 2 Lloyd's Rep. 431 at p. 439 and 441 (C.A.).

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contrivances a gas floats moored as beacons,⁽⁶⁴⁾ seaplanes⁽⁶⁵⁾, a pontoon crane,⁽⁶⁶⁾ a flying boat⁽⁶⁷⁾ and jet skis,⁽⁶⁸⁾ have been excluded from the ship/vessel classification.

The following British ships are exempted from registration. These ships cannot be the subject of statutory mortgage. They are:⁽⁶⁹⁾

- (a) fishing vessels,
- (b) small ships, and
- (d) bareboat charter ships.

ii - Equitable mortgages

Every ship or vessel, either registered or un-registered, may be equitably mortgaged. Typical circumstances where equitable mortgages can and do exist are:

- (1) on an unregistered British ship⁽⁷⁰⁾ or a share in such;
- (2) on foreign vessels; and
- (3) on unfinished vessels. As unfinished vessels cannot be registered, so also no mortgage on them is capable of being registered.⁽⁷¹⁾

(64) *Wells and Another v. The Gas Float Whitton No.2. (Owners)*, [1897] A.C. 337 (H.L.).

(65) *Watson v. RCA Victor* (1934) 50 Ll.L.rep. 77.

(66) *Merchants' Marine Insurance v. North of England P & I Assosc.* (1926) 26 Ll.L.Rep. 201 (C.A.).

(67) *Polpen Shipping Co. v. Commercial Union Assurance Co.*, [1943] 1 KB.

(68) *Steedman v. Scofield*, [1992] 2 Lloyd's Rep. 163. The Court held that a jet ski was not a vessel, because that term usually refers to a hollow receptacle for carrying goods or people, being a craft larger than rowing boats. Nor was a jet ski used in navigation, because it was not a means of transportation on water. Accordingly, because it was not a vessel, it was not a ship under the definition in sect. 742 of the Merchant Shipping Act, 1894.

(69) 1993 Registration of Ships Regulations 1993, Part II, s. 3(4) (a).

(70) Buyers of unregistered ships could have unregistered mortgages enforced against them, even though they did not know that a mortgage existed. In *The Shizelle* (1992) 2 Lloyd's Rep. 444, a vessel was mortgaged to the plaintiffs and the vessel and mortgage were both unregistered. Subsequently the vessel was sold to the defendants 'free from any encumbrances'. The purchasers did not have any knowledge, actual or constructive, of the mortgage and were bona fide purchasers. The defendants registered their ownership of the vessel on the Small Ships Register maintained by the Secretary of State for Transport in accordance with the Merchant Shipping (Small Ships Register) Regulations 1983. That register did not provide for registration of mortgages or other security. The plaintiffs then advised the defendants of their undischarged mortgage and arrested the vessel. The question raised was whether the bona fide purchasers for value of an unregistered vessel were liable to the mortgagees under an unregistered mortgage of the vessel where he has neither actual nor constructive notice of the mortgage at the time of the purchase of the vessel. The purchasers argued that the only legal mortgage of a ship was a registered mortgage and as the mortgage was unregistered it was equitable only and would not bind a bona fide purchaser for value. The High Court disagreed. The fact that the vessel was unregistered and therefore the mortgage was incapable of being registered did not prevent the mortgagees from acquiring a legal interest in the vessel. The purchasers would be bound by what was a legal mortgage and not an equitable mortgage.

(71) Hill, *op.cit.*, at p.29. For mortgage of an unfinished ship see *Ex parte Hodgkin* (1875) L.R. 20 Eq. 746.

(4) on a registered British ship or share but the mortgage unregistered.

4.1.2. SHIP'S TACKLE, EQUIPMENT AND APPURTENANCES

A mortgage, according to the principal sum and interest and account current forms, is upon the vessel, her boats and appurtenances. The judicial interpretation of the word 'appurtenances' is that they cover "all articles necessary to the navigation of the ship or to the prosecution of the adventure, and without which no prudent person would sail, which were on board at the date of the mortgage and articles brought on board in substitution for them subsequently to the mortgage."⁽⁷²⁾

Such articles were held to be sails, compasses, side lights, masthead lights, an engine used for the fishing gear, ropes, boats, clocks, lamps, lanterns, charts, flare fires, barometers, tea-kettles, plates, saucepans, etc.

It has been contended that the mortgage does not include ship's fittings, unless they are expressly mentioned, and that where a thing on board a ship is severable, although it may be appurtenant to the ship, it is not part of it, and that under the word "ship" come only those things which are actually attached to the ship at the date of the mortgage. But it was held,⁽⁷³⁾ that the words "ship and its appurtenances" include anything in fact, without which it would not be prudent to send a ship to sea. And it would seem, in the light of such construction, that where the parties would like to exclude something which is within the meaning of the word "ship", from the effects of the mortgage they must do this by express exception in the mortgage deed. In *Re Salmon, ex parte Gould*,⁽⁷⁴⁾ several fishing boats had been mortgaged by bankrupts and the mortgagees laid claim to the nets and fishing gear which had been used on board the mortgaged vessels, but of which no particular nets were appropriated to, or especially belonged to any particular vessel. It was held that they could not be considered appurtenances on the ground that there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately. The same conclusion is to be drawn from the decision in *The*

(72) *Coltman v. Chamberlain* (1890) 25 Q.B.D. 328. See also *The Dundee* (1823) 1 Hagg 109 where it was held that where the word 'appurtenances' is used in the mortgage documents and the prescribed form., the word means, broadly, a thing belonging to another and, in the case of mortgages, it indicates that anything on board the ship, being necessary for the voyage and the adventure, is included as belonging to the owner and it is thus part of the security.

(73) *Re Salmon & Woods, ex p. Gould* (1885) 2 Mor. Bky. Cas. 137.

(74) (1885) 2 Mor. Bky. Cas. 137.

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Humorous, The Mabel Vera,⁽⁷⁵⁾ where there was a mortgage of two fishing vessels and "their appurtenances". At the time of the mortgage, one fishing vessel had nets appropriated to it, but the other fishing vessel had not. It was held in an action by the mortgagee who had entered into possession, that the nets on board the latter vessel at the time when he entered into possession did not pass under the mortgage as no nets had been appropriated to her at the time of the mortgage.

As has been already mentioned, articles brought aboard in substitution for the originals, pass under the mortgage. "It was suggested that they did not pass, and that there are no words in the mortgage giving the mortgagee an interest in after-acquired property (which is true). But in my opinion it is unnecessary that there should have been such words, words amounting to an equitable assignment, for what has to be looked to is whether the articles for which they were substituted were essential to the original equipment of the ship. And there is no ground for saying that the mortgage ought to have been registered under the Bills of Sale Acts".⁽⁷⁶⁾

A ship's chronometer passes under an assignment of "all the appendages and appurtenances". So do fishing nets. But containers do not pass under appurtenances as they are not necessary for its operation.⁽⁷⁷⁾ Bunkers on board the ship are not always part of the security. Bunkers are not part of the ship, but they could be included in the mortgage by a collateral agreement if bunkers are the property of the owner.⁽⁷⁸⁾ In *The Honshu Gloria*,⁽⁷⁹⁾ Clause 4 of the mortgage document meticulously set out the various items or appurtenances of the vessel which were to be transferred as security. The list did not include fuel. The mortgagee plaintiff (or bank) argued that Clause 1 of the same document, wherein a definition of the vessel was given, expressly mentioned fuel as part of the vessel's definition and as the vessel itself was transferred so also should

(75) [1933] P. 109.

(76) *Coltman v. Chamberlain* (1890) 25 Q.B.D. 328, at 334 per Charles J. In *The Hull Ropes Company v. Adams* (1895) 65 L.J.Q.B. 114. a trawl warp was purchased by the mortgagor after the date of the mortgage on hire-purchase and put on board the ship. Subsequently the mortgagee entered into possession. It was held that the trawl warp was covered by the mortgage and that property in it had passed to the mortgagee, notwithstanding the hire-purchase agreement.

(77) *The River Rima* [1987] 2 Lloyd's Rep 106 (CA), aff'd by HL [1988] 2 Lloyd's Rep 193.

(78) Usually, bunkers belong to the charterers. The arrest of a ship, other than for taking possession by the mortgagee, includes the bunkers, if the charterer is responsible for the claim which is the cause of the arrest (see *The Silia*, [1981] 2 Lloyd's Rep. 534.)

If there are no judgment creditors other than the mortgagees, they can recover against the whole of the ship fund and the bunker fund. See *The Eurostar*, [1993] 1 Lloyd's Rep. 106 at p. 111; *The Span Terza*, [1983] 1 Lloyd's Rep. 441 at p. 444 (C.A.).

(79) [1986] 2 Lloyd's Rep. 67

those items which fell within the definition of the vessel. It was held that Clause 4 would have had little significance if it was merely repeating 'parrot fashion' the items listed as per the definition. The fact that the list in Clause 4 did repeat some of the Clause 1 items but expressly excluded others, e.g. fuel, the word at issue here underlined the fact that fuel was meant to be excluded in the context of this particular mortgage agreement.

4.1.3. CARGO AND FREIGHT

The mortgage of a ship does not vest any property in the cargo in the mortgagee. Where the cargo belongs to the owner of the ship, it will not, in the absence of any special agreement pass to the mortgagee. In *Brancker v Molyneux*,⁽⁸⁰⁾ Tindal CJ said "I see no ground for the proposition that any property in the cotton (cargo) vested in the defendant (mortgagee). The only title set up by him was a mortgage of a ship. The party who is owner of the ship at the time that the cargo is put on board is *prima facie* owner of the cargo." The same was held in *Alexander v Simms*,⁽⁸¹⁾ where a part-owner of a ship, whose share was subject to a mortgage, agreed with the other part-owner, whose share was not subject to any mortgage, but without the concurrence of the mortgagee to purchase guano in Patagonia, and bring it in the ship to England. On the completion of the voyage, and when the cargo was about to be discharged, the mortgagee took possession of the ship. It was held that the mortgagee, even when he took possession of the vessel, had no claim against the owner of the unmortgaged share for cargo or freight. At the most he could only claim to adopt the mortgagor's contract, and to stand in his place as to the profit of the adventure.

Nevertheless, it may happen that not only actual cargo on board, but even future cargo to be loaded during a particular voyage, can be validly assigned in equity to the mortgagee at the same time as the mortgage of the ship.⁽⁸²⁾

Under a legal mortgage the mortgagee acquires no right to the freight earned by the mortgaged ship, unless and until he takes actual or constructive possession of her.⁽⁸³⁾ The shipowner is the person who is primarily entitled to receive the freight, since the goods have been carried upon his ship, and the right to receive freight is one of the incidents of ownership. The mortgagor, so long as he remains in possession, is not divested of his right as owner and

(80) (1841) 2 Man. & G. 84, at 86.

(81) (1854) 32 E.R. 791.

(82) *Langton v. Horton* (1842) 1 Hare 549; 66 E.R. 1149; *Curtis v. Auber* (1820) 37 E.R. 468.

(83) *Liverpool Marine Credit Co v Wilson* (1872) LR 7 Ch 507, P 511.

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therefore can receive the freight to be earned. Upon taking possession the mortgagee becomes entitled to the freight, and his right depends not upon the existence of the mortgage, but solely upon the fact that he is in possession as owner.

The freight may, however, be assigned separately from the ship, before it has been earned, or even contracted for.⁽⁸⁴⁾ The assignment is, usually, the subject of a collateral agreement. As between the assignor (shipowner) and his assignee (mortgagee), the latter acquires a right to the freight, independent of taking possession of the ship. This was held in *Gardner v Lachlan*,⁽⁸⁵⁾ where it was said also that no notice is necessary, and the assignee of the freight will get a good equitable title against the assignor. But his title may be defeated by a person who has acquired a legal right to the freight or by one who holds a prior equitable right.⁽⁸⁶⁾

4.2. UAE LAW**4.2.1. SHIPS**

The *EMC 1981* provides that any ship which is registered⁽⁸⁷⁾ and above 10

(84) See *Wills v Palmer* (1860) 141 ER 847 (CP).

(85) (1838) 41 E.R. 51, at 52.

(86) See further, Carver, *Carriage by sea*, 13th ed. 1982, at para 1734-1737.

(87) *EMC 1981*, article 18/1 provides that :

(Rough translation) It shall not be permissible for any vessel to sail upon the sea under UAE flag unless it has been registered.

In order for a ship to be registered and therefore to be considered as a UAE ship she must fall within one or other of the classes of UAE ships defined by article 14 of the *EMC 1981* which provided: *(Rough translation)*

1- A vessel shall acquire the nationality of the (UAE) if it is registered in any of its ports, and is owned by a natural or legal person having the said nationality. If the vessel is owned by a number of persons jointly it may only have the nationality of the (UAE) if all of the owners are of (UAE) nationality.

2- If the owner is a joint liability company, all of the partners must have the nationality of the (UAE). In the case of limited partnerships, all of the jointly liable partners must have the nationality of the (UAE), and at least two thirds of the capital must be owned by persons of that nationality.

In the case of limited liability companies, at least 51% of the capital must be owned by persons having the nationality of the (UAE), and the directors must be of that nationality.

In sleeping partnerships (also: speculative companies), all sleeping partners (or: speculators) must have the nationality of the (UAE), and at least 51% of the capital shares must be owned by nationals of the (UAE).

In share companies, at least 51% of the capital must be owned by nationals of the (UAE), and a majority of the members of the Board of Directors, including the Chairman of the Board, must be nationals of the (UAE). This provision shall not apply to share companies in which the Government or other public bodies corporate participate in the establishment thereof.

3- If a vessel is owned by a body corporate in the capital of which more than one state has shares and it has the nationality of the shareholder states in accordance with international agreements, among which is the nationality of the (UAE), it shall be permissible, by a resolution of the Council of

DWT⁽⁸⁸⁾ may be mortgaged. A ship is defined to mean “(Rough translation) any structure⁽⁸⁹⁾ which is normally working or prepared to be working in maritime navigation irrespective of its power, tonnage or the purposes for its navigation.”⁽⁹⁰⁾ Thus, barges, dredgers, floating cranes, tugboats, floating docks, platforms, and so on, regardless of their use, method of propulsion and their tonnage may be mortgaged, provided that they have been registered. A yacht used exclusively for the pleasure of its owner, and never for commercial purposes, may be mortgaged, if exceeding ten tons. If it is less than ten tons it may be mortgaged provided that it has been registered. For the same reason Government-owned ships are within the definition of the law. Nevertheless it would seem that, at least in practice, mortgage rules are not applicable to such ships, because of the complications which may arise.

Warships are not affected by the provisions concerning mortgages, etc., for obvious reasons.

A ship in the course of construction may be mortgaged.⁽⁹¹⁾

4.2.2. SHIP'S TACKLE, EQUIPMENT AND APPURTENANCES

In UAE law, too, a mortgage of a ship will include, except a condition to the contrary, all the accessories of the vessel.⁽⁹²⁾ Parties are free to negotiate the

Ministers, to confer that nationality on the ship to enable it to be registered and to give effect the desired purposes of its owner.

4- Ships confiscated for a breach of the laws of the (UAE) shall be treated as having the nationality of the (UAE), as well as abandoned ships picked up by vessels having the nationality of the (UAE).

(88) *EMC 1981*, article 18 provides that: (Rough translation)

2. Vessels designed for fishing, pleasure-cruising or trading, and whose tonnage is not more than 10 tons shall be exempt from registration. The same exemption shall apply to lighters, barges, tugs, boats, cranes, dredgers, diving vessels and other floating installations working within the UAE ports.

3....These vessels may be registered at the request of the owners.

(89) In English law the term ‘ship’ includes every description of vessel used in navigation; see *MSA 1995* s. 313 (1).

(90) In *R v Goodwin* [2006] 1 Lloyd's Rep 432 (CA), the Court of Appeal said that: “A ‘vessel used in navigation’was confined to a vessel which was used to make ordered progression over the water from one place to another, although it was not a necessary requirement that it should be used in transporting persons or property by water to an intended destination. Craft that were simply used for having fun on the water without the object of going anywhere, such as jet skis, were not “used in navigation” and were accordingly excluded from the definition of ship or vessel”.

(91) *EMC 1981*, article 101 provides that:

(Rough translation) It shall be permissible for a vessel to be mortgaged while it is still in course of construction, but before the mortgage there must be a declaration from the relevant Maritime Office in the port in the area of its jurisdiction in which the vessel is being constructed, setting out the length and other dimensions of the vessel, its approximate tonnage, and the address of the yard or place in which it is being built.

(92) *EMC 1981*, article 11/3 provides that:

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subject of encumbrance. They do not need to provide an extensive description and inventory of the accessories, because the latter are legally included in the ship mortgage. Therefore, the mortgage can even attach to only a part of the ship.⁽⁹³⁾

Accessories are not defined by the *EMC 1981*. Articles under the name of accessories should be divided into two kinds, fixtures and annexes. Fixtures are moveable articles which cannot be severed from the ship, without damage being caused to either the ship or the accessory, or without their substance or purpose being altered. Fixtures are *ipso jure* included in the mortgage of a ship, because they cannot be the subject of separate rights *in rem*, as long as they are attached with the ship. Fixtures of a ship include keel, rudder, masts, engines, spare parts, and some essential instruments of navigation like compasses, etc.

Annexes are chattels, which without being fixtures, are designed to serve the economic purpose of the ship, and consequently are attached to it. Annexes are included in the mortgage of a ship, except where there is an express clause in the mortgage contract to the contrary. They seem to include nets, equipment, boats, ropes, furniture etc. If any doubt arises about them, all articles enrolled in the ship's list are deemed to be annexes of the ship, even if they are temporarily separated from her.

The difference between a fixture and an annex of a ship is that whereas an annex may be excluded from the mortgage by an express clause, and even be mortgaged separately from the ship, a fixture cannot.

When a fixture or an annex, e.g. an accessory, is separated from the ship (not temporarily), and afterwards is transferred to a third person by way of pledge or sale, the mortgagee of the ship cannot claim the accessory from that person.

A mere separation of the fixture or annex from the ship is not sufficient, and actual or constructive transfer is needed, otherwise the mortgagee may enforce the mortgage upon the separated accessory, e.g. engine separated temporarily from the ship for repairs on shore, but not transferred by contract to a third person.

(Rough translation) All the appurtenances of the ship necessary for the operation thereof shall be deemed to be part of the ship and of the same nature,

(93) *EMC 1981*, article 109 provides that: *(Rough translation)*

1. If the mortgage is against a share which does not exceed one half of the vessel, the mortgagee creditor may only attach and sell that share. If the mortgage is against more than one half of the vessel, the creditor may arrest and sell the entire vessel.
2. In both cases the creditor must give official warning to the other shareholders at least fifteen days

On the other hand, if fixtures are attached to the ship, even after the mortgage, they become fixtures of the ship, in the sense that they are subject to the mortgage, notwithstanding any right of third persons to them, e.g. a new rudder⁽⁹⁴⁾

Thus, the shipowner is granted the right to separate and sever articles belonging to the ship and even transfer them to other persons, because otherwise it would be impossible to carry out necessary repairs or alterations on board the ship. Anyway the mortgagee is duly protected from any fraudulent removal and transfer of the ship's tackle and equipment. He may consider the mortgage as terminated and claim the immediate disbursement of the money. Moreover, according to the provisions of the Code of Civil Procedure, from the date of the seizure of the ship, any alteration or removal of articles from the ship is prohibited, and therefore any transfer of such accessories is void.

4.2.3. CARGO, FREIGHT AND INSURANCE MONEY

Under the *EMC 1981*, freight or cargo is not covered by the mortgage of a ship. because a mortgage applies only to ships.⁽⁹⁵⁾ Nevertheless, the owner may by a separate informal contract assign his rights on the freight to the mortgagee. No form, or instrument in writing is needed. Therefore, even an oral agreement is sufficient for the validity of the assignment. As between assignor and assignee, an assignment of the freight is effected at once, upon the agreement being made. It does not depend on the assignor or assignee giving notice to those who are liable for the payment of the freight. But as against third parties, including the person by whom the freight is payable, the assignee acquires no rights unless and until notice of the assignment is given to the debtor. The notice need not be in writing, and there is no need for an agreement or acceptance on the part of the person by whom the freight is payable.

Furthermore, mortgage does not cover the compensation from the ship's insurance unless stated in the mortgage deed. *EMC 1985*, article 100/3 states:

(Rough translation) Nevertheless, it shall be permissible for an agreement to be made in a contract of mortgage for the mortgagee creditor to recover his debt out of the insurance money on condition that the insurers so accept in writing, or

(94) See *Emirati Civil Code 1985*, article 1407:

(Free translation) A hypothec shall include the appurtenances of the (property)...and things which have become part of the (property) of affixation, and any new (things) erected on the (property) after the contract was made.

(95) *EMC 1981*, article 100/2 reads:

A mortgage effected on a vessel shall not have effect against freight...

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if they are given notice thereof.

EMC 1985, article 86/3 provides three situations in which compensation, where mortgages are concerned, replaces the lost or damaged ship. The list is as follows:

- (a) Compensation due to the owner for material damage caused to the vessel if it has not been repaired, or for loss of freight.
- (b) Compensation due to the owner for general average if it arises out of material damage caused to the vessel which has not been repaired, or for loss of freight.
- (c) Monies due to the owner for acts of assistance or salvage performed up to the end of the voyage, after deducting sums due to the master, crew and other persons connected with the contract of maritime work on the vessel.

5. RIGHTS AND OBLIGATIONS OF THE MORTGAGOR AND MORTGAGEE

Although the rights and obligations of mortgagors and mortgagees are dealt with in separate sections, there is a great deal of overlap and interplay between the two. The rights and obligations of the mortgagor and the mortgagee exist only in relation to each other, and the comments contained in this section must be read keeping in mind the comments contained in the succeeding section.

The rights and obligations of the mortgagor and the mortgagee will be determined to a great extent by the security documentation executed with respect to the loan. Where there is an extensive collateral loan agreement between the mortgagor and the mortgagee, the relationship between the parties will be substantially determined by the covenants contained therein. However, where the covenants in the collateral loan agreement are incomplete or are silent with respect to certain matters, the provisions of the statute and common law with respect to ship's mortgages will be applicable.

5.1. ENGLISH LAW

5.1.1. RIGHTS OF THE MORTGAGOR

Perhaps the most significant right of the mortgagor is that he remains the owner of the vessel. The only limitation of this is that it may be necessary to make the ship or share available as security for the mortgage debt⁽⁹⁶⁾. The

(96) Schedule 1, paragraph 10 to the *MSA 1995* which deals with protection of registered mortgagees provides that

mortgagor" said Lord Carins in *Keith v Burrows*,⁽⁹⁷⁾"may do all the acts which would be the ordinary incidents of his ownership. He may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not only in earning freight, but for the purpose of bringing home goods for his own benefit... All these acts would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor."

Thus, unless and until the mortgagee enters into possession, the mortgagor remains the owner of the ship.⁽⁹⁸⁾ He will operate the ship, man and victuals her and bestows labour and expense on her, take the earnings, procures the insurance, make the repayments under the loan agreement and enters into contracts. In *Collins v Lamport*,⁽⁹⁹⁾ it was held that the mortgagor, as the registered owner, subject to which do not materially impair the mortgagee's security. The mortgagor retains all the rights and power of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not impair the mortgagee's security. Lord Westbury summed up the mortgagor's rights:

In my judgment...so long as the mortgagee of a ship does not take

Where a ship or share is subject to a registered mortgage then—

- (a) except so far as may be necessary for making the ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be treated as owner of the ship or share; and
- (b) the mortgagor shall be treated as not having ceased to be owner of the ship or share.

This paragraph clarifies that the mortgagee, by reason of the exercise of his statutory powers, which give him owner-type rights for the limited purpose of realising his security, shall not be treated as owner. The heading indicates that the mortgagee is protected from being exposed to owner-type liabilities during his possession of the ship.

Until 1854 the ship mortgage undoubtedly was a property transfer mortgage. When a registered shipowner mortgages the ship, the mortgage is created by the mortgage deed. The mortgage deed transfers ownership of the ship to the mortgagee, so that it is the mortgagee and not the shipowner who owns the ship, despite the fact that the mortgagor remains registered as "owner". The only proprietary interest that the shipowner retains in the ship during the continuance of the mortgage is the equity of redemption, which is an equitable proprietary interest; see Hill, *op. cit.*, at 28.

(97) (1877) 2 App. Cas. 636, at 645.

(98) See *Chinnery v. Blackburne*, (1784)1 H. Bl. 118 at p. 119,126 E.R. 71 at p. 72, where Lord Mansfield declared: "Till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expences [sic], and he is to reap the profits."

(99) (1864) 4 De G.J. & Sm. 500; 46 E.R. 1012.

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possession, the mortgagor, as the registered owner, subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, provided that his dealings do not materially impair the mortgagee's security.

In *Castle v. Duke*⁽¹⁰⁰⁾ the question arose as to who was responsible as between the mortgagor and the mortgagee for the costs of repairs to the mortgaged ship in circumstances where the mortgagee, who was also the ship's broker, had ordered the repairs to be carried out. The court held that liability for the repairs depended upon the capacity in which the order had been given out.

In *The "Ripon City"* (No. 2),⁽¹⁰¹⁾ minority shareholders in possession of the ship incurred liabilities including a claim for wages and disbursements by the master. The majority shareholders settled the claim, repaired the ship and had to pay a sum of money in order to cancel an unprofitable charter entered into by the minority shareholders. In distributing the proceeds of sale of the ship, the court held that the mortgagees of the minority shares were not liable to deduction of the costs and expenses of the majority shareholders in respect of the master's claim, the repairs and the cancellation charges as they were not in possession at the material time.

In the absence of any collateral assignment, the mortgagor is entitled to freight. The mortgagee, upon entering into possession, is not entitled by that act alone to recover the freight received by the mortgagor before that time.⁽¹⁰²⁾

The mortgagor may enter into contracts dealing with the ship, and accordingly he may let out the vessel on charter at his discretion.⁽¹⁰³⁾

The mortgagor may insure the ship or share therein to their respective full value. He has an insurable interest⁽¹⁰⁴⁾ in the mortgaged property to its full

(100) (1832) 5 Car. & P. 359.

(101) [1898] P. 78.

(102) See *Gardner v. Cazenove* (1856) 1 H. & N. 423 and *Essarts v. Whinney* (1903) 9 Asp. M.L.C. 363.

(103) *The Heather Bell* [1901], P. 273, at 280. Lord Westbury in *Collins v Lamport* (1864) 4 De GJ&S 500, summed up the mortgagor's rights to enter into contracts in relation to his ship in the light of the statutory provisions:

"Every contract, therefore, entered into by the mortgagor remaining in possession, is a contract which derives validity from the declaration of his continuing to be the owner, but at the same time, every such contract is a contract into the benefit of which the mortgagee may at any time enter by giving notice to the person who under that contract is to pay to the mortgagor, that he requires the payment to be made to him, the mortgagee."

(104) The Marine Insurance Act 1906 provides that both the mortgagor and the mortgagee have an insurable interest. Section 14 provides:

(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum

value, because in case of loss he would not only be deprived of the vessel insured, but would still remain liable for the mortgage debt.

Where the mortgagor has stipulated that he will insure the mortgaged ship on account of the mortgagee, he is a trustee for him of the proceeds of the policy. But where a ship was mortgaged "together with its policies of insurance" the insurance policy was treated as a substantive and independent equitable security for the mortgage debt. In *Swan & Cleveland's Graving Dock and Slipway Company v. Marine Insurance Co*⁽¹⁰⁵⁾ a ship was mortgaged "together with the policies of insurance effected thereon" and the mortgagee had possession of the policy. During the currency of the policy the ship suffered general and particular average losses. The mortgagor had the damage repaired and assigned to the repairers, as security for the cost of the repairs, the monies due under the policy and gave notice to both the underwriters and the mortgagees. The mortgagor subsequently became insolvent.

The court held that the mortgagee obtained the policy as security for his debt, and not merely as security for his security (viz. the ship) and was entitled to the monies under the policy to his own use and was not liable to apply it in payment of the costs of the repairs. It was further held that the mortgagor retained an interest in the policy in the nature of an equity of redemption, and was entitled to sue upon it, or to require the mortgagee to sue upon it on his behalf in so far as he had an interest exceeding that of the mortgagee in the sum recovered. In the course of giving judgment Channell J said:

The rights between the mortgagor and the mortgagee must be determined by the mortgage deed so far as these have not been varied by subsequent agreement. If the money had been recovered from the underwriters before the ship had been repaired, it is quite clear that the money would belong to the mortgagee; and if the mortgagor claimed, as in substance he did claim in the present case, that the money should be applied in payment of the cost of repairs, he would have to get the authority or consent of the mortgagee so to apply it, or he would have to show that such consent had been given in the original contract.

It should be noted that in the absence of an express provision, there is no general implied right on the part of a mortgagee to pay insurance premiums and

due or to become due under the mortgage.

(2) A mortgagee, consignee or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.

(105) (1906) Asp. M.L.C. 450.

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add them to the mortgage debt. In *The Basildon*⁽¹⁰⁶⁾ the question arose as to whether payments made for insurance were recoverable under the plaintiffs' first mortgage (which had no express provision) or under their second mortgage which did. The question was material owing to the existence of yet another mortgage ranking between the plaintiffs' first and second mortgages. Brandon J. dealt with this question of principle as follows:

The plaintiffs claim that they had an implied right to make the payments and add them to the mortgage debt under the first mortgage on the ground that failure by the defendants to continue the insurance of the vessel would impair the security of the first mortgage. I am not satisfied that the plaintiffs had any such right under the first mortgage.... It may well be that where a mortgagor fails to insure the mortgaged ship the mortgagee will be entitled to take possession of the vessel under the powers to take possession which always exist. If that sort of question arose, the question would be whether the failure to insure, either by itself or along with other activities of the mortgagor, constituted such an impairment of the security as would justify the mortgagee in taking possession .

. . . It seems to me that if a mortgagee did take possession in such circumstances, and properly took possession, he could then insure the ship and charge the insurance together with other outgoings against the freight which he received. But I am not satisfied that where the mortgagee does not take possession he is entitled to pay insurance premiums and add them to the mortgage debt.

The mortgagor is responsible for the wages of the crew and the master. He appoints the master, can dismiss him and in general is liable for all duties and responsibilities, which are imposed by the Merchant Shipping Act, upon the owner of a ship.

The mortgagor may obtain an injunction of the court, preventing the mortgagee from arresting or interfering with the vessel, if there is not sufficient proof that the acts of the mortgagor do impair materially the mortgagee's security.

5.1.1.1. Power of the mortgagor to sell the ship

The mortgagor may sell the vessel to another person even though the vessel is mortgaged. If a vessel is sold to by her owner to another British owner and any mortgage on the vessel at the time of transfer is not discharged, then the

(106) [1967] 2 Lloyd's Rep. 134.

vessel will be transferred subject to the mortgage. If a vessel is sold by her owner to a person not qualified to own shares in a British ship then, according to the *MSA 1995* the registry of the vessel in the register book shall be considered closed except in so far as it relates to any unsatisfied mortgage recorded therein.⁽¹⁰⁷⁾

Where, however, a ship is sold by order of the court, the position of the mortgagee is different. He is barred from proceeding against the vessel under her new ownership to recover any outstanding balance due under the mortgage before the sale. The new owner, being an innocent purchaser for value, takes the ship free of all encumbrances. The mortgagee's recourse is restricted to the proceeds of sale only.⁽¹⁰⁸⁾

5.1.1.2. Right of redemption.

The mortgagor has the right to redeem the property from the mortgagee as soon as the time for redemption has elapsed. This is usually six months after the date of the mortgage. Payment of all the moneys outstanding under the mortgage must be made. The right still vests although the mortgagee may have taken possession of the security. However, the right cannot be exercised once the mortgagee has sold the vessel for the purpose of realizing his security. A mortgagee who wrongfully refuses to allow a mortgagor to redeem and proceeds to sell the property may be liable in damages to the mortgagor. In *Fletcher & Campbell v City Marine Finance Ltd*⁽¹⁰⁹⁾ the defendants were the mortgagees of the ship for a loan granted to the first plaintiffs (the mortgagor). The deed of covenants provided for repayment of the loan in monthly instalments. There was default in payment and the mortgagees wanted to take possession, refusing to accept payment from the second plaintiffs, who were the beneficial owners of the ship, and insisting that the mortgagor should pay on unconditional terms. Although an offer was made by the second plaintiffs for

(107) Hill, *op. cit.*, p.37.

(108) See *The Blitz* (1992) 2 Lloyd's Rep. 441 a loan of £10,000 was secured by mortgage on the vessel and the mortgage duly registered in 1989. In 1991, the vessel was arrested for unpaid harbour dues and pursuant to s 44 of the Harbours, Docks and Piers Clauses Act 1847, the harbour owners sold the vessel to the defendant. The purchaser was unaware of the mortgage. The question was whether the sale was one free of encumbrances, or whether the mortgagee could enforce his mortgage against the ship after she had been sold by the harbour authority. Sheen J held that a purchaser of the ship from the harbour authority could not be expected to investigate the register, which may be in some foreign land, and a harbour authority could not be expected to clear any unsatisfied mortgage affecting a ship pursuant to his right under s 44. The risk of non-payment should be borne by the person who voluntarily lends an unwisely large amount on the security of a ship, rather than a harbour authority or an innocent purchaser without notice of the mortgage. The claim of the mortgagee failed.

(109) [19678] 2 Lloyd's Rep. 520.

[SHIP MORTGAGE A STUDY OF ENGLISH AND EMIRATI LAW]

payment by the mortgagor, the mortgagees sold the vessel a few days thereafter, depriving the mortgagor of his right to redeem. It was held that the tender of the sum due was a proper tender, and the defendants had acted unreasonably by refusing to accept it. The mortgagor was entitled to recover damages, because his right to redeem was prevented by the wrongful action of the mortgagee.

5.1.2. Obligations of the Mortgagor

Sometimes the mortgagee will endeavour to gain greater control over the use of the vessel than he would otherwise enjoy at common law or by statute by including positive and negative covenants on the part of the mortgagor concerning the care, operation, and control of the vessel. The breach by the mortgagor of any of these covenants will enable the mortgagee to exercise his remedies by taking possession of the vessel and realizing on his security.

Broadly, the covenants may include the following obligations on the mortgagor:

5.1.2.1. An obligation to maintain the ship in good condition and repair

Obviously, the mortgagee is concerned not only that its security is not devalued by the deterioration of the ship, but also that accidents are prevented by maintaining the ship in good condition. In addition, this covenant protects the mortgagee from the risk of the ship being detained in a port for breaches of the International Safety Management (ISM) Code, which may result in the impairment of his security and prejudice the insurance cover.

5.1.2.2. An obligation to notify the mortgagee

Notification to the mortgagee with regard to the movements of the ship is required, in case the ship sails either in war zones, where the security will be exposed to a higher risk or loss, or in jurisdictions in which the law may be unfavourable to the priority enjoyed by the mortgage over other maritime claims, which are not recognised as maritime liens under the law of the mortgage.

5.1.2.3. An obligation to discharge claims or liens

In parallel with the previous covenant, the mortgagor has an obligation to discharge all debts and liabilities, which may encumber the ship and can be enforced against the security by arrest. If the ship is arrested, the mortgagor has an obligation to provide security and procure its release.

To pay dues to port authorities and any debts which may affect the priority of the mortgagee's security, also form part of the covenants.

5.1.2.4. An obligation not to sell or grant a charge on the ship

During the duration of the mortgage, the mortgagor covenants not to sell, or grant a mortgage or charge to any person without first discharging the debt to the mortgagee.

5.1.3. The Rights of the Mortgagee

This section should be read together with the preceding section on the rights and obligations of the mortgagor.

The ownership, control, and possession of the ship by the mortgagor is subject to certain rights belonging to the mortgagee. The mortgagee on his part is deemed the owner of the vessel or share therein for all purposes necessary for making the ship available as a security for the mortgage debt.⁽¹¹⁰⁾

The mortgagee has the following principal rights:-

(a) The right to take possession of the ship, whenever the mortgagor is in default or his security is impaired.

(b) The power to start proceedings for the foreclosure of his mortgage on the ship.

(c) The right to sell the ship.

In addition, the mortgagee not in possession may acquire by a separate collateral agreement any such power or right on the mortgaged ship he thinks necessary for the realization of his security, and for the restriction of the equitable title or the power and rights of the mortgagor.⁽¹¹¹⁾

5.1.3.1. Right to Possession

Independently of the collateral deed of covenants, the mortgagee has a right at common law⁽¹¹²⁾ to enter into possession of the mortgaged ship in two situations: where the mortgagor has defaulted on a payment of interest or capital (or both), and where the mortgagor has allowed the security of the mortgage to have become imperiled.

(110) *MSA 1995*, Sched 1, para 10. The purpose of this rule was stated in *Kitchen v. Irvine* (1858) 28 L.J. Q.B. 46. to be to protect a mortgagee taking possession from certain liabilities which frequently attach to an owner in possession.

(111) See above, note 95

(112) The mortgagee can rely on the statutory rights given by the *MSA 1995*. In particular, para 10 of Sched 1 seems to imply a right of possession, in that it protects the registered mortgagee, only insofar as it is necessary for making the ship or share available as a security for the mortgage debt, to exercise ownership rights. In pursuance of such rights, he can interfere with the mortgagor's possession, control and operation and, insofar as it is necessary to make the ship available as a security, he may be treated as owner

[SHIP MORTGAGE A STUDY OF ENGLISH AND EMIRATI LAW]**(i) Default by Mortgagor in Covenants**

Default in payment of instalments of the capital and interest will entitle the mortgagee to take possession, but the totality of the circumstances will be looked at in the context of the contract. Paragraph 9 of Sched 1 to the MSA 1995 provides for when the mortgagee could sell the ship and, by implication, he may enter in possession before sale. Before such power can be exercised, para 9 puts a condition that there must be money or any part of it due.⁽¹¹³⁾ In the absence of a variation in the contract, once the date of payment has passed, technically, the mortgagee will be able to exercise his statutory power. The statute does not specify any other default or the extent of default, but gives only a general event of money being due, leaving the parties to agree other reasons of default and any maximum or minimum non-payment.

(ii) Impairment of Security

A mortgagee may be entitled to take possession of the vessel in the absence of a default in the terms of the mortgage if the mortgagor's dealings with the vessel are inconsistent with or impairing the mortgagee's security (i.e. the vessel).

One question that has frequently faced the courts is this: when could it be said that the mortgagee's security is being endangered, or that his security is likely to be impaired? The answer to that question depends on the circumstances of each case and it is a question of fact. The courts usually consider a certain number of factors before coming to the conclusion that the mortgagee was justified in taking possession, if his security was indeed impaired or likely to be impaired, in the absence of default in payment.

The security of the mortgagee was held to be impaired in the following cases.

In *Johnson v Royal Mail Steam Packet Co.*,⁽¹¹⁴⁾ when the mortgagees learned that the owners were in course of liquidation, it was held that they were justified in coming forward to protect their own interest by taking possession of the mortgaged ships.

In *Laming v. Seater*,⁽¹¹⁵⁾ the mortgaged ship was put into a yard for repair by the mortgagors, but they were unable to pay for the repairs. The ship was due to proceed on a foreign voyage under a charterparty entered into by the mortgagors. The mortgagees paid part of the repair bill and the repairers took a

(113) See *The Maule* [1997] 1 WLR 528

(114) (1867) 37 L.J. C.P. 33, at 46.

(115) (1889) 16 Ct of Sess Cas (4th ser) 828.

second mortgage on the ship for the balance. The mortgagors agreed to take out and maintain a policy of insurance on the ship in the name of the mortgagees. The mortgagors failed to take out the insurance and the mortgagees took possession. The court held that they were entitled to do so and said:

"It is plain enough that the mortgage was in jeopardy. The owners were in great pecuniary embarrassment, and could not meet the cost of repairing the ship. Further, the owners had become bound to affect an insurance over the ship, etc., which they did not, and which they were never in a condition to do... The mortgagees thereupon were quite justified to prevent the sailing of the ship by interdict, and thereafter proceed with an action for a sale."⁽¹¹⁶⁾

In *The Celtic King*,⁽¹¹⁷⁾ a charter of five years was held to be prejudicial to the mortgagee's security. It was said that, "while it is important that person should be able to charter vessels in the ordinary way, without interference by mortgagees, etc...yet a mortgagee without notice of any particular contract affecting the ship in this way (long period of time) ought not to be prevented from realising his security."⁽¹¹⁸⁾

In *Law Guarantee and Trust Society v. Russian Bank for Foreign Trade*,⁽¹¹⁹⁾ mortgagors in possession entered into charterparties for the carriage of contraband to belligerent ports and the ships were not insured for war risks and in particular the risk of capture. The ships were liable to be seized as prize and the Court of Appeal held that the mortgagees were entitled to a declaration

(116) *Ibid.*, at 837, per Lord Rutherford.

(117) [1894] P. 175.

(118) Cf. *The Heather Bell* [1901], P. 272, from which it is implied that an agreement binding the ship for a usual period of time, does not materially impair the mortgagee's security. The facts of the case were as follows: the mortgagor of a ship entered into an agreement for the use of the ship with the plaintiff whereby the plaintiff to have possession of the ship for about six weeks, the mortgagor was to insure her, the plaintiff was under no obligation to keep the ship in repair, and the profits were to be divided equally between the mortgagor and the plaintiff. The defendant mortgagee entered into possession of the ship upon default being made in one of the instalments due under the mortgage. The mortgagee was held liable in damages to the plaintiff, the agreement being binding upon him as it was not prejudicial to the security created by the mortgage. In the course of his judgment, Lord Alverstone said:

I am not prepared to say that the agreement to run her on half profits must impair or does impair the security. No doubt it prevents the boat for a period of about 6 weeks from earning freight unless that freight is produced by the profits; but I cannot say that under the circumstances there might not be an honest expectation that there would be profits. Therefore, to undertake to run the boat at half profits seems to me not to be terms which must under the circumstances do any wrong to the rights of the mortgagee. I quite agree that the mortgagee has a right to prevent the vessel being run unless she is properly protected against perils of the sea; but it cannot be contended that if a charterparty is otherwise binding on the mortgagee the fact that he could have restrained her from running until properly insured would justify him setting aside a charterparty otherwise bona fide.

(119) (1905) 1 K.B. 815, 10 Asp. M.L.C. 41.

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that they were not bound by the charterparties on the ground that they materially impaired the security of the mortgages.

In *The Manor*,⁽¹²⁰⁾ a mortgaged ship had been variously employed over a two-year period during the course of which maritime liens had been created in respect of wages and disbursements. There was also clear evidence that the mortgagor did not have sufficient funds to pay the canal dues and coaling costs from the previous voyage, or the cost of repairs required to make the vessel seaworthy for the next voyage. Time for the repayment of the mortgage amount was imminent and the mortgagee took possession of the ship. The issue for the court was whether the mortgagee's security would be materially impaired if the ship were left under the control of the mortgagor. The judge came to the conclusion that, on the facts, there was not sufficient impairing of the security to justify the mortgagee in taking possession. The Court of Appeal held that a set of circumstances existed, which did, in fact, impair the security and the mortgagee was entitled to take possession. Lord Alverstone C.J. stated the main issue in the case to be as follows:⁽¹²¹⁾

In our view there is only one question in the case, viz., what are the rights of the mortgagee if he finds the vessel is going to be sailed on charterparties by an impecunious mortgagor and on credit.

Lord Alverstone continued to say:

When we look at the broad facts of the case as they existed when this vessel came into Cardiff, I think it would be straining the rights of the mortgagor to excess if we were to hold that he was entitled to keep the management and chartering of this vessel in defiance of the rights of the mortgagee and prevent the mortgagee from taking possession ... I think that the dealing with this ship by the mortgagor in the state of circumstances which then existed when she arrived in the port of Cardiff was such that, if she was left in the possession of the mortgagor the security of the mortgage would be seriously impaired.

Similarly Fletcher Moulton L.J. said:⁽¹²²⁾

It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims of the mortgagee. For example, it cannot be said to be a breach of the rights of the mortgagee, if a ship in distress accepts salvage assistance, though a maritime lien thereby arises. But there is an obvious

(120) [1907] P. 339

(121) *Ibid.*, at 359.

(122) *Ibid.* at p. 361.

difference between allowing a ship to become burthened with a maritime lien, and allowing her to remain burthened with such a lien, without the power to discharge it, for, to that extent, you have, as in this case, substantially diminished, that is to say, impaired the value of the mortgage security. Is a ship to be allowed to go on a long voyage incurring ruinous liabilities in the shape of maritime liens which count against her in priority to the mortgage? I am satisfied that equity would never interfere with a mortgagee taking possession under such circumstances as we find in this case, and, therefore, this action asking for a decree that the mortgagor was entitled to possession at the date of the writ cannot be maintained.

Further, in *The Myrto*⁽¹²³⁾ a vessel registered initially in Liberia and subsequently in Greece was arrested in Sunderland by a mortgagee bank pursuant to a claim for sums due under mortgages registered against the vessel in Liberia/Greece. Other defaults were also alleged. The mortgagees applied to the court for the vessel to be sold, and the charterers applied for an order that she should be released on the basis that the arrest was wrongful or was inconsistent with their rights under the charterparty. The charterparty in question had been entered into in September 1976 (after the date of the mortgage), for a voyage from several ports in north-west Europe to the Persian Gulf. The vessel had loaded a part cargo in Antwerp in November 1976 and had then proceeded to North Shields and to Sunderland where the arrest took place.

Brandon J summarised the owner's rights to deal with the ship and the bank's right to arrest under English law as follows:-

- (1) The owner is entitled, subject to one exception, to deal with the ship (and that includes employing her under a contract with a third party) in the same way as he would be entitled to do if the ship were not mortgaged.
- (2) The one exception is that the owner is not entitled to deal with the ship in such a way as to impair the security of the mortgagee (which is a question of fact).
- (3) Where the owner makes a contract with a third party for the employment of the ship, of such a kind and made or performable in such circumstances, that the security of the mortgagee is not impaired, and the owner is both willing and able to perform such contract, the mortgagee is not entitled, by exercising his rights under the mortgage, whether by

(123) [1977] 2 Lloyds Rep. 243.

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taking possession, or selling, or arresting the ship in a mortgage action *in rem*, to interfere with the performance of such contract.

- (4) The mortgagee is, however, entitled to exercise his rights under the mortgage without regard to any such contract made by the owner with a third party for the employment of the ship in two cases:-
 - (a) where the contract is of such a kind and/or is made or performable in such circumstances, that the security of the mortgagee is impaired;
 - (b) where, whether this is so or not, the owner is unwilling and/or unable to perform the contract.
- (5) Where the mortgagee, by exercising his rights under the mortgage, interferes with a contract made by the owner with a third party for the employment of the ship in circumstances where he is not, in accordance with (3) and (4) above, entitled to do so, he commits a tort (or actionable wrong in the nature of a tort) against the third party.
- (6) The remedies available to the third party against the mortgagee in respect of such tort or actionable wrong are as follows:-
 - (a) where the mortgagee interferes by taking possession or seeking to sell, an injunction restraining him from doing so;
 - (b) where the mortgagee interferes by arresting the ship in a mortgage action *in rem*, an order for the release of the ship from arrest in such action;
 - (c) further or alternatively to (a) or (b) above, damages.

In summary, on the basis of this judgment, where the owner of a ship has entered into a charterparty or other contract for the employment of the ship, the mortgagee will be restricted from taking possession, selling or arresting the ship unless the contract is such that the security of the mortgagee would be impaired, or the owner is unwilling and/or unable to perform the contract. This is so even though the mortgagee may be entitled, on the strict terms of the mortgage, to take any of those steps he chooses. His freedom of action is limited by the effect it would have on the charterer

The mortgagee, prior to taking possession of the vessel, must be reasonably certain that there has been either a default in the terms of the mortgage or that the dealings with the vessel are inconsistent with or impairing the security. It is, therefore, not enough merely to show that the enforcement of the security is about to be rendered difficult by the removal of the ship from the jurisdiction of

the English courts.⁽¹²⁴⁾ In consequence a mortgagee is not entitled to arrest a vessel for the purpose of enforcing bail for her safe return to England⁽¹²⁵⁾ or to show that a ship is not profitably employed. The employment of the ship concerns the mortgagor only.

The burden of satisfying the court that an act of the mortgagor prejudices or impairs the mortgage security lies -as already mentioned- on the mortgagee.⁽¹²⁶⁾ It can be said that the facts of each case must be judged upon their individual merits, and possession should be taken only in the clearest cases, because if a mortgagee, whether of part or the whole of a vessel, arrests her, or takes possession without just cause, the courts on motion by the owners or charterers will order the release of the vessel, generally with costs, and even with substantial damages against the mortgagee.

Thus in *The Cathcart*,⁽¹²⁷⁾ while the date for payment had passed, the parties had agreed to postpone repayment until freight had been paid. When the mortgagee arrested the ship for non-payment, despite the fact that he had full knowledge that the vessel was about to commence a profitable charterparty, the court held him liable in damages.

In *The Maxima*,⁽¹²⁸⁾ shares in a ship were mortgaged, possession remaining in the mortgagor, and the managing owner, duly appointed by all the co-owners including the mortgagor, chartered the ship for a foreign voyage. The mortgagee arrested the ship after she had loaded and was about to proceed. The court held that even though the mortgagee had taken possession before the ship had sailed, but after the making of the charterparty, he could not arrest or demand bail in an action to enforce the mortgage debt provided the charterparty is not prejudicial to the security. The court ordered the ship to be released and the mortgagee had to pay the costs. But no damages were awarded

Similarly in *The Fanchon*⁽¹²⁹⁾ 20/64th shares in a ship had been mortgaged to a bank and the ship was subsequently chartered for a voyage to carry cliff stone from Hull to Philadelphia. Immediately the mortgage debt became due,

(124) *The Highlander* (1843) 2 W. Rob. 109; 166 E.R. 696. See also *The Fanchon* (1880), 5 P.D. 173, where a beneficial charterparty for an outward voyage to USA was held not to prejudice the rights of the mortgagee.

(125) *The Innisfallen* (1866), L.R. 1 A & E 72, 35 L.J. Adm. 1 10.

(126) Per Sir R. Phillimore in *The Fanchon* (1880), 5 P.D. 173, at 177.

(127) (1887), 1 Ad. & Ec. 314, at 333 "The mortgagees had no right to arrest the vessel... and the arrest was made on the eve of commencing a profitable voyage."

(128) (1878), 4 Asp. 21.

(129) (1880) 5 P.D. 173.

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the mortgagees took possession by putting a man on board, commenced foreclosure proceedings, and had the ship arrested. The court held that in the absence of any evidence that the charterparty materially prejudiced their security, the mortgagees were bound by it and the ship would be released from arrest in order to perform the charterparty voyage.

In *The Blanche*,⁽¹³⁰⁾ the registered mortgagees of a ship instituted an action *in rem* for possession, and the ship was arrested before the mortgage money became due, and without any default on the part of the mortgagor. The court was of the opinion upon the facts that the ship was not being dealt with, so as to impair the mortgagees' security and ordered her release.

5.1.3.2. THE MORTGAGEE IN POSSESSION

i. Mode of taking possession.

The taking of possession of a mortgaged ship by the mortgagee may be actual or constructive.

(a) Mortgage of whole ship or the majority of shares.

Such a mortgagee may take actual possession by physically placing his own representative on board. A registered mortgagee may also take actual possession by obtaining an order of the court for the arrest of the ship in a mortgage action.⁽¹³¹⁾

If a ship is out of the jurisdiction of the court, in foreign territorial waters or on the high seas and actual possession cannot be taken, the mortgagee may obtain constructive possession by giving notice to all parties interested, e.g. mortgagor, charterers, underwriters, bill of lading holders, etc., of his intention to take actual possession at the first available opportunity. In *Rusden v. Pope*,⁽¹³²⁾ Kelly C.B., said: "The question is not, whether possession was in fact taken, but whether anything equivalent to taking possession had been done... Where the mortgagee cannot take possession of a ship at sea, it is sufficient if he does anything else which manifests his title."

(130) (1887), 6 Asp. 272. No damages were awarded.

(131) Under section 21 of the Supreme Court Act 1981

(132) (1868) L.R. 3 Ex. 269, at 278; see also *The Benwell Tower* (1895) 8 Asp. M.L.C. 13, at 16 "in order to constitute constructive possession, acts must be done on behalf of the mortgagee, which clearly indicate an intention on his part to assume the rights of ownership." In that case, the ship was in France and although the mortgagees (who were also assignees of the freight under a separate assignment) sent their solicitor to take actual possession this was not possible under French law. The mortgagees arrested the ship, but not by way of asserting a claim to become mortgagees in possession. Accordingly the court held that they had not taken sufficient steps to indicate an intention to enter into possession of the ship as mortgagees in possession and to claim the freight as an incident of such possession. Their actions were ambiguous and equally consistent with their asserting a claim as assignees under the assignment.

(b) Mortgagee of the minority of shares.

A mortgagee of the minority of shares can only take constructive possession of the ship by giving notice to the person having the management of the ship. Giving this notice is tantamount to taking possession of the shares. By assuming possession the mortgagee of the minority of shares becomes a co-owner. If he could take actual possession of the ship, the rights of the majority of the co-owners would be subject to the will of the minority. This was emphasised in *Cato v Irving*,⁽¹³³⁾ where Sir J. Parker VC said: "The mortgagees of certain shares only, cannot take possession of the ship to the exclusion of the other owners. When the mortgage is of the entirety, the mortgagee can take exclusive possession, so as to entitle himself to the freight. But when the mortgage is of a share only, he cannot effectually take possession, so as to entitle himself singly to receive the freight."

(c) Equitable mortgage- Second mortgagee.

An equitable mortgagee may take only constructive possession of the mortgaged ship, because an equitable mortgage is effective only *inter partes*. Consequently an equitable mortgagee taking actual possession of the ship may be met by the prevailing claims of the holders of other registered mortgages on the same ship, or of trustee in bankruptcy of his mortgagor.

A second mortgagee has no right to take possession as against a first mortgagee. A second mortgagee is not, properly speaking, a legal one. But he can take constructive possession as against other persons, and can enforce it, if necessary, by obtaining the appointment of a receiver.⁽¹³⁴⁾

ii. Effects of taking possession.

When a mortgagee takes possession he becomes the owner of the ship. Therefore, he has all the rights as well as the obligations of the shipowner.

a. Care and Use of Vessel

By taking possession of a mortgaged ship, the mortgagee has control of the vessel for all purposes as may be necessary to realize the security. Any expenses incurred from the date of taking possession with respect to caring for, insuring, or working the vessel are payable by the mortgagee.⁽¹³⁵⁾

As the mortgagee in possession has complete control of the ship, he may dismiss the master and appoint as master a person of his own choice. In *The*

(133) (1852), 5 De G. & Sm. 210; 64 E.R. 1084, at 1092.

(134) Cf. *Liverpool Marine Credit v. Wilson* (1872), 7 Ch. App. 507.

(135) *Ex parte Howden* (1842) 11 L.J. Bcy. 19, at 21.

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Fairport,⁽¹³⁶⁾ it was held that the master becomes the agent of and subject to the orders of the mortgagee once the mortgagee takes possession, and where, against the mortgagee's orders, the master takes the vessel to sea, the master will be entitled to wages for the time when he properly served the legal owner on board the ship but will not be entitled to damages as a result of dismissal.

The mortgagee in possession of a vessel may employ her but must not use her in a speculative or hazardous manner. If, however, the mortgagee uses the ship in a speculative or hazardous manner, and the result is unfortunate, he will be charged with the value of the ship as at the date when he took possession of it. In *Marriott v. The Anchor Reversionary Co.*,⁽¹³⁷⁾ the mortgagee entered into possession and employed the mortgaged ship in a speculative trade during the course of which she was improperly managed and damaged while racing other vessels. As a result losses were incurred and the ship had to be sold for a greatly reduced price. The court held that the mortgagor was entitled to be credited with the value of the ship at the time the mortgagee had entered into possession. In the course of giving judgment, Lord Campbell said:⁽¹³⁸⁾

I cannot concur in the unlimited right of the mortgagee to use the ship as the owner might do ... Nor can I lay down the strict rule that the mortgagee can never lawfully employ the ship to earn freight, or that, after taking possession, he must allow her to lie idle till he may prudently sell her. He may take possession while she is prosecuting a voyage under a charter-party, and at the end of the voyage it is easy to conceive circumstances which would justify him in a temporary employment of the ship while waiting for a favourable opportunity to sell her. .. But although there may be a great difficulty in defining the limits of the power of the mortgagee to use the ship, this, I think, may be laid down with perfect safety and confidence, that if the mortgagee does take possession, he can only lawfully use the ship as a prudent man would use her, she being his own property.

b. Charterparties.

The mortgagee on taking possession becomes entitled to look upon the earning of the ship as his property.⁽¹³⁹⁾ On the other hand, on taking possession

(136) (1884), 10 P.D. 13, 5 Asp. M.L.C. 348. A mortgagee took possession by putting a man on board and giving notice to the master, who, by order of the mortgagor took the vessel to sea, with the man in possession on board.

(137) (1861), 30 L.J. Ch. 571.

(138) *Ibid.* at pp. 572 to 573.

(139) *Keith v. Burrows* (1877), 2 App. Cas. 636, at 650, per Lord Penzance.

he is bound by any charterparty for the use of the ship, provided that the charterparty does not impair his security.

In *The Fanchon*,⁽¹⁴⁰⁾ a vessel registered in Yarmouth, N.S., was taken possession of and subsequently arrested by the mortgagee of 20 shares and in proceedings commenced to obtain judgment for the debt owing. The vessel had been chartered by the mortgagor prior to the mortgagee taking possession. The charterer brought an application for release of the vessel from arrest and Sir Robert Phillimore held that as the charterparty was entered before the mortgagee took possession, and as the charterparty would not materially injure or impair the security, the mortgagee was bound by the charterparty and the vessel was ordered released from arrest.

However, if the prior agreement to employ the vessel does impair the mortgagee's security, or has, in the circumstances become impossible of performance, or finally restricts or affects his power of sale, then the mortgagee is not bound by it. In *The Celtic King* the shipowner agreed with the defendants to provide a ship which was then being built to be run and operated by them in their line for a period of five years, upon such terms as they thought proper and for the account of and at the sole risk of the shipowner who was to divide the profits equally with the defendants. Subsequently, the shipowner mortgaged the ship to secure an account current and the mortgagees had no notice of any subsisting engagements with the defendants. The shipowner then gave a second mortgage to the plaintiffs who were aware of the existence of the agreement with the defendants and, although they were not aware of the precise terms, inferred that they were onerous. Upon the shipowner's death, the first mortgagees took possession of the vessel and sold her to the plaintiffs who at that time knew of the terms of the agreement with the defendants. Upon the defendants' application for an injunction restraining the plaintiffs from dealing with the ship contrary to the provisions of the agreement with the defendants, it was held that the injunction would be refused as the first mortgagees, who were unaware of the agreement with the defendants, were entitled to realise their security by selling the ship free of her engagements, and that the plaintiffs, although they had notice of the agreement with the defendants, were entitled to the same rights as were possessed by their vendor, the first mortgagees. Gorrell Barnes J. said:⁽¹⁴¹⁾

It is said upon the defendants' side that the contract would not have any

(140) (1880), 5 P.D. 173, 4 Asp. M.L.C., 272.

(141) *Ibid.* at p. 188.

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depredatory effect upon the security of the mortgage. I cannot take that view. It seems to me that where there is a contract of this particular character it would be prejudicial to the security if the mortgagee were to be obliged to admit or forced to admit, that he could not sell the ship to realise his security in an open market without that restrictive covenant. It is not like an ordinary employment of a ship which is made from time to time as things are good and as things are bad; but it is a contract which binds the vessel for a very long period and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were tied by its terms.

The dilemma which was presented to the court as a result of the conflicting claims of mortgagee and charterer was expressed by Gorrell Barnes J. in the following words:

I think myself that while on the one hand it is important that you should be able to charter vessels in the ordinary way without interference by mortgagees other than is necessary to protect their security, yet, on the other hand, a mortgagee who takes his rights without notice of any particular contract affecting the ship in this way, ought not to be prevented from realising his security.

In *De Mattos v. Gibson*⁽¹⁴²⁾ it was held that while a mortgagee, with notice of a prior charterparty effected by a mortgagor, will in general be restrained from doing anything to prevent the performance thereof, and where the mortgagor was unable to place the vessel in proper repair for the voyage contemplated by the charterparty, and otherwise unable to perform his obligations under the charter, the mortgagee ought not to be restrained in exercising the powers granted in the mortgage. In that case a mortgaged ship was chartered to carry coals from the Tyne to Suez. After loading she put into Penzance for repairs, but the mortgagor was unable to pay for them. Accordingly the mortgagee took possession and undertook to pay for the repairs and then sought to sell the vessel. The charterer sought and obtained an interim injunction to prevent the mortgagee from interfering with the charterparty. Subsequently it was held by Lord Chelmsford LC, after a full trial that no injunction should be granted because the charterparty would not be able to be performed by the shipowner in any event owing to his financial position.

In *The Lord Strathcona*,⁽¹⁴³⁾ a ship was chartered for 10 consecutive St. Lawrence seasons, with an option to the charterers for a further three or five

(142) (1858), 4 DeG. & J. 276, 45 E.R. 108.

(143) [1925] P. 143, 16 Asp. M.L.C. 536.

seasons. During the currency of the charterparty, the shipowners mortgaged her to the plaintiffs who had notice of the charterparty. The shipowners became insolvent and made default in repayment under the mortgage. Accordingly the plaintiffs commenced action in rem and obtained judgment and an order for sale. The charterers intervened to claim that the plaintiffs were not entitled to deal with the ship otherwise than in accordance with the charterparty. It was held by Hill J. at trial, and affirmed on appeal, that even though the mortgagee had notice of the charterparty he was not bound by it as the mortgagor was financially incapable of further performance under the charterparty. If the mortgagee were forced to sell, subject to the charterparty, he would be unable to recover the debt. The mortgagee was entitled to sell free from the charterparty.

c. Freight, etc.

As a general rule from the time the mortgagee takes possession and becomes owner,⁽¹⁴⁴⁾ everything which represents the earnings of the ship which have not been already paid, must be paid to the mortgagee.⁽¹⁴⁵⁾

(144)The mortgagee is not entitled in the absence of a collateral assignment, to earnings of the vessel prior to entering into possession. The position was described by James LJ. in *Liverpool Marine Credit Company v. Wilson* (1872) L.R. 7 Ch. 507 at p. 511) thus:

[the mortgagee] had no absolute right to the freight as an incident to his mortgage; he could not intercept the freight by giving notice to the charterer before payment; but if he took actual possession, or, ... if he took constructive possession of the ship before the freight was actually earned, he thus became entitled to the freight as an incident of his legal possessory right ...

The facts of the case were as follows:

The owners of the ship executed and registered a mortgage in favour of the plaintiffs, the first mortgagee. Two days later, a second mortgage was executed in favour of the defendants, the second mortgagee, and it was later registered. The owners then gave a lien on the accruing freight to a third party, to which the first mortgagee signed a written consent that this advance would have priority over their own mortgage. As additional security to the second mortgagee, the owners granted them a lien on accruing freight. The first mortgagee, with no notice of the second mortgagee's lien on the freight, made further advances to the owners on the security of another mortgage, including all freight already earned, or to be earned under any charterparty entered into during the continuance of the mortgage. The first mortgagee's second mortgage was unregistered. All parties who were given a lien on the freight subsequently gave notice of their charge to the charterers. The first mortgagee (plaintiffs) took possession of the vessel and claimed priority over the second mortgagee to the net proceeds of the sale and to the freight (subject to the sum payable to the third party) for the satisfaction of their second mortgage. The second mortgagee contended that the first mortgagee was not entitled to the freight as a separate fund in the discharge of their first mortgage. It was held that:

The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereat not only what is due on his first mortgage, but also the amount of any subsequent charge which he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight.

(145) *Keith v. Burrows* (1877), 2 App. Cas. 636, at 646, per Lord Cairns.

When a mortgagee takes possession he becomes the master or owner of the ship, and his

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Moreover, the mortgagee having taken possession before any freight has become payable, but which becomes due after his taking, is entitled to it, although it is due in respect of services rendered previously. Otherwise, the mortgagor in possession, having effected a charterparty, can also mortgage or assign the freight before it becomes due, so as to prevent the mortgagee from receiving it. But this would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee.⁽¹⁴⁶⁾

But the mortgagee is not entitled to unpaid freight which became due previously to the date of his taking possession of the ship,⁽¹⁴⁷⁾ because the right to the freight arises as an incident to the mortgagee's possession. Therefore in order to be able to claim the freight the mortgagee must have taken possession, (actual or constructive) before the freight accrued due.⁽¹⁴⁸⁾ Nor can he recover back freight which has reached the hands of the mortgagor, or freight which he has allowed the mortgagor to receive.⁽¹⁴⁹⁾ In *Shillito v. Biggart*⁽¹⁵⁰⁾ a dispute

position is simply this: from that time everything which represents the earnings of the ship which had not been paid before, must be paid to the person who then is the owner, who is in possession.

(146) See *Brown v. Tanner* (1868), L.R. 3 Ch. App. 597, at 603, after the ship had arrived at the port of discharge and was in the course of unloading her cargo, the mortgagee took possession and was held to be entitled to the freight earned on the voyage. Page-Wood LJ said:

It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken.

See also *Cato v. Irving* (1852) 5 De G. & Sm. 201, where the Vice-Chancellor said:

The authorities referred to in the argument establish that the mortgagee of a ship, who takes possession before the conclusion of the voyage, is entitled to the then accruing freight. It was contended by the Defendants that the present case does not come within this rule because the Plaintiffs did not take possession until the ship was in the docks, and the voyage therefore concluded. I consider that a mortgagee who takes possession at any time before the cargo is discharged comes within the rule. The right to freight does not accrue until the goods are not only conveyed to their destination but are also delivered; and a mortgagee who takes lawful possession of the ship while the goods are still on board, and is thereby entitled to deliver the goods and receive the freight, to the exclusion of the mortgagor, must be as much within the reason of the rule when the ship is in the docks as where she is only on the way to the docks at the time when possession is taken.

(147) *Shillito v. Biggart* [1903], 1 K.B. 683, at 688.

(148) *Garder v. Casanova* (1856) 156 E.R. 1267, at 1272 "The question in this case is, for whom the ship is working" and at 1273 "Unless possession is taken by the mortgagee the freight does not belong to him."

(149) *Wilson v. Wilson* (1872), L.R. 14 Eq. 32. See also *Garder v. Casanova* (1856) 156 E.R. 1267, where the master received a sum of money from the charterers on account of freight and, having no notice of the mortgage, remitted the same to the ship's husband. The court held that the mortgagees had no right to this sum.

arose between the mortgagors and the mortgagees as to the entitlement to a sum in respect of freight earned on a voyage prior to the mortgagees' arrest of the ship, but which remained outstanding when the ship was arrested. The charterers interpleaded and the court held that notwithstanding the mortgagees' possession the freight was payable to the mortgagor as it had accrued due and was payable prior to the mortgagees taking possession.

The freight to which the mortgagee of a whole ship is entitled is the gross freight without any deduction of any expense, not authorised by him, previously incurred in the earning of the freight. Thus, in *The El Argentino*,⁽¹⁵¹⁾ bunker coal was supplied on the personal credit of the owners of a mortgaged ship. A quantity of coal was consumed and when subsequently the mortgagees took constructive possession of the ship and a receiver was appointed by the court to collect the freight, it was held that the mortgagees were entitled to the freight without any deduction on account of the coal consumed, for though the coal was used in earning the freight, it was coal which had been sold to and was the property of the mortgagors, and therefore the unpaid vendor had no interest in the coal or freight.

The same rule applies in the case where charterers of a ship make advances to the owner, which are to be applied in ship's disbursement. If before the freight becomes due under the charterparty the mortgagee takes possession, the charterers have no right to deduct advances from the freight payable to the mortgagee. In *Tanner v. Phillips*⁽¹⁵²⁾ the charterparty provided for advances not exceeding £150 to be made by the charterers on account of freight. Advances in excess of £150 were duly made for ship's purposes before the mortgagees took possession. It was held that the mortgagees were entitled to receive the whole freight less the £150 authorised by the charterparty, but without any deduction for the advances in excess of £150 made prior to the mortgagees taking possession. "The advances in excess of the £ 150 were mere personal loans, and had nothing to do with freight, and could not therefore be deducted out of it."

On the other hand, the mortgagee of the minority of shares by taking constructive possession takes the place of the mortgagor and becomes part-owner. Accordingly, he is entitled only to the net earnings, according to his share, after deducting all the expenses. The mortgagee or the minority of shares

(150) [1903] 1 K.B. 683

(151) [1909], P. 236.

(152) (1872), 42 L.J. Ch. 125.

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on taking possession is not “master and owner” of the ship, within the meaning of the *dictum* of Lord Carins, in *Keith v Burrows*⁽¹⁵³⁾ but merely a partner, and he ought not to be treated as mortgagee in possession, entitled to the rights appertaining to such mortgagee, but simply as a part-owner.⁽¹⁵⁴⁾

d. Obligation to Pay Expenses

A mortgagee, by taking possession of the vessel and operating the same, assumes the obligations and duties of the owner. In *Johnson v. Royal Mail Steam Packet Co.*,⁽¹⁵⁵⁾ the mortgagee paid wages that were due to a crew employed by the mortgagor. It was held that the mortgagee was entitled to recover these expenses from the mortgagor.

The fact that a mortgagee is in possession at the time goods are supplied to the vessel will not necessarily make the mortgagee liable for payment. In *The Troubadour*⁽¹⁵⁶⁾ it was held that there is no implication at law that the master of a ship is the agent of the mortgagee in possession, and a necessities supplier, in order to succeed against the mortgagee must prove that the person ordering the goods was the agent of the mortgagee and had his authority to enter into a contract as alleged

5.1.3.3. OTHER REMEDIES OF THE MORTGAGEE

i. Right in personam

A part from the right to take possession the mortgagee may, when the day for the repayment of the mortgage debt has passed without the mortgagor paying off the debt, bring an action *in personam* on the covenant for payment contained in the mortgage deed. This is extremely useful where the mortgagee, by selling the ship, does not realise enough to pay off the mortgage debt. He may sue for the deficiency and bring an action *in personam* to recover the balance from the property of the mortgagor other than the mortgaged ship.

In addition to this personal right of action, the mortgagee has certain rights over the mortgaged ship herself, namely the right to sell her, and the right of foreclosure. Further he may ask for the appointment of a receiver.

ii. Right of foreclosure

When the mortgagor has failed to pay off the mortgage debt within the proper time, the mortgagee is entitled to bring an action asking that a day

(153) (1877), 2 App. Cas. 636.

(154) Cf. *Japp v. Campbell* (1887), 57 L.J. Q.B. 79 at 81. See also the argument of Pyke, Q.C. in *The Faust* (1887), 56 L.T. 722 at 723.

(155) (1867), L.R. 3 C.P. 38.

(156) (1866), L.R. 1 A. & E. 302, 16 L.T. 156.

(normally six months from the settling of the account) may be fixed on which the mortgagor is to pay off the debt, and that in default of payment on that day, the mortgage be foreclosed, that is the mortgagor deprived of his right to redeem.⁽¹⁵⁷⁾

In principle there seems no reason why a mortgagee of a ship should not have a right of foreclosure. The right of foreclosure is inherent in the very nature of the mortgage. In practice however, foreclosure actions are now comparatively rare, especially in cases of registered mortgages of registered ships, as the mortgagee's remedy of sale is in general more speedy and convenient. Nevertheless an action for foreclosure is practically essential especially in the case of equitable mortgages or mortgages of shares to enable the mortgagee effectively to realise his security.⁽¹⁵⁸⁾

The effect of an order for foreclosure absolute is to divest the mortgagor and any person against whom it is made of all their estate in the mortgaged property and to transfer it to the mortgagee in whose favour the order was made.⁽¹⁵⁹⁾

Although it is not necessary in any action for foreclosure to apply for the sale of the mortgaged property this is nevertheless frequently done, and in any event the court may at any time prior to making an order for foreclosure absolute order the property to be sold.⁽¹⁶⁰⁾

iii. The appointment of a receiver

A receiver is a person appointed, usually by the court, to collect the profits from the mortgaged property (freight etc.) and to pay any necessary expenses pending the realisation of the security by the mortgagee or by the court.⁽¹⁶¹⁾

If the agreement provides for the appointment of a receiver to deal with the profits of the ship, the receiver may be appointed by the mortgagee, the

(157) Hill, *op.cit.*, at p.42.

(158) In *The Buttermere* (24 July 1883 (Folio 211)), the registered mortgagee of 2/64th shares claimed a decree of foreclosure, or in the alternative a sale of the mortgaged shares. The mortgagor appeared in the action but made default in pleading and the court ordered that the defendant be precluded from all equity of redemption in the mortgaged shares unless he paid the amount due on the mortgage within a month.

(159) *Heath v. Pugh* (1881) 6 Q.B.D. 345.

(160) *Union Bank of London v. Ingram* (1882) 20 Ch.D. 463.

(161) In *Medforth v Blake* [1999] 3 WLR 922, the Court of Appeal held that the extent and scope of any duty of the receiver or manager additional to that of good faith depended on the facts and circumstances of the particular case. While his primary duty in the exercise of his powers of management was to try to bring about a situation in which interest on the secured debt could be paid and the debt itself repaid, the receiver owed a duty to manage the property with due diligence.

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mortgagor, or jointly, as the agreement provides.⁽¹⁶²⁾ In this case the receiver is deemed to be the agent of the mortgagor, who is solely responsible for his acts and defaults.⁽¹⁶³⁾

But apart from any special agreement, any mortgagee may in any event apply to the court for the appointment of a receiver where the mortgagor is in breach or the mortgagee's security is threatened. In a foreclosure action the mortgagee can limit his action to a mere claim for the appointment of a receiver. In this case the receiver is an officer of the court, and usually has to give security for the performance of his duties.

When a first legal mortgagee is in possession, a receiver will not be appointed against him by a subsequent mortgagee, except on the confession of the first mortgagee that he has been paid off, or if he refuses to accept what is due to him.⁽¹⁶⁴⁾ Further, a receiver may be appointed by a second mortgagee as against the first mortgagee when a gross mismanagement of the first mortgagee is shown.⁽¹⁶⁵⁾

But where the prior legal mortgagee has not taken possession the court will appoint a receiver at the instance of any mortgagee, without prejudice to the right of the prior legal mortgagee to take possession. If the first mortgagee takes possession subsequently, he must be treated as having been in possession of the mortgaged ship from the date of the service of his notice of motion, and therefore is entitled to profits which from that date came into the hands of the receiver.

A receiver as such has no general power to manage the mortgaged ship, and his function are limited to the receipt of profits and disbursing ordinary running expenses pending realisation of the security. But the court can appoint a receiver-manager where a person is required to carry on or superintend a trade, business or undertaking.⁽¹⁶⁶⁾

iv. Right to sell

Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money.⁽¹⁶⁷⁾ Thus, a power of sale is conferred on every

(162) In *Re Hale, Lilley v. foad* [1899] 2 Ch. 107, at 109 "The mortgagee in lieu of taking possession or before or after taking possession shall have the power of appointing a receiver".

(163) *Ibid.* at 113, per Byrne J., and at 119 per Sir F.H.Jeune.

(164) *Berney v. Sewell* (1820) 37 E.R. 515.

(165) *Rowe v. Wood* (1822) 37 E.R. 740, at 741.

(166) *Fairfield v. London & East Coast S.S. Co.* [1895] W.N. 64.

(167) *MSA 1995*, Schedule 1, section 9 provides that:

registered mortgagee, *ex lege*, even though no such power is given in the mortgagee deed or covenants. As a consequence every registered mortgagee of a whole ship or shares therein has, in the absence of an express power of sale, an implied power to sell the ship or shares therein on default by the mortgagor in payment of the amount due at the time appointed for payment.

If the mortgage does not provide for a specific date for repayment of the debt, the power of sale will nevertheless be available upon the mortgagee having given reasonable notice to the mortgagor requiring repayment and intimating to him that in default of repayment the mortgagee will sell the property.⁽¹⁶⁸⁾ It was held that a month's notice or even less would be reasonable notice.⁽¹⁶⁹⁾ But this is a pure matter of fact.

A mortgagee is at all times free to serve his own interests alone as to whether or not to exercise his power of sale.

The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor.

It does not matter that the time may be unpropitious and that, by waiting, a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price.

The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value of the property. In *The Tropical Reefer*, the bank advanced the borrower a loan to purchase three vessels and took mortgages over them as security. When the borrower defaulted under the loan, the bank arrested one of the vessels in Panama. The vessel was loaded with bananas that were bound for Germany. In order to sell the vessel, the bananas had to be disposed of, the cost of which (US\$200,000) was deducted from the proceeds of sale. When the bank demanded payment from the guarantor of the amount outstanding, the guarantor argued that the bank had

(1) Subject to sub-paragraph (2) below, 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.

(2) Where two or more mortgagees are registered in respect of the same ship or share, a subsequent mortgagee shall not, except under an order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee.

(168) *Deverges v. Sandeman & Co.*, [1902] 1 Ch. 579.

(169) *Ibid.* at 590; see the dissent of Vaughan Williams L.J. on the ground that the mortgagees were not justified in selling the mortgaged property, because a proper notice had not been given to the mortgagor.

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been negligent in arresting the vessel in Panama instead of allowing it to travel to Germany, where the proceeds of sale would not have been diminished by the cost of disposing of the bananas. The court decided, inter alia, that:

. A mortgagee has an unfettered discretion to sell when it likes to achieve repayment of the debt it is owed, and its decision is not constrained by the fact that the exercise or non-exercise of the power could cause loss or damage to the mortgagor;

. A mortgagee is entitled to sell property "as is" and is under no obligation to improve it or increase its value;

.The bank owed no duty of care in deciding whether to arrest the vessel or in deciding whether to release the vessel from arrest:

"a mortgagee" said Longmore LJ "had an unfettered discretion to sell when he liked to achieve repayment of the debt which he was owed, and his decision was not constrained by reason of the fact that the exercise or non-exercise of the power would occasion loss or damage to the mortgagor; he was entitled to sell the mortgaged property as it was, and was under no obligation to improve it or increase its value; when and if the mortgagee did exercise the power of sale, he came under a duty in equity (and not tort) to the mortgagor and all others interested in the equity of redemption to take reasonable precautions to obtain 'the fair' or 'the true market' value of or the 'proper price' for the mortgaged property at the date of the sale, and not the date of the decision to sell; he had to take proper care to obtain the best price reasonably obtainable at the date of sale; the remedy for breach of that equitable duty was not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received; and a mortgagee was entitled to sell the property in the condition in which it stood without investing money or time in increasing its likely sale value.... The defendants' argument that if, in the course of carrying out the sale of a mortgaged ship, the mortgagee impaired the value of the ship, he was in breach of his duty to obtain the best reasonably obtainable price for the ship, would be rejected on the facts of the present case; first, the submission fell foul of the many statements that the mortgagee was entitled to decide the time at which he sold without regard to the interests of the mortgagor; secondly, the bank was in any event entitled to take the view that releasing the vessel from arrest and permitting her to travel to Germany with her cargo on board was fraught with risk. "

In *The Maule*⁽¹⁷⁰⁾, the plaintiffs (the bank) lent money to the defendants (the vessel's owners). As security for the performance of the obligations under the loan agreement, the defendants granted to the plaintiffs mortgage over their vessel. The deed of covenants provided that upon the occurrence of any of the events of default specified in the loan agreement the plaintiffs would be entitled, forthwith, to sell the ship, with or without prior notice to the owners. Amongst the events of default in the loan agreement was the failure by the defendants to sell a vessel belonging to the group, *The Foresight Driller II*, within 60 days after notice by the mortgagees had been given, in the event that no employment could be found for her. Following the failure to secure employment, the plaintiffs duly gave notice for the sale of *The Foresight Driller II* but it was not sold within the 60 day deadline. Although no instalment was outstanding and the plaintiffs had not exercised their power to accelerate repayment of the loan, the defendants' vessel, *The Maule*, was arrested. *The Foresight Driller II* was eventually sold and its proceeds were used to reduce the indebtedness of the owners in the group to the lender.

At first, the Hong Kong Court of First Instance and Court of Appeal both held that the writ was unlawful, and that the bank could only sell a mortgaged vessel when money was outstanding. The plaintiffs appealed to the Privy Council and the issue was, whether they were entitled to arrest *The Maule* in the circumstances, If they were not, the shipowners were claiming damages for wrongful arrest.

The Privy Council, allowing the appeal, recognised that the parties were free to determine the rights and duties which appeared in their agreement. Since the parties had agreed, in the event of any default, that the lender may sell the vessel, the defendants had become duty bound to accept the sale of the vessel even though no monies were due and outstanding under the loan agreement.

Where the mortgagee exercises his power of sale,⁽¹⁷¹⁾ and chooses to sell the ship privately, rather than through the court, he will be a constructive trustee of

(170) [1997] 1 WLR 528 (PC)

(171) The vessel can be sold privately by the mortgagee or it can be put under ship arrest and the sale can be dealt with by the court. Private sale indicates a creation of a constructive trust by the mortgagee. Court sale is implemented by the virtue of the Supreme Act 1981 s. 20 (2) c as well as by the virtue of s.29 of the 1894 Merchant Shipping Act (repealed by the 1993 c. 22, s. 8(4) stating

...Where any court, whether under the preceding sections of this Act or otherwise, order the sale of any ship or share therein, the order of the court shall contain a declaration vesting in some person named by the court the right to transfer that ship or share, and that person shall thereupon be entitled to transfer the ship or share in the same manner.

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any surplus realised for the second or subsequent mortgagees,⁽¹⁷²⁾ and ultimately for the mortgagor.⁽¹⁷³⁾ He is not however a trustee of his power of sale. In *Warner v. Jacob*⁽¹⁷⁴⁾ Kay J. described the mortgagee's power of sale thus:

a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.⁽¹⁷⁵⁾

In *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*,⁽¹⁷⁶⁾ Cross L.J. said:

A mortgagee exercising a power of sale is in an ambiguous position. He is not a trustee of the power for the mortgagee as it was given to him for his own benefit to enable him to obtain repayment of his loan. On the other hand he is not in the position of an absolute owner selling his own property but must undoubtedly pay some regard to the interests of the mortgagor when he comes to exercise the power.⁽¹⁷⁷⁾

Nevertheless, the mortgagee is under a duty to exercise his power of sale in a prudent way and he will be held liable to the mortgagor where acting imprudently he fails to realise sufficient from the sale.⁽¹⁷⁸⁾ Lord Moulton in *McHugh v. Union Bank of Canada* said:⁽¹⁷⁹⁾

It is well settled law that it is the duty of a mortgagee when realising the mortgaged property by sale to behave in conducting such realisation as a reasonable man would behave in the realisation of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

(172) The *MSA 1995*, Schedule 1, parap. 9(2) specifically states that:

Where two or more mortgages are registered in respect of the same ship or share, a subsequent mortgagee shall not, except under an order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee.

(173) As explained in Temperley, *The Merchant Shipping Acts*, 7 Ed., 197 at para. 76, it is advisable that the mortgagee come to some agreement with the mortgagor regarding the sale, because the mortgagor, being more familiar with the ship's characteristics, is in a better position to effect a profitable sale than the mortgagee. The mortgagee may not sell the vessel "disadvantageously". See *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.*, (1858) 4 K. & J. 676, 70 E.R. 281; *Marriott v. Anchor Reversionary Co.*, (1861) 45 E.R. 846.

(174) (1882) 20 Ch. D. 220.

(175) *Ibid.* at p. 224.

(176) [1971] Ch. 949.

(177) *Ibid.* at p. 969.

(178) *The Calm C* [1975] 1 Lloyd's Rep. 188.

(179) [1913] A.C. 299 at p. 311.

Similarly in *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*⁽¹⁸⁰⁾ Salmon L.J. said after considering the authorities:

I accordingly conclude both on principle and authority, that the mortgagee does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

In *The Calm C.*⁽¹⁸¹⁾ a mortgagee sold a vessel for considerably less than its appraised value. The vessel was also sold while situated in a small outport without being fully exposed to the market in which it would realize the greatest value. It was held by the B.C. Court of Appeal that the mortgagee was liable to the mortgagor for damages with respect to the improper conduct of the sale. The mortgagee had also made no effort to recouperate the value of a net damaged while the mortgagee had possession of the vessel and was operating it as a fishing vessel. The mortgagor was allowed a set off as against the amount claimed by the mortgagee. In setting forth the test to be observed by a mortgagee in the possession and sale of the vessel the B. C. Court of Appeal said:⁽¹⁸²⁾

In assessing that conduct, too, in my opinion it is proper to consider that a mortgagee exercising a power of sale is entitled to act in his own interests. He is not a trustee of the power of sale for the mortgagor. He is, however, required by law to take reasonable steps and precautions, having regard to all of the circumstances.

Generally, the power of sale ought to be exercised with due regard to the mortgagor's, or subsequent mortgagee's interests, and the sale ought to be made in the manner that it would be made by a reasonably prudent man selling his own property. If the sale is not performed fairly and *bona fide*, it can be set aside. Thus, the court may find that a sale by an assignee of a mortgage, in the exercise of a power of sale, is invalid as against the mortgagor, and may order redemption, on the ground that there has been reckless disregard of the interest of the mortgagor in the conduct of the sale.⁽¹⁸³⁾ Further, the court may grant an

(180) [1917] Ch. D. 395, at p. 968.

(181) [1975] 1 Lloyd's Rep. 188.

(182) *Ibid.*, at 191.

(183) *Haddington v. Hudson* [1911] A.C. 722.

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injunction to restrain the mortgagee from proceeding with the sale.⁽¹⁸⁴⁾

The mortgagee must comply with any restrictions upon the power of sale contained in the deed of covenants. In *Broward v. Dumaresque*,⁽¹⁸⁵⁾ it was provided that the mortgagee should sell the ship only in public auction. Default was made in payment, and pending investigation before arbitrators the mortgagee caused the ship to be sold by private contract. It was held that such a sale was wrongful and improper, and the mortgagee was liable to damages on the ground that the mortgagor might have very good reasons for guarding against a sale by private contract, in stipulating for some other mode whereby the mortgaged ship might be rendered available for the benefit of the mortgagee.

The mortgagee is not entitled in the exercise of his power of sale to sell to himself, whether alone or jointly with others, nor to any agent or trustee acting on his behalf. In *Martinson v. Clowes*,⁽¹⁸⁶⁾ North J. said: "It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it is clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either."⁽¹⁸⁷⁾

However there is nothing to prevent a subsequent mortgagee from purchasing the property even where he is in possession. If he does so he will obtain the property free from the equity of redemption in the same way as a stranger.

A more difficult situation arose in *Twe Kwong Lam v. Wong Chit Sen*.⁽¹⁸⁸⁾ In that case the mortgagee arranged for the mortgaged property to be sold by public auction pursuant to his power of sale. Meanwhile, together with his wife, as directors of a company of which they and their children were the only shareholders, the mortgagee held a director's meeting whereat it was resolved that the wife should bid for the property on behalf of the company. At the auction there was only one bid and the property was sold to the company. It was held that there was no fixed rule which prevented a company in which the mortgagee was interested from purchasing the mortgaged property, but that there was an onus on the mortgagee to prove that he had made the sale in good faith and had taken reasonable precautions to obtain the best price reasonably

(184) See *Whitworth v. Rhodes* (1850) 20 L.J. Ch. 105 where the court restrained the mortgagee of certain real estates from selling under his right of sale.

(185) (1841) 166 E.R. 186. *Dickinson v. Kitchen*, (1858) 8 E.L. & B.L. 789, 120 E.R. 293; *The Maule*, [1997] 1 Lloyd's Rep. 419 (P.C.).

(186) (1882) 21 Ch. D. 857, at p. 860.

(187) In *Hodson v. Dean*, Joyce J. said: "The mortgagee has right of his own, but he is under certain obligations to the mortgagor... A sale by a person to himself is no sale at all."

(188) [1983] 1 W.L.R. 1349.

attainable at the time. After considering the authorities, Lord Templeman said:

on authority and on principle there is no hard and fast rule that a mortgagee may not sell to a company in which he is interested. The mortgagee and the company seeking to uphold the transaction must show that the sale was in good faith and that the mortgagee took reasonable precautions to obtain the best price reasonably obtainable at the time. The mortgagee is not however bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss ... In the present case in which the mortgagee held a large beneficial interest in the shares of the purchasing company, was a director of the company, and was entirely responsible for financing the company, the other share-holders being his wife and children, the sale must be closely examined and a heavy onus lies on the mortgagee to show that in all respects he acted fairly to the borrower and used his best endeavours to obtain the best price reasonably obtainable for the mortgaged property.⁽¹⁸⁹⁾

Where, however, the vessel is being sold by the court the mortgagee may apply to the court to be permitted to bid as a purchaser.

The mortgagee is not entitled to sell the ship to himself or to a trustee or to an agent of himself. In *Hodson v. Dean*, Joyce, J. said: "The mortgagee has right of his own, but he is under certain obligations to the mortgagor... A sale by a person to himself is no sale at all."

In the absence of any express decision and in view of what was said in *The Western Ocean* it would seem that a first mortgagee can sell his interest in the ship, even while she is under arrest by subsequent registered mortgagee.

But, a second or subsequent registered mortgagee cannot sell the ship without the consent of every prior mortgagee, or the consent of the court.

A mortgagee of shares will usually resort to a foreclosure action in order that the whole ship may be sold by order of the court. Thus, in *The Fairlie*,⁽¹⁹⁰⁾ a sale of a vessel at the suit of the mortgagee of 3/4 of the shares was effected. The court ordered that the owner of 1/4 of shares should have notice of the intended sale, and that upon proof of this fact to the satisfaction of the registrar, the decree of sale should be issued.

The right of sale may be expressly limited. In *Broward v. Dumaresque*,⁽¹⁹¹⁾

(189) *Ibid.* at p. 1355.

(190) (1868) 37 L.J. Ad. 66.

(191) (1841) 166 E.R. 186.

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it was provided that the mortgagee should sell the ship only in public auction. Default was made in payment, and pending investigation before arbitrators the mortgagee caused the ship to be sold by private contract. It was held that such a sale was wrongful and improper, and the mortgagee was liable to damages on the ground that the mortgagor might have very good reasons for guarding against a sale by private contract, in stipulating for some other mode whereby the mortgaged ship might be rendered available for the benefit of the mortgagee.

Effect of sale.

When the sale of the ship is completed, the mortgagor ceases to have any right to redeem, and all his rights to the mortgaged property are lost. The only right remaining in the mortgagor is to receive any balance of the proceeds of sale after deduction of the expenses of the sale, the sums due to the mortgagee and the amount of any subsequent encumbrances.

If the proceeds of sale after discharging the mortgage debt show a surplus in the hands of the mortgagee, he is bound to discharge the debt of any subsequent mortgagee incumbrancer of which he has notice. He becomes a constructive trustee of such surplus for subsequent incumbrancers and for the mortgagor to whom he must pay the ultimate balance. If he has any difficulty in deciding how to deal with the surplus in his hands he may pay the money into court for distribution.

When any court orders the sale of any ship etc., the order shall contain a declaration vesting in some person named by the court, (in practice the Admiralty Marshal) the right to transfer the ship or share therein and he shall thereupon be entitled to transfer the ship or share therein in the manner and to the same extent as if he were the registered owner.

5.2. UAE LAW**5.2.1. Rights of the mortgagor**

Under the *EMC 1981* the mortgagor is not deprived of his ownership of the vessel. He remains the legal owner, and moreover, by operation of law he is left in the possession of the mortgaged ship, until the date of seizure. Even in the case where the mortgagor is in default, the mortgagee is not permitted to take possession of the ship and operate the ship himself.

A mortgagor retains the rights of an owner, therefore, the employment and management of the ship remain within his power. He is entitled to operate the ship to transport his own cargo or to earn freight, or to lay up the ship in a

port.⁽¹⁹²⁾

5.2.1.1. Right to Transfer the Ship

In UAE, a mortgagor can sell the mortgaged ship but he must get the permission of the mortgagee to sell the mortgaged ship.⁽¹⁹³⁾ Article 69 of the *EMC 1981* provides that: (*Rough translation*)

1. It shall not be permissible for the owner of a national ship to sell it or to scrap it before satisfying all debts due to the State in respect thereof, and, if the said vessel is encumbered with a mortgage, the consent of the mortgagee obtained.

2. Any sale made contrary to the provisions of the foregoing subsection shall be void.

5.2.1.2. Right to the Freight

In UAE, freight is not usually included in the mortgage⁽¹⁹⁴⁾ without a specific arrangement in the mortgage contracts, thus enabling a mortgagor to collect the freight of his ship. However, when the ship has been arrested by the court, he is no longer entitled to collect freight.

5.2.1.3. Right to Give Subordinate Mortgages

As legal owner the mortgagor may create further mortgages on it, without any interference or without the consent on the part of the mortgagee. Mortgages

(192) *Emirati Civil Code 1985*, article 1413/1 provides that:

(*Free translation*) The (mortgagor) shall have the right to manage the property hypothecated and to obtain the yield thereof up to the date on which he is compulsorily divested of ownership upon his failure to pay the debt.

(193) Under English law the mortgagor may sell the vessel to another person even though the vessel is mortgaged, since he remains the legal owner. If the sale is to a British subject, the buyer takes with notice of the mortgage since it is registered and he would be unable to resist an action by the mortgagee to have the ship sold to recover the money due. In that event, the surplus of any proceeds from the sale would be held in trust for the new owner of the ship by the mortgagee after he had satisfied his own account.

Section 16(4) of the *MSA 1995* and Regulation 63 of the 1993 Regulations provide that where the registration of a ship terminates by virtue of any provisions of the Registration Regulations, the termination of that registration shall not affect any entry made in the register of any undischarged registered mortgage of that ship or any share. So if a ship is transferred to someone not qualified to be an owner of a British ship, the unsatisfied registered mortgage, may, if the ship comes within the jurisdiction of a court in the UK which has jurisdiction to enforce the mortgage, or would have had jurisdiction had the vessel not been sold, be enforced.

Where, however, a ship is sold by order of the court, the position of the mortgagee is different. He is barred from proceeding against the vessel under her new ownership to recover any outstanding balance due under the mortgage before the sale. The new owner, being an innocent purchaser for value, takes the ship free of all encumbrances. The mortgagee's recourse is restricted to the proceeds of sale only.

(194) See *EMC 1981*, article 100/2:

A mortgage effected on a vessel shall not have effect against freight...

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registered on the same date shall rank in order of registration even if they were registered on the same day.⁽¹⁹⁵⁾

5.2.2. Obligations of a Ship Mortgagor

5.2.2.1. Obligation to Preserve the Value of the Ship

In UAE, although a mortgagor is the owner of a mortgaged ship, he should preserve the value of the ship not only for his own interest, but also as an obligation towards the mortgagee.⁽¹⁹⁶⁾ When a mortgaged ship's value decreases, the mortgagor must restore the value of the ship, or offer the mortgagee a guarantee equivalent to the value decreased. This is prescribed by *Emirati Civil Code 1985*, article 1415/1, which reads as follows:

If the property hypothecated is destroyed or damaged through the default of the (mortgagor), the (mortgagee) shall have the right to require that his debt be paid

If the behaviour of the mortgagor causes the value of the gage to decrease, the mortgagee shall be entitled to have the right to demand the mortgagor to stop his behaviour.⁽¹⁹⁷⁾ When the value of the gage decreases, the mortgagee shall have the right to demand the mortgagor to restore the value of the gage, or offer a guarantee equivalent to the value decreased.⁽¹⁹⁸⁾

If the mortgagor has no fault for the decrease of the value of the gage, the mortgagee shall demand to be offered an amount within the extent of compensation for the damage obtained by the mortgagor. The part of the gage for which the value does not decrease shall remain the guarantee of the obligatory right⁽¹⁹⁹⁾ Article 1415.

(195) See *EMC 1981*, article 106/2:

(Rough translation) If two or more mortgages are effected against a vessel or against a share in it, they shall rank in order of registration even if they were registered on the same day.

(196) *Emirati Civil Code 1985*, article 1414 states:

(Free translation) The (mortgagor) shall be the guarantor of the property hypothecated and he shall be liable in full for its safety until the date the debt is paid. The (mortgagee) may make objection to any shortfall in his security and may take such steps as will preserve his right, and shall have recourse against the (mortgagor) for the costs of so doing.

(197) See *Emirati Civil Code 1985*, article 1415/3:

(Free translation) If acts take place which are such as to expose the property hypothecated to destruction or damage or which may render the property insufficient as a security, then the (mortgagee) may apply to the court for an order that such acts cease and that steps be taken to prevent any damage occurring.

(198) *Emirati Civil Code 1985*, article 1415/1.

(199) *Emirati Civil Code 1985*, article 1415/2 provides that

(Free translation) If the loss or damage occurs through a cause with which the (mortgagor) had nothing to do, he may elect between providing sufficient security for the debt or discharging the debt prior to the maturity date thereof.

5.2.2.2. *Obligation to Insure the Ship*

In UAE a mortgagor is usually obliged to insure the ship regardless of any arrangement in the contract.

5.2.3. Rights of a Ship Mortgagee

5.2.3.1. *Right to Protect the Mortgage*

Emirati Civil Code 1985, articles 1414 and 1415 prescribe the right of the mortgagee to protect the mortgage. There are three kinds of rights involved: the right to demand the mortgagor to stop the behaviour that decreased the value of the mortgage; the right to demand the mortgagor to restore the mortgage; and the right to demand the mortgagor to offer a guarantee equivalent to the value decreased. The right to demand that the mortgagor stop decreasing the value of the mortgage is similar to the "Mareva Injunction" in common law. The consequences to a mortgagor who ignores these rights are not entirely clear. One thing is certain; the mortgagee then has the right to accelerate the debt and realize the mortgage immediately.

5.2.3.2. *Right to Ask the Court to Arrest and Sell the Ship*

In UAE a mortgagee has no right to take possession of the ship. The rights of a mortgagee are limited to requesting the court to arrest and sell the ship. Furthermore, the options of realization of the mortgage are restricted to an auction sale.

Two or more mortgages may be effected on the same ship. The ranking of the mortgages shall be determined according to the dates of their respective registrations.

5.2.3.3. *Right to Preferred Compensation from the Proceeds of the Sale of a Ship*

The right of mortgage with respect to a ship is the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of an auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee secured by the mortgage of that ship. In UAE, a ship mortgage is the preferred compensation from the proceeds of the sale of the mortgaged ship. The substantial advantage that the mortgagee enjoys from his security is to take priority over other creditors of the same debtor on the proceeds of sale after arrest. Although he is outranked by the highest ranking lien creditors, he outranks all others.⁽²⁰⁰⁾

(200) Under the *EMC 1981*, article 84 the following debts are privileged debts against proceeds of sale of the vessel: (*Rough translation*)

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The law, in order to ensure the right of preference, grants to the creditor a right of pursuit, that is the ability to follow the ship regardless of who now holds it.⁽²⁰¹⁾ The mortgagee has the ship arrested when it is in the buyer's hands after having sent the buyer a summons to pay or to allow him to pursue the arrest.⁽²⁰²⁾

5.2.3.4. Right to Dispose the Mortgage

As a property right, the mortgagee can transfer, assign or give up the mortgage..⁽²⁰³⁾

-
- (i) legal costs incurred in protecting and selling the vessel, and distributing the proceedings of such sale, including loading and port fees and other dues of a similar nature; piloting fees and compensation for damage caused to port installations, docks and navigation lanes, the costs of removing obstacles to navigation caused by the vessel, and the costs of towing and maintenance of the vessel from the time of its arrival at the last port;
 - (ii) debts arising out of a contract for the employment of the master and crew, and other persons bound by a contract of maritime employment aboard the vessel;
 - (iii) monies due for assistance and salvage and the vessel's share in general average;
 - (iv) compensation due for collisions and other navigational accidents, compensation due for physical injuries to the passengers and crew and compensation for loss or damage to goods and possessions;
 - (v) debts arising out of contracts made by the master, and operations carried out by him outside the port of registration of the vessel within the scope of his lawful powers for a real need required by the maintenance of the vessel or the continuance of the voyage;
 - (vi) breakdowns and damage giving rise to a right of compensation in favour of the charterers in favour of the charterers of the vessel; and
 - (vii) all insurance premiums in respect of hull and machinery for the last insured voyage, or for the last period of insurance, as appropriate, but not exceeding one year's premium.

It should be noted that a ship mortgage will rank directly after debts (i) to (v) listed above.

(201) *EMC 1981*, article 107 provides that:

(Rough translation) The mortgagee of a vessel or part thereof shall follow it in the hands of whomsoever it may be. The mortgage shall not terminate by reason of confiscation of the vessel for a breach by it of the laws of the State.

(202) *EMC 1981*, articles 111 provides that: *(Rough translation)*

- 1- If the ownership of the mortgaged vessel or part of it is transferred before registration of a notice of arrest, the mortgagee creditor who has taken the enforcement proceedings against the vessel must notify the person in whose possession it is of the notice of arrest, and must give him official notice to pay the debt.
- 2- If the person in possession of the vessel wishes to annul the proceedings for arrest and sale, he must before commencing those proceedings or within the fifteen days following the notice to pay the debt, notify the creditors registered on the register of vessels at their chosen places of residence in the contracts of mortgage of his preparedness to pay the debts secured by the mortgage immediately, whether they are due for payment or not, up to the value of the vessel to which they attach. The said notice must include the following:-
 - a. A resume of the contract, with the date of the contract, the name and nationality of the seller, the name and type of the vessel, its tonnage, value and costs.
 - b. A schedule of the debts registered, with the dates and amounts thereof, and the names of the creditors.

(203) *Emirati Civil Code 1985*, article 1418 provides that:

5.2.3.5. There is no Foreclosure under UAE Law

When entering into a mortgage contract, the mortgagor and the mortgagee shall not agree that, when the mortgagee is not satisfied at date of expiration of the time limitation for the debt performance, the ownership of the gage is to be transferred to the creditor *Emirati Civil Code 1985*. Article 1420 of the provides that the following:

(1) If it is a condition of the hypothec contract ... that the ownership of the property hypothecated be vested in the mortgagee in consideration for his debt in the event that the mortgagor does not pay at the specified time, or if there is a condition that it be sold regardless of the legal procedures, the hypothec shall be valid but the condition shall be void.

(2) The condition shall also be void notwithstanding that it may have been made by subsequent agreement.

This article has prevented the transfer of title in a mortgage case, thus making foreclosure impossible. The different attitudes towards foreclosure reflect the different theoretical bases for mortgage in common law and hypothec in civil law. Historically, a mortgage is transfer of title in common law while a hypothec is only a preferred right to compensation. Thus, while foreclosure exists as a remedy in common law, civil law has no corresponding option.

6. PRIORITIES OF MORTGAGES

The mortgagee of a vessel will be concerned about the priority in which the mortgage ranks *vis-à-vis* the rights of other claimants against the vessel, or any fund created from the proceeds of sale of the vessel. While the vessel is security for sums advanced by a mortgagee it may also be subject to other charges, some of which may have priority over the mortgage.

6.1. ENGLISH LAW

6.1.1. CLAIMS RANKING IN PRIORITY TO MORTGAGES

6.1.1.1. *Court costs and custodia legis.*

(Free translation) A (mortgagee) ...may assign his right to another person provided that the (mortgagor) consents, and the deed of assignment shall be registered with the ... registry.

Under English law a mortgage may be assigned and there is a form of assignment endorsed on the reverse side of both principal sum and interest and account current mortgages. This is the only form of assignment which may be accepted by the registrar for recording but it may be supplemented by contract between the parties. It should be noted that the right to the debt or the benefit of the performance of the obligation secured must be assigned, either expressly, by separate instrument, or impliedly, for a mortgage may only secure the indebtedness and obligations it is expressed to secure (see Hill, *op.cit.* at pp. 33-34).

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The total costs of a plaintiff in an action for the arrest of a vessel, and obtaining the order for the appraisal and sale of the same may be awarded to a claimant, such as a necessaries' man whose claim may be postponed to those of others, and may be paid in priority to other claims only after the Admiralty Marshal's costs, if the court feels that the party instigating the arrest and sale of the vessel should be so entitled.⁽²⁰⁴⁾

6.1.1.2. Maritime liens.

A mortgagee, as regards his claim against the subject vessel, is postponed to all maritime liens from the moment of their attachment.⁽²⁰⁵⁾ The following claims constitute maritime liens under English law:

(i) damage caused by a ship;⁽²⁰⁶⁾ although it is doubtful whether the shipowner's statutory liability for oil pollution, mentioned in this heading, constitutes a maritime lien. Cargo claims will not fall under this heading unless they are brought against a vessel that has collided with the vessel on which the cargo was being carried;

(ii) salvage;⁽²⁰⁷⁾

(iii) seamen's emoluments, that is, wages plus all fringe benefits such as pension contributions, etc.;

(iv) master's wages and disbursements;⁽²⁰⁸⁾

(204) *The Immacolata Concezione* (1883) 9 P.D. 37.

(205) *The Aline*, (1839) 166 E.R. 514; *The Feronia* (1868) L.R. 2 A. & E. 65. If a maritime lienholder exercises an action *in rem* against a sister ship, he then only has a statutory right *in rem* and his claim should rank after that of the mortgagee of the sister ship (see *The Leoborg* (No. 2), [1964] 1 Lloyd's Rep. 380 at p. 382 where this point was argued, but not decided).

(206) Where a vessel causes damage to another vessel in a collision, the damaged vessel and the owner thereof will have a maritime lien against the vessel which caused the damage. The holder of a maritime lien for collision damage will rank in priority to a mortgagee with respect to the fund created from the proceeds of sale of the vessel (see *The Athena* (1921) 8 Ll.L.Rep. 482).

(207) Where a salvor renders assistance to a vessel in distress so as to give rise to a claim for salvage, that claim will constitute a maritime lien against the vessel. The courts recognise that on equitable grounds the preserver of the *res* should be entitled to priority over other lien claimants, including mortgages. In *The Lyrma* (No. 2) [1978] 2 Lloyd's Rep. 30 at 33 Brandon J. stated:

It has long been an established principle that a maritime lien on a ship for salvage has priority over all other liens which have attached before the salvage services were rendered. The basis for the principle is an equitable one, namely, that the salvage services concerned have preserved the property to which the earlier liens have attached, and out of which alone, apart from personal remedies against the shipowners, the claims to which such liens relate can be satisfied.

(208) In *The Mary Ann* (1865) 13 L.T. 38 it was held that a claim by a master for disbursements ranks as a maritime lien and is a prior claim to that of a mortgagee against the ship or the proceeds of sale thereof. It has further been held that even though a vessel is in the possession of a mortgagee, the master has a right to proceed *in rem* against the vessel for disbursements made by him for necessaries.

(v) bottomry bond (which is no longer in use).

6.1.1.4 Possessory Liens

A ship repairer who has done work on a vessel to the order of the owner is entitled to a possessory lien for so long as he retains possession of the vessel, and a mortgagee seeking to take possession of a vessel subject to such a lien must first discharge the lien.⁽²⁰⁹⁾ If a repairer is forced to give up his possessory lien by judicial process, for example, by arrest of the ship, the court will protect his rights and will give him priority over all claims including those of a mortgagee except for maritime liens which attached before the possessory lien.⁽²¹⁰⁾ In *The Tergeste*,⁽²¹¹⁾ Phillimore J. stated:

It is said that they had no possessory lien, because the master and crew were on board; if that were the rule a great number of shipwrights' liens would be disturbed. That man has a lien who has such control of the chattel as prevents it being away from his possession.

6.1.2. CLAIMS RANKING AFTER MORTGAGES

6.1.2.1. Necessaries Claimants - Statutory Liens

The Supreme Court Act 1981 and its predecessors grant certain rights to claimants who do not have maritime liens against the vessel to commence proceedings and arrest the vessel. Such rights are often referred to as statutory liens. A claimant under a statutory lien who has no maritime or possessory lien will rank after a mortgagee in any claim with respect to the distribution of the proceeds of the sale of the vessel.⁽²¹²⁾ In *The Pickaninny*;⁽²¹³⁾ a ship was

(209) *Williams v. Allsup*, (1861) 30 L.L.C.P. 353 ; *The "Turtiani"*, (1875) 2 Asp. M.L.C. 603; *The "Sherbro"*, (1883) 5 Asp. M.L.C. 88; *The Scio*, (1867) L.R. 1 A. & E. 353.

(210) *The Ally*, [1952] 2 Lloyd's Rep. 427.

(211) [1903] P.26 at 33. In *The Sherbro* (1883) 52 L.J.P. 28 a mortgagee commenced an action by arresting a vessel. A ship repairer in possession intervened and claimed a possessory lien. The vessel was sold by court order and it was held that the taxed costs of the mortgagee up to the date of sale would be permitted even though the balance of the proceeds after the costs of the sale would only be sufficient to satisfy the possessory lien, which had priority to the claim of the mortgagee.

(212) There are circumstances in which a mortgagee will lose priority to a necessities claimant. In *The Sullivar* [1965] 2 Lloyd's Rep. 350 a mortgagee had given an undertaking to the Admiralty Marshal to indemnify him for the cost of repairs. The sale of the vessel was postponed until repairs could be effected and it was held by the court that the repairs of the vessel had a prior claim to the mortgagee in the fund created from the proceeds of sale, based on the undertaking of the mortgagee. In *The Colonsay* (1885) 11P.D. 17, where a mortgagee intervened in an action commenced by a necessities man and the vessel was sold by a court order, the Marshal's fee, the mortgagee's claim and the mortgagee's taxed costs were paid out in priority to the claim of the necessities man.

(213) [1960] 1 Lloyd's Rep. 533. See also *The Zigurdsy* (1932) 43 L.L.Rep. 387, where stevedores argued that they should be ranked ahead of the mortgagee because, if they had not discharged the ship, freight

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repaired on the undertaking by the ship's agent and necessaries men that they would be personally liable for the cost of repairs. The ship was subsequently arrested by the mortgagees. The ship's agent and necessaries men intervened and argued that the cost of repairing the ship should be given priority because that expenditure was a benefit that accrued directly to the mortgagee. Hewson J. held that it was not shown that the mortgagees knew that the intervenors had given the undertaking. Therefore, the mortgagees should rank ahead of the repairman in accordance with the normal rule.⁽²¹⁴⁾ He stated as follows:⁽²¹⁵⁾

Are the first mortgagees, the plaintiffs in the first action, entitled to priority over the plaintiffs in the second action, who are necessaries men? It is said by the mortgagees' counsel that the necessaries men normally come after the mortgagees and that their claim only attaches when they issue the writ. Well, that is a statement about which nobody will complain.

6.1.3. PRIORITY BETWEEN MORTGAGES

i) A registered mortgage has the priority over an unregistered mortgage regardless of the respective dates on which the mortgages were made. The registered mortgage will have priority over an unregistered mortgage of a vessel even if, at the time of registration, the registered mortgagee knew of the existence of a prior unregistered mortgage.⁽²¹⁶⁾

ii) A registered mortgage has the priority over later registered mortgages;⁽²¹⁷⁾

would not have been earned and it would not have become part of the fund covered by the mortgage. They also argued that equitable principles required that the mortgagee pay them (i.e. the stevedores), since otherwise the mortgagee would be getting more than the owner would have gotten. Langton J. rejected those arguments and gave priority to the mortgagee.

(214) A 'necessaries' claimant may be preferred to a mortgagee if that mortgagee had stood by knowing that the shipowner was insolvent and that the claimant was carrying out work in supplying materials which were directly benefiting his interest (see *The Pickaninny* [1960] 1 Lloyd's Rep. 533).

(215) *Ibid.*, at 536.

(216) *Black v. Williams* [1895] 1 Ch. 408. See also *Parr v. Applebee* (1895) 11 L.T.R. 77, a first registered mortgagee entered into a subsequent mortgage agreement in a separate unregistered instrument. Subsequently, a mortgagee, with notice of the unregistered instrument also held by the first registered mortgagee, registered his mortgage as a second charge. It was held that the second registered mortgage had priority over the unregistered instrument also held by the first mortgagee.

Priority between unregistered mortgages *inter se*, and between unregistered mortgages and other equitable interests affecting the ship, will be governed by general equitable priority rules-the first in time (i.e. according to date of creation) will prevail, but with priority liable to be postponed on the grounds of conduct; see *Burgis v. Constantine* [1908] 2 K.B. 484.

(217) Hill, *op. cit* at p. 32. Regulation 59 of the Merchant Shipping (Registration) Regulations 1993 allows intending mortgagees of a registered ship or a share in a registered British ship to give notice of his interest which it is intended that he should have under the proposed mortgage to the Registrar.

iii) Where there is more than one mortgage registered on the same date then their order of priority is determined by their respective times of registration in the register book and not according to the date that each mortgage was made .

6.2. UAE LAW

6.2.1. *System of Priorities Inter se of Registered Mortgages*

When there are several mortgages on a ship, the date of registration is decisive for their priority inter se. If several mortgages are registered on the same day then their order of priority is determined by their respective times of registration.

6.2.2. *Priorities between Registered Mortgages and Right of Retention (Possessory Lien)*

Registered mortgages have priority over the right of retention. In the case of an enforced sale, the retaining person will be treated only as an ordinary creditor.

6.2.3. *Priorities between Registered Mortgages and Maritime Liens*

A creditor will obtain a maritime lien for the following claims and in the following priority:⁽²¹⁸⁾

- a. harbour dues and other similar taxes, pilot expenses, custody charges after entry of the ship into the last port, court costs, due to an enforced sale of the vessel;
- b. wages owed to the captain, his crew and other persons working on board the ship;
- c. awards in salvage and assistance operations and contributions to general average.
- d. damages payable because of collisions with other ships or harbour installations, or other liability incurred in the handling of the ship; e. debts arising from contracts made by the master in the interest of the ship.

Once this priority notice has been given the Registrar records that interest on the register. Once notice of this intended mortgage is given and recorded on the register the mortgage will, if later executed and registered, take priority over another registered mortgage even if the other registered mortgage was fully registered in the first place. The priority notice lasts for 30 days although it can be renewed. Subject to priority notices, where two or more mortgages are registered in respect of the same ship or share, the priority of the mortgages between themselves is determined by the order in which the mortgages were registered (paragraph 8 of Schedule 1 to the 1995 Act) (see Hill, *op.cit.* at pp. 31-32).

(218) See *EMC 1981*, article 84.

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Such maritime liens have priority over registered mortgages.⁽²¹⁹⁾

7. CONCLUSION

Studying the law of the ship mortgages under English and UAE law, one notices, *inter alia*, the following points:

1) In both systems a ship's mortgage creates a *jus in re aliena*, upon the vessel, as a security for the reimbursement of a loan or the performance of an obligation. This security is the *causa* of the mortgage in UAE law, and the consideration of it, in English law. By the mortgage instrument the mortgage obtains a hold on the vessel, which enables him if the mortgagor defaults, to seize it and recover the money lent in priority as against other personal creditors of the mortgagor.

2) In both systems a mortgage may be created either with reference to a ship, or in a share therein. In both systems a mortgage of a ship may only be created by the consent of the shipowner. A co-owner has right to give his share in a mortgage.

3) In the U.K., a registerable ship mortgage must be in statutory form either Form ROS 25 or Form ROS 30. UAE has no prescribed forms for a ship mortgage. The only formal requirement is that the contract that creates the mortgage should be in writing. The owner of a ship or an agent authorized by the owner may establish a mortgage of the ship, which must be effected by a contract in writing.

4) The principle of publicity is upheld in both systems by registration. In order to make publicity more effective, the mortgage instrument and the registration must contain such particulars, whereby the identities of the parties and the description of the ship, such as names of the parties to the mortgage, name of the vessel, time and date of the mortgage instrument and registration, etc. are made clear to any prospective creditor.

According to UAE law, the completion of a mortgage is effected by registration. The same may be said about legal mortgages in English law. In both systems a mortgage of a ship, may be good as between the parties in the mortgage, even though not registered.

5) It would seem that the definition of the word "ship" as formulated in the Merchant Shipping Acts, 1995, is substantially the same as that of the *EMC 1981*. It should be noticed, however, that the UAE law has an advantage over the English law, namely that ships under construction stand on the same footing

(219) See *EMC 1981*, article 105/1.

as completed ships, in respect of mortgages. Such ships may be registered and afterwards may be mortgaged by statutory mortgages in exactly the same manner as completed ships. The advantages of this system, in the financing of shipbuilding, over the English equitable mortgage system of unfinished ships, are apparent, especially in the ranking of mortgages and their order of priority.

6) Generally speaking, English and UAE law agree that the word "ship" or "vessel" is understood to comprise the ship's tackle, equipment, and appurtenance. Consequently, as a general rule, these articles are considered to be mortgage *ipso jure*, with the ship.

In *The Humorous, The Mabel Vera*, nets found on shore after the bankruptcy of the mortgagor, but belonging to and appropriated to a certain vessel were held to pass under the mortgage of the vessel. The same would have been held under UAE law. But, under UAE law if such nets were transferred to a third person, the mortgagee could not have any right to them.

Again in the same case of the vessel *Humorous* where no nets were appropriated at the time when the mortgage was entered into, Bateson, J. said "I do not see, even if there was any appropriation of any special gear to her afterwards, how that would pass under a mortgage made before the gear was ever allotted to her, nor do I see how you can mortgage property which you do not possess or which does not belong to you." The same solution is arrived at under UAE law. But if instead of nets a new engine, or mast etc., e.g. fixtures, were brought aboard and fixed in the ship they would pass under the mortgage.

7) Under English law a mortgagee who is not in possession has no right to the freight a vessel may be earning unless he has a specific assignment thereof. Once the mortgagee takes possession, either actual or constructive, he becomes entitled to all the freight that the vessel is in the course of earning. In UAE, freight is not usually included in the mortgage without a specific arrangement in the mortgage contracts, thus enabling a mortgagor to collect the freight of his ship. However, when the ship has been arrested by the court, he is no longer entitled to collect freight.

8) In an English mortgage, although the legal property in the ship, as between the parties, passes from the moment of the execution of the mortgage, the equitable title of ownership still remains vested in the mortgagor, who can always redeem his property. In a UAE law the legal property does not pass to the creditor.

9) Under the English law a mortgagee has the right to take possession of the ship in a default of the mortgagor which eventually means that he becomes

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owner of the ship and has the right of control and management of her. In contrast with **UAE** law, the mortgagee is not entitled to the possession of her even in the case of default of the mortgagor therefore, has no right to assume the management of the ship.

10) In the U.K., the ranking of maritime claims depends on case law, and has little to do with statute law. In UAE the order of maritime claims differs greatly from that of the U.K. While embodying the general principles of the ranking around the world, UAE has its own rules of ranking, with its own particular characteristics.

**الرهن البحري للسفينة :
دراسة مقارنة للقانون الإنجليزي و الإماراتي**

د. عبد الله حسن محمد

أستاذ القانون التجاري والبحري المشارك

كلية القانون – جامعة الإمارات العربية المتحدة

يتطلب الاستغلال البحري أموالاً طائلة. ومن الوسائل أو الطرق التي تلجأ إليها شركات السفن للحصول على الأموال اللازمة للاستغلال البحري هي رهن السفينة. وقد عالج المشرع الإماراتي الرهن البحري في المواد من ٩٧ إلى ١١٤ من القانون البحري.

ويهدف هذا البحث إلى إلقاء الضوء على نظام الرهن البحري في ظل القانون الإماراتي عن طريق مقارنته بالقانون الإنجليزي الأكثر تطوراً في هذا المجال.