

REPLY BY THE NEDERLANDSE VERENIGING VOOR VERVOERRECHT (NVV) (DUTCH TRANSPORT LAW ASSOCIATION) TO THE CMI QUESTIONNAIRE OF 29 MARCH 2016 WITH REGARD TO SHIP FINANCING SECURITY PRACTICES

Introduction

The Kingdom of the Netherlands is made up of four separate countries:

- the Netherlands
- Aruba
- Curaçao
- Sint Maarten.

Each of the countries has its own government that is responsible for the legislation applying in the particular country. However, within the country of the Netherlands there are two separate legal systems operating in:

- the Netherlands in Europe, and
- the Caribbean Netherlands (the islands of Bonaire, Sint Eustatius and Saba), the government of the Netherlands being responsible for the legislation applying in both jurisdictions.

Consequently there are five different legal systems existing within the entire Kingdom. These are all civil law systems, and much of the main statute law applying in the different jurisdictions is identical. Furthermore, Article 39 of the *Statuut voor het Koninkrijk der Nederlanden* (Charter for the Kingdom of the Netherlands) contains the so-called ‘principle of concordance’. It provides:

1. Civil and commercial law, the law of civil procedure, criminal law, the law of criminal procedure, copyright, industrial property, the notarial profession, and provisions concerning weights and measures shall be regulated as far as possible in a similar manner in the Netherlands, Aruba, Curaçao and Sint Maarten.
2. Any proposal for drastic amendment of the existing legislation in regard to these matters shall not be submitted to or considered by a representative assembly until the Governments in the other countries have had the opportunity to express their views on the matter.

With this principle in mind the courts of the different countries within the Kingdom tend to interpret the law in a manner that unifies the law of the countries and

jurisdictions as much as possible ('harmonious' or 'concordant' interpretation).

With regard to the topic of this CMI questionnaire the differences between the separate jurisdictions are not very dramatic. The differences mainly concern the management of the different ship registers and the conflict of law rules that may apply.

Where relevant we will indicate the differences. In doing so, we will use the terms Caribbean Netherlands and Dutch Caribbean. The Caribbean Netherlands is the term used for the islands Bonaire, Sint Eustatius, and Saba (the 'BES islands'), which are part of the Netherlands. The Dutch Caribbean is the term used to cover all Caribbean islands that are part of the Kingdom, i.e the three independent countries Aruba, Curaçao, Sint Maarten together with the islands forming the Caribbean Netherlands.

1 MARITIME AND OTHER CONVENTIONS

1.1 Has your jurisdiction ratified the 1952 and/or the 1999 Arrest Convention or neither?

Netherlands: The Netherlands has ratified the Arrest Convention 1952, but under both reservations allowed under Article 10 Arrest Convention 1952:

«Les dispositions de la présente Convention ne sont pas appliquées à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux alinéas o) et p) de l'article 1, saisie à laquelle s'applique la loi néerlandaise; et

Les dispositions du premier paragraphe de l'article 3 ne sont pas appliquées à la saisie pratiquée sur le territoire du Royaume des Pays-Bas en raison des créances prévues à l'alinéa q) de l'article 1.»

(Source: <https://verdragenbank.overheid.nl/en/Verdrag/Details/007235>)

The Arrest Convention 1952 was not incorporated into Dutch legislation as such. As the convention is considered to be self-executing the convention text itself has the force of law and is applied as part of Dutch law.

The Arrest Convention 1952 is in force in the Netherlands in Europe since 20 July 1983, in Aruba since 1 January 1986 and in the rest of the Dutch Caribbean since 10 October 2010.

1.2 If your jurisdiction has not ratified either of the aforementioned conventions, what categories of claim can be brought by way of arrest¹ of a vessel?

¹ The term 'arrest' is used throughout for convenience but it is acknowledged that this may not be a concept known to the laws of all jurisdictions. If in your jurisdiction the equivalent concept is attachment or something else, please briefly explain.

Netherlands: (In response to the question raised in footnote nr. 1:) The ‘action in rem’ type of ‘arrest’ is unknown in the Netherlands. We will use the term ‘attachment’ (*beslag*) to emphasize that distinction. Dutch law has two types of attachment: (1) the *conservatoir beslag* (≈ the *saisie conservatoire* of the French text of the Arrest Convention 1952; or the precautionary arrest of the 1933 Rome Convention on the Precautionary Arrest of Aircraft) and the *executoriaal beslag* (≈ *saisie exécutoire*; the ‘seizure in execution or satisfaction of a judgment’ of Article 1 sub (2) Arrest Convention 1952). Under Dutch law enforcement (*executie*) can take place on the basis of an *executoriale titel* (enforceable title), which will generally mean a court judgment or a notarial instrument with an enforceable character. A Dutch ship mortgage, *hypotheek* (hypothec), is created by such a notarial instrument, followed by the entry of the instrument in the public registers. However, it should be noted that under Dutch law the hypothecary creditor enjoys the right of ready or immediate enforcement (*parate executie*) meaning that the hypothec can be enforced without using the notarial instrument as an enforceable title and/or by effecting an attachment in execution. But in practice, the hypothecary creditor often does attach the vessel as it gives better safeguards against the vessel escaping the enforcement by sailing away.

(In response to question nr 1.2:) Although the Netherlands has indeed ratified the Arrest Convention 1952, this does not mean that there may not be questions in determining for what categories of claim an attachment may be effected, particularly as the Netherlands has made the reservations under Article 10 Arrest Convention 1952. So it seems better to answer this question nevertheless.

Obviously, subject to the reservation noted under 1.1. above, a ship flying the flag of a Contracting State may be attached for the maritime claims set out in Article 1 pursuant to Article 2 Arrest Convention 1952.

Pursuant to Article 8 sub (2) Arrest Convention 1952 a ship flying the flag of a non-Contracting State may be attached in respect of any of the maritime claims enumerated in Article 1 or of any other claim for which the law of (the different jurisdictions within the Kingdom of) the Netherlands permits arrest. It could be argued that this subparagraph itself contains a conflict of law rule which would require the application of the *lex fori* of the Netherlands (except where the reservation of Article 10 heading and sub (a) would lead to non-applicability of the Arrest Convention 1952). But the *travaux préparatoires* seem to indicate that the drafters were more concerned with the application of the convention to all ships flying the flag of a non-Convention state and allowing arrest for non-maritime claims than they were concerned with determining the choice for a particular law. In practice in the Netherlands, the parties and the courts first tend to apply national conflict of law rules in order to determine whether which (foreign) claims can be brought by way of attachment.

Dutch civil law distinguishes between the law of property (real rights/rights in rem) and the law of obligations. If purely Dutch law is to be applied a vessel can be

attached for claims arising out of the law of property, including but not limited to *rei vindicatio*, hypothec, and pledge/pawn (*pignus*), or for claims arising out of the law of obligations provided there is a right to recover (*verhaalsrecht*) the latter type of claims against the ship simply (1) because the ship owner is the debtor of the claim (normal *verhaalsrecht*) or (2) because statute law gives a specific right to recover the claim against the ship even when the ship is not the property of the debtor (special *verhaalsrecht*, usually connected to privileged claims, i.e. claims with preference/priority).

But if there are foreign elements (foreign ship; foreign claimant or debtor) the courts will first need to determine the applicable law. There are different conflict of law rules that may apply. In the Netherlands in Europe these conflict of law rules are codified in Book 10 of the Dutch Civil Code (DCC). (No such codified conflict of law rules exist in the Dutch Caribbean at this moment.)

Article 10:127 DCC provides for the basic conflict of law rule for issues of property law. It reads:

1. Except as provided otherwise in paragraphs (2) and (3), the property law regime relating to objects shall be the law of the State in whose territory the object is situated.
2. Except as provided in Article 160 of this Book, the property law regime relating to registered vessels shall be governed by the law of the State where the vessel is registered.
3. The property law regime relating to registered aircraft and aircraft exclusively registered in a nationality register as referred to in Article 17 of the International Civil Aviation Convention of Chicago of 7 December 1944 (Staatsblad 1947, H 165) shall be the law of the State of registration of the aircraft or the law of the State of its registration in its Nationality Register.
4. The law referred to in the preceding paragraphs shall determine in particular:
 - a. whether an object is movable or immovable;
 - b. what forms a component part of the object;
 - c. whether the object is transferable or whether a right can be created therein;
 - d. which requirements may be set for a transfer or creation of rights therein;
 - e. which rights may be vested in respect of an object and the nature and content of such rights;
 - f. the manner in which such rights may arise, be modified, be transmitted and are extinguished, and the relationship between such rights.
5. For the application of the provisions of the preceding paragraph, as regards the acquisition, the establishment, the transmission, the modification or the extinction of rights in respect of a thing, the time of occurrence of the legal facts required for such purpose shall be conclusive.
6. The provisions of the preceding paragraphs apply, *mutatis mutandis*, in the case of a transfer or creation of rights in respect of rights in rem.

So under Article 10:127 DCC the property law regime generally is that of the *lex rei sitae*. However, the property law regime of registered ships is the law of the ship's (underlying) register (the *lex registrationis*), not to be confused with the law of the ship's flag (*lex vexilli; droit du pavillon*) which may be different in case of bareboat registration. (With one notable exception: where the Convention between the Kingdom of the Netherlands and the Kingdom of Belgium concerning Territorial Jurisdiction, Bankruptcy and the Authority and Execution of Judgements, Arbitral Awards, and Notarial Acts, Brussels, 28 March 1925 is applicable Article 23 of the Convention would lead to the application of the law of the flag of the ship on questions relating to hypothec (and privileges) in bankruptcy situations. But it is arguable that this Convention has been replaced on this issue by the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.)

Under Article 10:127 DCC the law of the (underlying) register will therefore determine whether a mortgage or hypothec may have been vested in the ship and the nature and content of such mortgage or hypothec. The same should perhaps be said of common law (maritime) liens, as these maritime liens are often characterized as a form of hypothecation (see e.g. the historical analysis in the opinions in the recent Australian case of *The Ship "Sam Hawk" v Reiter Petroleum Inc* [2016] FCAFC 26; [2016] 2 Lloyd's Rep. 639).

The foreign right recognized by applying Article 10:127 DCC should however not be exercised in a manner incompatible with the *lex rei sitae* (in this case Dutch law). Article 10:130 DCC provides:

Rights to an object acquired or created in accordance with the law applicable pursuant to this Title shall continue to vest therein even if the object is transferred to another State. No rights may be exercised in a manner incompatible with the law of the State in whose territory the object is situated at the time such rights are exercised.

So generally foreign security rights/interests of this nature are compared to security rights existing under the *lex rei sitae* to determine the ways in which the foreign right may be exercised locally.

With respect to recovery against the ship for claims the conflict of law rule of Article 10:160 of the Dutch Civil Code (DCC) would be applied. It provides:

1. If, in the event of a bankruptcy or judicial sale, the proceeds of a registered ship are to be distributed in the Netherlands by the court, the question whether a claim submitted in such proceedings exists and, if so, in what amount, shall be governed by the law which is applicable to that claim.
2. Whether a claim as referred to in the preceding paragraph is privileged and, if so, the scope, rank and consequences of such privilege, are to be decided by the law of State where the ship was registered upon commencement of the bankruptcy or sale. In determining the ranking of claims, however, priority over

claims secured by hypothec shall only be attributed to those claims which have such priority under Dutch law.

3. No priority shall be attributed to a claim which, under the law applicable thereto, is not privileged on the ship.

4. Subparagraphs 2 and 3 apply mutatis mutandis to the recoverability of a claim against the ship.

On the basis of this article both the *lex causae* (the law applying to the claim itself) and the *lex registrationis* would have to be applied.

The boundary between Article 10:127 and 10:160 DCC is not entirely clear. It would seem that issues relating to attachment, forced sale and the ranking of claims (including claims subject to mortgage, hypothec and liens) are subject to Article 10:160 DCC, whereas other issues of a property law nature may be covered by Article 10:127 DCC, e.g. the self-help remedies as referred to under 12 below.

So depending on the nature of the claim (proprietary interest or obligation) the categories of claim which can be brought by way of attachment of a vessel in the Netherlands in Europe are generally thought to be determined by the *lex registrationis* and *lex causae* jointly (Article 10:160 DCC).

The situation in the Dutch Caribbean is a little less clear. Article 10:127 DCC and its predecessor (Article 2 of the Act of 18 March 1993 containing some provisions of private international law with regard to maritime and inland shipping law) codify principles which were already applied by the courts before that time. The conflict of law rules with regard to property law will therefore be similar throughout the Kingdom. (Confirmed by the Court of First Instance Sint Maarten, 9 Febr. 2016, ECLI:NL:OGEAM:2016:5.)

The same cannot be said for Article 10:160 DCC. This article, or rather its almost identical predecessor (Article 3 of the Act of 18 March 1993 containing some provisions of private international law with regard to maritime and inland shipping law) replaced a two tier system of the *lex causae* and the *lex fori* which was developed in court judgments. The question therefore is whether the latter system still applies in the Dutch Caribbean, or whether the courts there will – on the basis of the principle of concordance – shift to applying the same principles rules as laid down in Article 10:160 DCC as it applies in the Netherlands in Europe.

1.3 In particular, can arrest be made:

(a) by a mortgagee of a vessel registered under the laws of your jurisdiction?

Netherlands: A mortgagee could effect a *conservatoir beslag* (*saisie conservatoire*) or an *executoriaal beslag* (seizure in execution), but it is not necessary in view of the right of ready or immediate enforcement (*parate executie*).

(b) by a mortgagee of a vessel registered under the laws of a different jurisdiction?

Netherlands: Yes, provided the claim of the mortgagee is recognized by the law to be applied on the basis of the conflict of law rules of either Article 10:127 or Article 10:160 DCC applying in the Netherlands in Europe or the unwritten conflict of law rules applying in the Dutch Caribbean.

1.4 Has your jurisdiction ratified the 1926 and/or the 1993 Maritime Liens and Mortgages Convention or neither?

Netherlands: Neither.

1.5 If your jurisdiction has not ratified either Maritime Liens and Mortgages Convention does your jurisdiction recognize foreign maritime liens? If so what types of claim are recognised as maritime liens?

Netherlands: Yes, foreign maritime liens may be recognized under the conflict of law rules of either Article 10:127 and/or Article 10:160 DCC applying in the Netherlands in Europe or the unwritten conflict of law rules applying in the Dutch Caribbean. The types of claim recognized will therefore be determined by the law to be applied under these conflict of law rules.

1.6 Does the law of your jurisdiction incorporate the 1961 Hague Convention Abolishing the Requirement for Legalisation of Foreign Public Documents?

Netherlands: Yes, the Netherlands is a party to the Apostille Convention (see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=41>). The Apostille Convention is in force in the Netherlands in Europe since 8 October 1965, in Aruba since 1 January 1986 and in the rest of the Dutch Caribbean since 10 October 2010.

2 NATURE OF THE SHIPS' REGISTER

2.1 Is the ships' register² in your jurisdiction a register of legal title?

Netherlands: In principle, the Dutch ships' registers are registers of instruments/deeds (negative system), and not registers of title (positive system). However, reliance in good faith on the register may create legal rights so that the Dutch system is often categorized as a semi-negative or semi-positive system.

2.2 Does the ships' register in your jurisdiction (whether or not a register of legal title) provide for registration of the interest of a demise charterer in circumstances where legal title is registered in another jurisdiction (the 'underlying register').

Netherlands: The ships' register of the Netherlands in Europe is, as part of the Dutch

² The term 'ships register' means a specialist register only for ships.

public register, maintained by the Dutch [Cadastre \(Kadaster\)](#). A separate bareboat-in register is maintained by the Human Environment and Transport Inspectorate (ILT) of the Ministry of Infrastructure and the Environment (on the basis of the *Wet nationaliteit zeeschepen in rompbevrachting* (Act on the Nationality of Sea-going Ships in Bare-boatcharter).

In the Dutch Caribbean only Curaçao and Sint Maarten keep registers for commercial ships. In Curaçao, the ship register is maintained by the Curaçao Land Registry and a separate bareboat-in register is maintained by the Maritime Authority of Curaçao. In Sint Maarten both the ship register and bareboat-in register are maintained by the Department of Civil Aviation, Shipping and Maritime Affairs of Sint Maarten.

2.3 If your jurisdiction does provide for registration of the interest of a demise charterer, does it provide for registration or notation of a mortgagee registered on the underlying register?

Netherlands: No.

2.4 Does your jurisdiction allow a vessel registered in the ships register in the name of the holder of legal title also to be registered in another jurisdiction in the name of a demise charterer? If so is such registrations permitted when the vessel is subject to a mortgage registered in the ships' register in your jurisdiction and is the consent of the mortgagee required?

Netherlands: Yes, although not specifically legislated for, bareboat-out registration is possible of ships registered in the Dutch ships' registers. The bareboat-out registration is also permitted when the vessel is subject to a (registered) hypothec. No consent of the hypothecary creditor is required as a matter of law, but the terms and conditions of the hypothecary instrument may and in practice do determine otherwise.

2.5 Please describe (briefly) the criteria for registration of a vessel on the ships' register in your jurisdiction, with particular reference to eligibility or not for registration of different types of assets employed in offshore oil and gas exploration, production, processing and storage.

Netherlands: Any ship being constructed in the Netherlands may be registered in the Netherlands as a 'ship under construction'. Any (finished) seagoing ship may be registered in the Netherlands if it may be regarded to be a Dutch ship. Any (finished) seagoing fishing ship may be registered in the Netherlands in Europe if it is registered in the Dutch fishing registry. Any (finished) inland navigation ship can be registered if it is operated from the Netherlands, or the natural person owning it is Dutch or lives in the Netherlands, or the company owning it has its company seat or principal place of business in the Netherlands. By ship is meant: all objects, other than aircraft, which, according to their construction, are meant to float and which float or have done so (Article 8:1 DCC). This includes all floating assets employed in offshore oil and gas exploration, production, processing or storage, and e.g. also floating windturbines. Use in navigation or transportation is not part of the definition of ship. (See in more

detail the Reply from our Association to the CMI Questionnaire of 8 March 2016 with regard to Vessel Nomenclature.)

3 FORMALITIES FOR MORTGAGE REGISTRATION

3.1 Does a mortgage in respect of a vessel registered in your jurisdiction need to:

(a) attach documents, such as a loan agreement, evidencing the obligations secured?

Netherlands: Article 3:260 DCC provides:

1. A hypothec is established by a notarial instrument drawn up between the parties in which the hypothecary debtor grants a hypothec to the hypothecary creditor over registered property, followed by the entry of the instrument, in the appropriate public registers provided for that purpose. The instrument must contain an indication of the claim for which the hypothec serves as security, or of the facts, on the basis of which that claim can be determined. The amount for which the hypothec is granted must also be mentioned or, if this amount has not yet been established, the maximum amount for which recourse may be had against the property pursuant to the hypothec. In the instrument the hypothecary creditor must elect domicile in the Netherlands. (...)

(b) set out in detail the circumstances giving rise to a right of enforcement?

Netherlands: Article 3:260 DCC provides:

1. If the debtor is in default of performing that for which the hypothec serves as security, the hypothecary creditor is entitled to have the secured property sold in public before a notary with authority to do so. (...)

3.2 Does a mortgage in respect of a vessel registered in your jurisdiction need to be notarised and/or legalised?

Netherlands: Yes, a Dutch hypothec is created by an instrument (≈ deed) executed before a civil law notary (without any further need of legalization), followed by the entry of the deed in the public registers.

3.3 What are the registry fees in order to have a mortgage registered against a vessel registered in your jurisdiction?

Netherlands: The fee charged by the Cadastre for the registration of a hypothec is EUR 126,- (per 1-1-2017).

The basic fee charged by the Curaçao Land Registry for the registration of a hypothec is 510 Antillean Guilders (ANG). In case the amount secured by the hypothec equals or

exceeds ANG 200,000, another fee of ANG 100 per ANG 100,000 of the secured amount applies.

(The above fees exclude the fee of the civil law notary for drawing up the notarial instrument itself.)

3.4 Is registration indefinite or is there any requirement for re-registration after a certain period?

Netherlands: The registration is indefinite.

3.5 In your jurisdiction is a mortgage of a vessel required to be registered only in the ships register or, in addition, in another register? If so, please give brief details.

Netherlands: The hypothec is only registered in the ships' register.

4 INFORMATION CONCERNING SECURITY INTERESTS IN SHIPS

4.1 Please advise if information concerning security interests in ships registered in your jurisdiction is publicly available, and if so, how it may be obtained, including the following issues, as applicable.

(a) Does a person seeking such information need the authorization of the vessel owner to get such information?

(b) Does your jurisdiction certify the accuracy of the information?

(c) How much time is generally required to obtain such information?

Netherlands: Please note that 'security interest' has no particular meaning under Dutch law. The only security rights in rem existing within the context of shipping are hypothec (registered ships) and pledge (non-registered ships). But other rights, some quasi in rem, may exist that improve the creditor's position, such as privileged claims or the right of retention (the latter being comparable to a possessory lien).

For the information that may be registered in the Dutch ship's register, please see under 6.6 below.

The information contained in the ship's register in the Netherlands in Europe is publicly available without authorization of the ship owner. The Cadastre certifies the accuracy of the information (subject of course to the proviso that the register is a register of deeds). The information can be obtained immediately by subscribers to the Cadastre's online service. Otherwise the information can be requested online and obtained within 2 working days.

The foregoing also applies to the ship's register in Curaçao. The only difference is that there is no online service (yet). Information from the Curaçao ship's register can be requested by e-mail to the Curaçao Land Registry and obtained within approximately 2 working days.

4.2 May a vessel subject to a security interest be sold by the owner prior to the release of the security interest, and if so, under what conditions or circumstances.

Netherlands: The ship subject to a (Dutch) security interest may be sold by the owner prior to release of the security interest without any conditions, unless the terms and conditions of the instrument by which the security interest was created determine otherwise. The security interest will, however, remain enforceable against the ship if the security interest has *droit de suite* (such as hypothec and certain privileged claims).

5 ARREST OF A CHARTERED VESSEL

5.1 Does your jurisdiction allow a mortgagee to arrest vessels on bareboat charter or time charter?

Netherlands: Yes.

5.2 Under the laws of your jurisdiction, could the mortgagee incur any liability in tort, delict (or similar) to charterers or cargo interests if the mortgagee arrests the vessel when it is subject to charter and/or carrying cargo (on the grounds of interfering with the contractual relationship between owner and charterer or bill of lading holder)?

Netherlands: Depending on the circumstances this is possible, but there are only a handful of cases dating back to the late 1980's and early 1990's which give very little guidance other than that the interests of the parties are weighed/balanced. In theory one of the parties can initiate proceedings before the Provisional Measures Judge of the District Court to obtain a court order aimed at forcing other parties involved to take certain actions or rather refrain from taking certain actions. This may involve the release from attachment, sailing of the vessel to other ports or berths to facilitate the discharge of cargo, the actual discharging of cargo from the vessel, suspension of the enforcement etc.

5.3 What are the procedures or requirements, if any, applied to the cargo on board a vessel that has become subject to judicial sale in your jurisdiction? Must the cargo be discharged before sale, and if so, who bears the costs and risks of such discharge?

Netherlands: There are no particular procedures or requirements under the law with regard to cargo on board a vessel subject to a judicial sale, with the exception that a pending charterparty governed by Dutch law may survive the judicial sale (see below under question 8.1) and require the buyer at the judicial sale to perform a duty under the charterparty to deliver cargo on board the vessel at the agreed destination.

6 PRIORITY ISSUES BETWEEN MORTGAGES REGISTERED IN THE SHIPS' REGISTER IN YOUR JURISDICTION

6.1 Does your jurisdiction have a system of "priority notice" to enable priority to be reserved for a period before actual registration of the mortgage?

Netherlands: No.

6.2 Once a mortgage is registered in your jurisdiction is it possible for a subsequent mortgage to be registered without the consent of the first registered mortgagee?

Netherlands: Yes. No consent of the first hypothecary creditor is required as a matter of law, but the terms and conditions of the hypothecary instrument may and in practice do determine otherwise (negative hypothecary declaration).

6.3 When there are two or more registered mortgages what determines their priority?

Netherlands: In principle, the moment of registration. Article 3:21 DCC (identical throughout the Kingdom of the Netherlands) provides:

1. The rank of entries pertaining to the same registered property is determined by the order in which they have been registered, unless a different order results from the law.
2. Where two entries are made at the same time and where they would lead to mutually incompatible rights of different persons to the same property, the rank shall be determined:
 - a. in the event that the instruments presented for registration have been executed on different days, by the order of those days;
 - b. in the event that both instruments, being notarial instruments and including notarial declarations, have been executed on the same day, by the order of the times of execution of those instruments or declarations.

6.4 Is there any doctrine of notice such that the priority of a registered mortgage is deferred to that of an earlier but unregistered mortgage of which the registered mortgagee has notice?

Netherlands: No. (There is no such thing as an unregistered hypothec under Dutch law.)

6.5 Can a second registered mortgagee exercise enforcement remedies without the consent of the first registered mortgagee?

Netherlands: Yes and no. A hypothecary creditor wishing to exercise enforcement remedies will have to inform the hypothecary debtor, the debtor and all others whose right or attachment will be lost by the intended judicial sale. A hypothecary creditor with higher ranking may then 'take over' the enforcement procedure from the lower ranking hypothecary creditor, provided the debtor is (also) in default under the higher ranking hypothec (Article 544 Dutch Code of Civil Procedure (DCCP) - identical throughout the Kingdom of the Netherlands).

6.6 Does your jurisdiction have a system for registration of security or liens other than mortgages, whether consensual or non-consensual? If so, please describe.

Netherlands: Yes. The Dutch and Curaçao ships' registers allow the registration of hypothecs, attachments, and privileges (i.e. claims with preference/priority) which rank higher than hypothec (in short: crew claims, salvage, GA contribution from the ship, and port (safety) dues) (Article 85 Cadastre Act; Article 8:215 DCC).

7 GENERAL ENFORCEMENT ISSUES

7.1 Does your jurisdiction make a distinction between the enforcement of mortgages registered under the flag of your jurisdiction and the enforcement of any other foreign mortgages?

Netherlands: As enforcement of hypothecs and mortgages usually takes place on the basis of a judgment or a (notarial) instrument with an enforceable character (*executoriale titel*), the main question in practice is whether the foreign judgment or (notarial) instrument is enforceable as such in the Netherlands, or whether some extra steps need to be taken to either have the foreign judgment or (notarial) instrument recognized in some way (*exequatur*) or whether a new fresh judgment or (notarial) instrument needs to be created in the Netherlands.

Some international instruments provide for the immediate enforceability of foreign judgments or (notarial) instruments (e.g. Article 40 of the Statuut voor het Koninkrijk der Nederlanden (Charter for the Kingdom of the Netherlands) and provisions of EU Regulation 1215/2012).

Other international instruments may provide for some sort of leave for enforcement (*exequatur*) to be obtained (e.g. the Brussels (1968) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, the Lugano (2007) Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, and the New York (1958) Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The outcome may differ between the different jurisdictions in the Kingdom, because these instruments may not apply in each jurisdiction.

The (foreign) mortgagee may also obtain a new enforceable instrument from a Dutch civil law notary containing an acknowledgement of debt by the mortgagor (notarial instrument of indebtedness). If the hypothecary debtor/mortgagor is not willing to cooperate, however, this notarial instrument can only be obtained on the basis of a power of attorney given by the hypothecary debtor/mortgagor to the mortgagee (in the mortgage deed or loan agreement) to have such an instrument drawn up, or by obtaining a provisional judgment to the same effect.

7.2 Is it necessary for the mortgagee to obtain a judgment in your jurisdiction on its

claim under the loan agreement or other applicable debt instrument before it can enforce that mortgage?

Netherlands: See under 7.1.

7.3 If so, how long is it likely to take to obtain a judgment if the claim is contested? Will the local court expedite the proceedings having regard to the ongoing costs of maintaining the vessel?

Netherlands: The time it will take to obtain a judgment for an exequatur depends on the particular route chosen, the circumstances of the case and the tenacity of the defendant contesting the claim. But the mortgagee may in the meantime obtain a provisional judgment allowing the sale of the vessel (in separate proceedings, but having a similar effect as a sale '*pendente lite*' in so far as the proceedings on the merits are concerned). The (foreign) mortgagee may also obtain a new enforceable instrument from a Dutch civil law notary containing an acknowledgement of debt by the mortgagor (notarial instrument of indebtedness). (See under 7.1.)

7.4 Will the court in your jurisdiction accept jurisdiction for the mortgage claim under Article 7 1952 Arrest Convention, or equivalent domestic legislation in your jurisdiction?

Netherlands: Although the Netherlands made the reservation under Article 10 Arrest Convention 1952 with regard to maritime claim under Article 1 sub (q) (mortgage/hypothecation), this does not mean that the Arrest Convention 1952 as such does not apply as the reservation is limited to the non-application of Article 3 sub (1). So it would follow that a Dutch court should accept jurisdiction for a mortgage claim under Article 7 Arrest Convention 1952, regardless of whether the ship is flying the flag of a Contracting State (compare District Court Rotterdam, 14 March 2012, S&S 2012/86 'Kaliakra' & 'UK 143 Andries de Vries' and Court of Appeal The Hague, 19 November 2012, S&S 2014/20 'Hero').

8 JUDICIAL DECISIONS AND APPEALS

8.1 Do all courts in your jurisdiction have authority to sell vessels free of maritime liens and prior claims, or is such authority limited to special courts, such as admiralty courts?

Netherlands: Registered ships are 'judicially' sold in the jurisdiction of the Netherlands in Europe by a civil law notary or, provided it is a foreign seagoing ship, by the Rotterdam District Court (Article 575 DCCP). Judicial sales of registered ships in the jurisdictions in the Dutch Caribbean always take place before a (first instance) court. Unregistered ships below a certain size will in all Dutch jurisdictions be sold by a *gerechtsdeurwaarder* (bailiff).

The procedure will lead to a sale of the ship free of certain encumbrances. If the sale is initiated by a Dutch hypothecary creditor, the sale will clear the

(registered) ship from (1) all hypothecs, from (2) all attachments on the ship, and (3) all other proprietary interests (e.g. usufruct) which cannot be invoked against the hypothecary creditor/seller (usually because they were created at a later date than the hypothec being enforced) (Article 3:273 DCCP).

If the sale is initiated by any other claimant, the sale will clear the ship from (1) all claims with priority ranking, (2) all attachments and (3) all other proprietary interests (e.g. usufruct) which cannot be invoked against the seller (Article 578 DCCP).

Article 8:375 DCC (identical throughout the Kingdom of the Netherlands) however provides:

1. Upon transfer of ownership of a previously chartered vessel, whether or not registered, to a third person, this person succeeds to all rights and obligations of the former owner who nevertheless remains bound to the contract next to the new owner.
2. Rights and obligations which have become exigible before the transfer of ownership are not transferred to the third person.

Article 8:375 DCC is part of a Title of Book 8 DCC which deals with contracts of carriage and not with rights in ships. It is therefore presumed that Article 8:375 DCC will only apply when the charterparty is subject to Dutch law.

The article provides for a limited statutory transfer/assignment of contractual (rights and) obligations under a pending charterparty to the new owner. This principle not only applies in case of a voluntary sale by the owner, but also in cases of judicial sale (R.P. Cleveringa, *Zeerecht*, Zwolle: W.E.J. Tjeenk Willink 1961, p. 717). So a judicial sale may free the ship of previous encumbrances, but the buyer at a judicial sale may become bound by a pending charter party. This may of course have a downward effect on the purchase price at the judicial sale.

The hypothecary creditor may overcome this problem by including provisions in the hypothecary documentation about charter conditions (e.g. that the charter ends at an event of default under the hypothec). The registration of the hypothec and this particular provision have the effect that the hypothecary creditor will be able to have the vessel judicially sold without the burden of the transfer (by operation of law) of a pending charter to the buyer. The terms and conditions of the hypothecary instrument provide for a termination of the charterparty from the moment the hypothecary creditor has expressed his desire to initiate a judicial sale. So we are not aware of this ever having been an issue recently in a purely national case, nor in an international case, which would be complicated even further by questions of conflict of laws.

8.2 What formalities, including evidence of claim, or evidence of notice, are required to affect the sale of a vessel free of liens and prior claims?

Netherlands: The formalities to affect a sale of a vessel free of liens and prior claims are as follows:

- Obtaining a title which may be enforced in the local jurisdiction (*executoriale titel*) (not necessary for the enforcement of a Dutch hypothec)(see under 7.1);
- Service of the *executoriale titel* or the notification of enforcement on the owner by a Dutch bailiff;
- Effecting the *executoriaal beslag* (attachment in execution) by the bailiff on board of the vessel (not necessary for the enforcement of a Dutch hypothec); if a *conservatoir beslag* had been effected earlier this *beslag* will have turned into a *executoriaal beslag* by operation of law at the moment of obtaining the *executoriale titel* (without the need therefore of having a bailiff effect another (*executoriaal*) *beslag*) ;
- Fixing the time and date for the judicial sale as well as the terms and advertisement requirements (for proceedings before a court a judgment may e needed);
- Publication of a notice of the judicial sale by placard on board the vessel and by announcement in a newspaper;
Normally there should be 14 days between publication and the judicial sale, but with regard to foreign ships the period of time will be determined by a judge. Normally an announcement in a newspaper of the location of the vessel suffices, but with regard to foreign ships the judge will (also) order publication in one or more newspapers of the country of the flag of the ship.
- In case of a judicial sale of a (in the Netherlands in Europe: foreign) ship before the court, filing at the Court Registry 30 days (can be reduced to 14 days in the Dutch Caribbean under certain circumstances) prior to the judicial sale of (1) the conditions of sale, (2) a declaration from the bailiff or advocate that the requirements regarding publication have been fulfilled, and (3) a list of parties which have a known interest in the vessel or which have effected an attachment on the vessel, which list is to be drawn up and signed by an advocate;
- In case of a judicial sale of a foreign ship before the court, filing at the Court Registry of a declaration from an advocate that the parties with the known interest in or attachment on the vessel were informed in writing of the day and hour of judicial sale.
- Judicial sale by auction before the civil law notary, or court.
- The price to be paid consists of the amount of the highest bid made during the auction, often increased by the costs of the sale proceedings. A statement of these costs has to be put up no later than three days prior to the judicial sale.
- Upon receipt of the purchase price, the civil law notary court will deliver its adjudication report, evidencing the acquisition of the vessel by the purchaser.
- Satisfaction of the purchase price will free the ship of previous encumbrances. See further 8.1.

8.3 If the owner presents an appeal against judgment, will the court make an order for sale of the vessel before that appeal has been heard and decided?

Netherlands: See generally under 7.3. But often the judgment from the lower court is

enforceable pending appeal (*uitvoerbaar bij voorraad*), so the appeal would not bar the claimant from moving towards a judicial sale of the ship.

9 SALE PROCEDURE

9.1 Can a mortgagee enforce his mortgage in your jurisdiction by applying for a judicial sale by auction?

Netherlands: Yes, all judicial sales in principle take place by auction.

9.2 What are the criteria for an application for a judicial sale by auction and what is the procedure and timetable for such an application and sale?

Netherlands: See under 9.1 and 8.2.

9.3 Will the court in your jurisdiction order a sale of the vessel pending judgment (pendente lite), recognising that the vessel is a wasting asset?

Netherlands: See under 7.3.

9.4 Will the court in your jurisdiction fix a minimum bid price (reserve price) for the vessel and will the amount of that minimum bid price be disclosed to interested parties? What happens if the maximum amount bid for the vessel is lower than the reserve price?

Netherlands: The conditions of sale are determined by the creditor seeking enforcement of his claim (with possible court supervision). The civil law notary or court conducting the judicial sale will therefore not fix a minimum bid price. The creditor seeking enforcement of his claim could include a minimum bid price in the conditions of sale (and sometimes does).

9.5 Can the owner or other creditors influence the amount of the reserve price?

Netherlands: See under 9.4.

9.6 What arrangements will be made for public advertisement of the sale?

Netherlands: See under 8.2.

9.7 To what extent is it possible for the owner or other creditors to influence the timetable or procedure for sale?

Netherlands: If the party enforcing his claim does not proceed with 'reasonable urgency', other parties may ask the court to take measures (Articles 545 and 569 DCCP).

9.8 Can a mortgagee enforce its mortgage in your jurisdiction by applying for a court approved private sale? If so, what are the criteria for an application requesting the court to approve a private sale and what is the procedure and timetable for such an application and sale?

Netherlands: Yes. Article 3:268 sub (2) DCC as in force in the jurisdiction of the Netherlands in Europe provides:

2. On the application of the hypothecary creditor, the hypothecary debtor and the person having effected an attachment in execution the Provisional Measures Judge of the District Court may determine that there be a private sale by contract submitted to him for approval together with the application. If the hypothecary creditor, hypothecary debtor, attachor or holder of a limited right who has an interest in obtaining higher proceeds for the property, submits a more advantageous offer to the Provisional Measures Judge before the end of the hearing of the application, the Provisional Measures Judge may determine that the sale be made according to such offer. (...)

The jurisdictions in the Dutch Caribbean have a similar provision, but in that provision the right to request a private sale is (still) only granted to the hypothecary creditor and the hypothecary debtor (and not the person having effected an attachment in execution (*executoriaal beslag*)).

Article 548 DCCP (applying throughout the Kingdom) further provides:

1. Until one week before the day fixed for the sale the application of Article 268 of Book 8 of the Dutch Civil Code that there be a private sale may be submitted to the Provisional Measures Judge of the District Court.
2. This application may only be made if a complete contract of sale is produced, with the proviso that, if the application is not made by the enforcing creditor, the contract need not be signed by him or on his behalf. Also should be produced copies of biddings received by the notary or a statement from the notary that he has not received any such biddings.
3. The application shall include a list of the interested parties referred to in Article 544. The Court Registrar shall inform them immediately that the application was made, and that they may be heard by the Provisional Measures Judge at their desire.
4. By timely submitting the application the day fixed for the public sale lapses. When the application is denied, the judge shall also fix the date on which the public sale shall take place. This sale shall be publicized at least fourteen days before in the manner set out in Article 516. The Provisional Measures Judge may determine that the person having made the application is to pay the costs of the publication, without prejudice to his obligation to compensate for the loss caused by the applications, if there are grounds therefor.

Although the legislative history of the Dutch Code of Civil Procedure (DCCP) made it

clear that Article 548 DCCP is not applicable to the judicial sale of ships as a private judicial sale of ships was not thought desirable, the Court of Appeal of the Hague held (19 December 1995, S&S 1996/34 'All-Ways') this to be contrary to the substantive provision of Article 3:268 sub (2) DCC allowing a private judicial sale. Whereas the 'All-Ways' was a purely national case, the same was held to apply in case of a judicial sale of a foreign ship by the Rotterdam District Court (29 April 2009, S&S 2009/122 'Hannes C'). As a consequence, parties that desire a private judicial sale of a ship will take heed of the requirements of Article 548 DCCP, although the Article is not (directly) applicable.

The law allows the private sale as it may result in a higher purchase price than can be obtained during an auction. To convince the court that the price offered by the prospective purchaser in a private sale is satisfactory, an independent valuation of the ship may be submitted to the court when applying for the private sale.

9.9 Can a mortgagee bid its debt (animo compensandi) so as to allow a set off of the debt against the purchase price (and provide security for the claims of potential prior lien holders)? Or does a mortgagee (or its preferred bidder or buyer) have to pay the full price in cash?

Netherlands: No, a mortgagee/hypothecary creditor cannot bid its debt so as to allow a set-off. The buyer must in principle pay the full price. The conditions of sale may allow deferment of payment if it is secured by an irrevocable demand guarantee, subject to prior approval by the creditor enforcing his claim.

10 SALE PROCEEDS

10.1 Will the sale proceeds be held in an interest bearing account?

Netherlands: Theoretically yes, unless payment is deferred and guaranteed by an irrevocable demand guarantee (which will include a provision about interest.) But in the current market circumstances the interest is practically 0%.

(a) Will they be held in the currency of the sale or will they be converted into local currency?

Netherlands: The sale proceeds will normally be held in the currency of the sale.

(b) Will the proceeds of sale ultimately be subject to any exchange control or similar restrictions (and/or court fees) when they are paid out? If so, what is the procedure and likely timetable for obtaining permission to remove the funds?

Netherlands: No exchange control permission is required to export the funds.

11 PRIORITIES GENERALLY

11.1 Are priorities determined under local law (lex fori), or the law of the jurisdiction in which the claim arose (lex causae), or the law of the flag of the vessel?

Netherlands: The priorities are determined by the law of the underlying register (*lex registrationis*) (not to be confused with the law of the flag of the vessel). (See more extensively under 1.2.) When determining the ranking of claims, priority shall however be given only to claims over and above claims secured by hypothec which also enjoy such priority under Dutch law. No priority is given to a claim which is not privileged according to the law applicable thereto (Article 10:160 DCC).

11.2 If local law, where does the mortgagee rank amongst other maritime claims in the order of priority and which are those claims which rank prior to the mortgagee. Do the claims which rank ahead of a mortgage in your jurisdiction vary depending on whether the mortgage is:

(a) a mortgage of a vessel registered under the laws of your jurisdiction?

(b) a mortgage of a vessel registered under the laws of a different jurisdiction?

Netherlands: Article 8:204 DCC provides:

A claim covered by hypothec ranks after the claims referred to in Articles 210, 211, 221, 222 (1), 831 and 832 (1); however, it ranks in priority to all other claims in respect of which this or any other law grants a privilege.

Article 8:210 DCC provides:

1. In the case of an execution sale of a sea-going vessel, the costs of execution sale, the costs of custody during such execution or sale, as well as the costs of judicial ranking and of distribution of the proceeds amongst the creditors, shall be paid from the proceeds of the sale in priority to all other claims to which this or any other law grants a privilege.
2. In the case of sale of a sea-going vessel which has run aground, has been dismantled or has sunk, and which public authority has had removed in the public interest, the costs of wreck removal shall be paid from the proceeds of the sale in priority to all other claims to which this or any other law grants a privilege.
3. The claims referred to in the preceding paragraphs rank equally and shall be paid pro rata

Article 8:211 DCC provides:

The following claims have a privilege on a sea-going vessel in priority to all other claims to which this or any other law grants a privilege, save for the provision in Article 210:

(a) in the case of attachment: the claims for costs made after attachment in

order to preserve the vessel, including costs of repairs indispensable to preserve the vessel;

(b) the claims resulting from the contracts of employment of the captain or of the other members of the crew, provided that the claims with respect to wages, salary or remuneration shall be privileged only up to an amount owed over a period of twelve months;

(c) the claims for salvage as well as for the contribution of the vessel to general average;

(d) the claims in respect of harbour charges and measures with regard to a vessel which were necessary for safeguarding the safety of the port or of third persons, provided that this privilege shall lapse upon commencement by the vessel of a new voyage.

(Article 8:211 sub (d) does not exist in the Civil Code of Aruba.)

The Articles 8:221, 8:222 sub (1), 8:831 and 8:832 sub (1) also referred to in Article 8:204 DCC involve claims with a privilege on objects on board of ship. We are not aware of these articles having ever been applied in practice.

11.3 Are there any special rules on priority for local creditors?

Netherlands: No, not under Dutch law.

11.4 Is it necessary for claimants to introduce their claims prior to the date of sale or within some specified period thereafter?

Netherlands: In order to share in the proceeds of a judicial sale claimants must have a hypothec/mortgage, or they must have effected an attachment for their claim on the vessel (prior to the judicial sale) or on the proceeds of the judicial sale (prior to distribution of the proceeds). It should be noted that an attachment on the proceeds will only attach the possible surplus of the sale proceeds that would be returned to the debtor after the claimants with a limited right in the vessel or that attached the vessel have been paid.

11.5 What is the timetable leading up to the distribution of the proceeds of sale?

Netherlands: See under 8.2. In the absence of a dispute on the priority of claims, distribution of sale proceeds normally takes a few weeks.

11.6 Is the distribution order decided by the court?

Netherlands: The main rule behind the statutory regulation is for the claimants (that are allowed to share in the proceeds) to come to an amicable settlement regarding the distribution of the proceeds. If such settlement is not reached any interested party may apply to the court to have a *rechter-commissaris* (perhaps best translated as judge commissary or supervisory judge) appointed who will prepare a list of

distribution of claims on the basis of documents submitted by the claimants. Claimants may oppose the list of distribution and if the *rechter-commissaris* is unable to reconcile the claimants, he will refer them to proceedings before the court.

11.7 Is that order subject to a right of appeal?

Netherlands: A decision by the court to appoint a *rechter-commissaris* is not subject to appeal, but a decision by the court in which the application to appoint a *rechter-commissaris* is denied, is subject to appeal. Decisions by the *rechter-commissaris* are not subject to a normal appeal (at a Court of Appeal), but are subject to cassation at the Hoge Raad (the Dutch Court of Cassation). Judgments by the court on the issue of ranking are subject to appeal.

12 MORTGAGEE'S SELF-HELP REMEDIES

12.1 Under the laws of your jurisdiction does a vessel mortgage governed by and registered in accordance with such laws give the right to take the following enforcement steps without a court order in your jurisdiction?

(a) to take possession of the vessel;

Netherlands: Not in the Netherlands in Europe. Recent changes to Article 3:267 DCC now require leave from the Provisional Measures Judge of the District Court to take possession of the mortgaged property (and provided this right was stipulated for in the hypothecary instrument). However, it is not entirely certain whether this new provisions applies to ships, as the legislative history to the act amending the provision explicitly states there was no intention to change the law relating to enforcement against ships. In the jurisdictions in the Dutch Caribbean leave from the court is not necessary (but the right to take possession must be stipulated for in the hypothecary instrument).

(b) to appoint a receiver, manager or other party to operate the vessel;

Netherlands: No. Article 3:267 requires court approval to take over the management of the vessel from the hypothecary debtor (and provided the right to take over the management was stipulated for in the hypothecary instrument). This rule applies throughout the Kingdom (only the particular type of court that is to give leave may be different in each jurisdiction).

(c) to sell the vessel as mortgagee;

Netherlands: See under 1.2. The hypothecary creditor may initiate the enforcement without further court approval. So an auction would follow, which may be replaced by a court approved private sale. But the ship cannot be simply sold privately by the hypothecary creditor/mortgagee.

(d) to sell the vessel as attorney in fact of the owner.

Netherlands: The hypothecary creditor may stipulate for a power of attorney to sell the vessel. This sale however will be regarded as a mere private sale and not as a judicial sale. (The vessel will not be freed from encumbrances.)

12.2 If, under the law of the ships' register (where that is a different law from the law of your jurisdiction) a mortgagee is given the right to take the enforcement steps referred to at (a) - (d) of 12.1 without a court order would its right to do so be recognised or prohibited in each case in respect of a vessel physically located in your jurisdiction?

Netherlands: As indicated under 1.2. on p. 5, generally foreign security rights/interests such as mortgages are compared to security rights existing under the *lex rei sitae* to determine the ways in which the foreign right may be exercised in the local jurisdiction.

12.3 Where answers to the questions in 12.2 are negative would the answers be different in each case if a court order were obtained in the jurisdiction of the ships' register?

Netherlands: The issue would then become one of recognizing foreign judgments. Judgments from the different jurisdictions within the Kingdom are readily enforceable in the other jurisdictions. Judgments from courts within EU-countries are readily enforceable in the Netherlands in Europe. All other judgments will need some form of *exequatur* to become enforceable. A judgment from outside the local jurisdiction which is or has become (by *exequatur*) enforceable in the local jurisdiction is thought to have the same effect as the judgment has in the jurisdiction of origin.

13 INSOLVENCY PROCESSES³

13.1 Has your jurisdiction adopted the UNCITRAL Model Law on Cross-Border Insolvency?

Netherlands: No.

13.2 Do the laws of your jurisdiction provide for recognition of foreign insolvency proceedings? (if the UNCITRAL Model Law has been adopted, in addition to its provisions)

Netherlands: The Dutch courts usually state to apply a principle of territoriality of (foreign) bankruptcies, which means that a foreign bankruptcy in principle has no effect in the Netherlands, unless an international instrument (convention; EU-

³ If your jurisdiction is subject to the EU Insolvency Regulation and will be subject to the 'Recast' EU Insolvency Regulation, please so indicate - but also respond to the questions.

regulation) the recognition of foreign bankruptcies. Some form of recognition is provided for by:

- the Convention between the Kingdom of the Netherlands and the Kingdom of Belgium concerning Territorial Jurisdiction, Bankruptcy and the Authority and Execution of Judgements, Arbitral Awards, and Notarial Acts, Brussels, 28 March 1925 (only in force in the Netherlands in Europe);
- the Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Enforceable Orders in Civil and Commercial Matters, The Hague, 30 August 1962, (in force in the entire Kingdom);
- the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (to be replaced per 26 June 2017 by the recast Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings per 26 June 2017 (only in force in the Netherlands in Europe); the Regulations replace, in respect of the matters referred to therein, in the relations between EU Member States, the Conventions concluded between two or more Member States.

However, in a recent judgment in a case where no such international instrument applied, the Hoge Raad (the Dutch Court of Cassation) (HR 13 Sept. 2013, ECLI:NL:HR:2013:BZ5668) ruled that a trustee appointed in the bankruptcy of a foreign company could validly dispose of assets in the Netherlands of that foreign company, provided these assets in the Netherlands were not subject to an attachment. It seems therefore that the application of the principle of territoriality is now somewhat limited to issues of enforcement.

13.3 Do the laws of your jurisdiction provide that the enforcement of rights of secured creditors (such as the mortgagee of a vessel) can be stayed or suspended during applicable insolvency proceedings?

Netherlands: All judicial enforcement against any part of the property, rights and interests of the debtor commenced prior to the bankruptcy ends immediately. All attachments effected lapse (Article 33 Bankruptcy Act/Article 29 Bankruptcy Act BES). But hypothecary creditors may exercise their rights as if there were no bankruptcy (Article 57 Bankruptcy Act/Article 53 Bankruptcy Act BES). Identical provisions exist in the legislation of Aruba (Bankruptcy Regulation), Curaçao and Sint Maarten (Bankruptcy Decree).

13.4 Is the answer to 13.3 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Netherlands: See under 13.2.

Again, the basic rule is that foreign bankruptcies are not recognized in the Dutch jurisdictions unless an international instrument would say otherwise.

The Convention between the Kingdom of the Netherlands and the Kingdom of

Belgium concerning Territorial Jurisdiction, Bankruptcy and the Authority and Execution of Judgments, Arbitral Awards, and Notarial Acts, Brussels, 28 March 1925 is only relevant in respect of the jurisdiction of the Netherlands in Europe. As such it is replaced by the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings in respect of the matters referred to therein (Article 44 Regulation 1346/2000). It would seem that the issue of a stay or suspension of the enforcement of rights of secured creditors are referred to in Regulation 1346/2000, so that the Brussels Convention is replaced in that respect.

The Treaty between the Kingdom of the Netherlands and the Federal Republic of Germany concerning the Reciprocal Recognition and Enforcement of Judicial Decisions and other Enforceable Orders in Civil and Commercial Matters, The Hague, 30 August 1962, (in force in the entire Kingdom) gives some rules about recognition and enforcement of bankruptcy distribution plans, but it does not give a basis for stays or suspensions of enforcement actions in the Dutch jurisdictions as a result of a bankruptcy in Germany.

Article 5 of Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings provides:

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:
 - (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
 - (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
 - (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
 - (d) a right in rem to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.
4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Under this provision the enforcement in the Netherlands in Europe of rights of creditors secured by a right in rem such as hypothecary creditors or mortgagees in

respect of vessels is not affected by the foreign insolvency. (Per 26 June 2017 this Article 5 will continue to apply without any change as Article 8 of the recast Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.)

The enforcement or rights of creditors that are secured, but not by a right in rem, would however be effected. It is debatable whether privileged claims can be regarded as rights in rem.

See the judgment ECJ 26 Oct. 2016, [ECLI:EU:C:2016:804](#) (SCI Senior Home v Gemeinde Wedemark) for the latest guidance from the Court of Justice of the European Union on what is to be considered a 'right in rem' within the meaning of Article 5 Regulation 1346/2000.

13.5 If the mortgage over a vessel located in your jurisdiction is being enforced through a maritime court sale in circumstances where the owner of the vessel is subject to insolvency proceedings in your jurisdiction, do the maritime court sale proceedings take precedence over the insolvency proceedings, or vice versa?

Netherlands: See 13.3.

13.6 Is the answer to 13.5 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Netherlands: See 13.4.

13.7 If a vessel is sold in your jurisdiction through a maritime court sale is the mortgagee's claim to the sale proceeds subject to the risk of the mortgage being challenged or set-aside by applicable insolvency claw-back rules for transactions prior to insolvency?

Netherlands: No.

13.8 Is the answer to 13.7 different if the insolvency proceedings did not originate in your jurisdiction but are foreign insolvency proceedings (being recognised in your jurisdiction by whatever means)?

Netherlands: Possibly, depending on the foreign insolvency law and the question whether the enforcement in the Netherlands must be recognized in the country where the insolvency proceedings are pending.

13.9 Do the insolvency courts of your jurisdiction have, or claim, extraterritorial jurisdiction, such as over vessels located in a different jurisdiction? If so, how?

Netherlands: Yes. Under Dutch law the Dutch insolvency is considered to have worldwide application. All assets of the insolvent debtor are considered part of the insolvency estate, including those assets (ships) that would be located in a different

jurisdiction. Creditors taking independent action against foreign assets of the insolvent debtor may be subject to claw back provisions. (Articles 203-205 Bankruptcy Act/Articles 195-197 Bankruptcy Act BES). Identical provisions exist in the legislation of Aruba (Bankruptcy Regulation), Curaçao and Sint Maarten (Bankruptcy Decree).

14 LEASING⁴

14.1 In your jurisdiction is leasing of vessels common as a method of financing?

Netherlands: No.

14.2 Do the laws of your jurisdiction give effect to a lease in accordance with the form of the document (formal approach) or is there a risk they will re-characterise certain leases as security interests (functional approach)?

Netherlands: Article 8:530 DCC (identical throughout the Kingdom of the Netherlands) defines bare-boat chartering/chartering by demise as follows:

Under the contract (bare-boat chartering) whereby one party (the bare-boat lessor) binds himself to make a vessel exclusively at sea available to the other party (bare-boat charterer) without retaining any control thereof, the operation of the vessel is under the control of the bare-boat charterer and for his account.

Book 8 DCC gives no further guidance regarding the obligations of the parties under a bare-boat charter or charter by demise. When the charter is regarded to be a lease contract, the statutory provisions about lease contained in Title 4 of Book 7 DCC may apply. It may also be that an agreement through which the shipowner grants a right in rem of usufruct would mean that a bare-boat charter within the meaning of Article 8:530 DCC exists.

As indicated under 4.1. 'security interest' has no particular meaning under Dutch law. The qualification as such therefore has no particular consequence. The only security rights in rem existing within the context of shipping are hypothec (registered ships) and pledge (non-registered ships). Other rights which may help to secure a claim are privileged claims.

The fact that a bare-boat charter exists does not as such create a security right in rem, or a privileged claim.

14.3 If the laws of your jurisdiction adopt a functional approach (14.2) please describe

⁴ By 'leasing' is meant a demise chartering of a vessel where the holder of legal title ('lessor') is a financier rather than a commercial shipping company and the vessel is demise chartered to a shipping company ('lessee'). It might or might not involve the lessee having an option to purchase for a pre-agreed price or title automatically passing to the lessee at the end of the lease term. It covers both finance leases, where the lessee by one means or another has substantially the whole economic interest in the vessel and operating leases where the lessor retains some economic risk and interest in the vessel.

briefly how this is applied; also, please say whether your courts would adopt a functional approach even where the governing law of the lease follows the formal approach.

Netherlands: Not applicable.

14.4 Do the laws of your jurisdiction permit the parties to the lease of a vessel governed by that law to expand by contract the rights and remedies of the lessor on default by the lessee? Or are such rights and remedies provided for exclusively by law?

Netherlands: There is no specific legislation on this point.

14.5 Do the rights and remedies of the lessor of a vessel include steps to terminate the leasing and re-take possession of the vessel through self-help or is this only possible in your jurisdiction with the assistance of the court?

Netherlands: The rights and remedies of the lessor of a vessel include steps to terminate the leasing.

14.6 Under the laws of your jurisdiction is a leased vessel considered to be an asset of the lessor or the lessee, or both?

Netherlands: A leased vessel is considered to be an asset of the lessor.

14.7 Under the laws of your jurisdiction what impact would an insolvency process (or different processes) in respect of the lessee have on the rights and remedies of the lessor of a vessel? Is this affected by the type and terms of the lease?

Netherlands: The lessor and the bankruptcy trustee of the lessee may terminate the lease (Articles 38a and 39 Bankruptcy Act). Identical provisions exist in the legislation of Aruba (Bankruptcy Regulation), Curaçao and Sint Maarten (Bankruptcy Decree).

14.8 Under the laws of your jurisdiction can a lessor arrest a vessel which it leases? Can it join in arrest proceedings initiated by a third party?

Netherlands: Yes. It could attach the vessel to secure its redelivery (*rei vindicatio*). The lessor can also join in attachment proceedings initiated by a third party.

14.9 Under the laws of your jurisdiction what priority is given to the rights of a lessor of a leased vessel as against third parties with maritime liens/claims?

Netherlands: None, as the leased vessel is considered to be an asset of the lessor.

14.10 Do the laws of your jurisdiction recognise registered leases in respect of vessels registered in a different jurisdiction? If so, please give brief details.

Netherlands: Yes. See 1.2.

14.11 In your jurisdiction is there generally a wish to promote leasing of vessels, including by reforming the law? If so please provide a brief explanation.

Netherlands: No.

15 RESERVATION OF TITLES⁵

15.1 Do the laws of your jurisdiction treat the holder of title under reservation of title as the holder of a security interest?

Netherlands: As indicated above, 'security interest' or 'holder of a security interest' have no particular meaning under Dutch law. The qualification as such therefore has no particular consequence. The only security rights in rem existing within the context of shipping are hypothec (registered ships) and pledge (non-registered ships).

But reservation of title in registered property is generally possible under Dutch law, although it is rare. The holder of title under reservation of title will be regarded as being the owner of the particular property, whereas the buyer will have a right to have (full) title transferred to him at some stage. In respect of aircraft Dutch law allows the creation of an 'in rem' right 'to acquire aircraft by purchase coupled with possession of the aircraft' on the basis of (Article 1 of) the 1948 Geneva Convention on the international recognition of rights in aircraft. However, with regard to ships (whether sea-going or not), Dutch law is based on the 1965 Geneva Convention on the Registration of Inland Navigation Vessels which does not provide for such an in rem right. An intermediate solution is provided for the hire-purchase of inland navigation ships (only provided for in the Civil Code of the Netherlands in Europe). When the statutory conditions for the execution of the hire-purchase contract are met and the agreement is registered in the ship's register, a third person acquiring ownership of the ship shall succeed to all (rights and) obligations of the seller in the hire-purchase. There is no similar provision relating to sea-going ships.

15.2 Do the laws of your jurisdiction provide for reservation of title arrangements to be registered in the ships' register in any way different from a standard registration of the holder of title as registered owner? If so, please give brief details.

Netherlands: See under 5.1.

15.3 If the laws of your jurisdiction do provide for reservation of title arrangements to be registered as referred to in 15.2, what rights and remedies are given to the holder of title?

⁵ References to 'reservation of title' are intended to include arrangements where a seller retains title to the vessel until the buyer pays the full price in circumstances where the buyer's obligation to pay the full price is deferred over time.

Netherlands: See under 5.1.

15.4 Do the laws of your jurisdiction recognise foreign reservation of title arrangements of a type referred to in 15.2? If so, please give brief details of how these arrangements would be recognised.

Netherlands: See under 2.1. with particular regard to art. 10:127 DCC.

16. Does a mortgage registered in your jurisdiction extend by law to vessel's insurance policies in the event of a casualty affecting the vessel?

Netherlands: Yes, Article 3:229 DCC (applying throughout the Kingdom) provides:

1. The right of pledge or mortgage entails, by law, a right of pledge over all claims for compensation which take the place of the secured property, including claims resulting from its reduction in value.
2. This right of pledge has preference over any other right of pledge established on the claim.

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Input provided by:

Reinier van Campen
Haco van der Houven van Oordt
Arij-Jan Noordermeer
Willemieke Princée
Taco van der Valk