THE TRANSPORT FINANCE LAW REVIEW

EIGHTH EDITION

Editor
Richard Howley

THE LAWREVIEWS

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PREFACE

The Transport Finance Law Review is intended to provide the industry with a guide to transport finance today in each of the key jurisdictions globally in which aircraft, rolling stock and ships are financed.

The covid-19 pandemic has provided an unprecedented level of turmoil to each of these vitally important industries, the full impact of which may not be known for a number of years. Each of the aviation and cruise and passenger ferry sectors have suffered an extraordinary reduction in demand due to lockdown and the closure of borders, while in the United Kingdom, there has been extensive government intervention that already presages transformative change.

The pandemic has caused a dramatic decline in new orders for aircraft, and a number of airline insolvencies and restructurings have occurred; however, the demand for capital has not in any way diminished and there are signs that airlines are now starting to request the delivery of aircraft deferred during the pandemic. All airlines that have managed to retain access to capital have been engaged in significant finance transactions during the past year, many by way of sale and leaseback of aircraft. Similarly, in the cruise industry, Carnival Corporation and Royal Caribbean International have made regular forays into the debt and equity capital markets to repair their affected balance sheets, often at better terms than they were able to secure during 2020.

Beyond the pandemic, the transport industries continue to face challenges, including increased financial regulation such as IBOR reform and environmental regulation. The year 2021 brought the IMO's introduction of the Energy Efficiency Existing Ship Index, which followed the 2020 sulphur cap in shipping, and these measures will inevitably be followed with further regulation on CO_2 emissions. In addition, some of the European Union's proposals in its 'Fit for 55' package could affect the shipping industry, for example, the intended expansion of the EU emissions trading scheme, the EU ETS, to include the maritime industry, would impact the United Kingdom's vessels calling at ports in the European Union.

These challenges mean that asset finance in its traditional form is now available from relatively few banks, which in turn are prepared to lend to relatively few names, being usually leaders in their relevant sectors that have green credentials and that satisfy new environmental standards set out in, for example, the Equator Principles or the Poseidon Principles. Tenors tend to be shorter, and borrowing more expensive. It is clear that debt finance alone is no longer sufficient to meet the needs of the global aviation, rail and shipping industries. Other financiers and investors have recognised this and have identified significant opportunities to secure returns using innovative new funding structures, and often in collaboration with traditional lenders who have remained in the market.

Against this evolving financing landscape, new environmental regulation and disruptive technology are bringing about further changes. Artificial intelligence, distributed ledger technology such as blockchain and low carbon technology are creating new funding requirements, as well as bringing new participants into the transport sector with new ideas for raising finance.

These developments have meant that legal advisers to the transport finance sector are now required to provide a far broader set of legal skills and market knowledge than has previously been required.

The aviation, rail and shipping industries each have their own unique characteristics and need lawyers with a deep understanding of how each of these complex industries operates. A detailed knowledge of the principles of asset finance is now also required, combined with the ability to advise on new capital markets, leasing and corporate structures. In addition, while the majority of asset financings in the transport sector tend to be governed by English or New York law, an understanding of the principles of local law in the key jurisdictions in which transport assets are registered is also of great importance.

We have sought contributions from jurisdictions that play a leading role in the financing of transport assets. Each chapter provides an overview of the transport finance industry in these jurisdictions, with an analysis of how key lenders have changed over the past seven years and how the financing of assets has developed as a result. Contributors have provided an overview of the legislative framework for transport finance and financial regulation affecting lenders to the transport sector. Authors have also been asked to review any significant innovations and notable recent and pending financings and cases, and to provide assessments of how the transport sector is likely to continue to develop in their markets.

I would like to thank the contributors to this volume. Their efforts are deeply appreciated and represent a substantial contribution to the transport law library as the sector continues its transformation.

Each contribution reflects the significance of the transport sector today, and the need for readily available funding for industries that underpin the global economy by transporting people and commodities around the world every day.

Lawyers have had to become increasingly nimble as clients require advice on developing intricate joint-venture agreements and complex capital market products, and increasingly on the opportunities and threats presented by environmental challenges and disruptive change throughout the transport sector. It is an incredibly exciting time to be a lawyer in this field, as our contributors demonstrate in the following chapters.

Richard Howley
Norton Rose Fulbright
London
April 2022

Chapter 4

MALTA

Matthew Xerri and Caroline Risiott[1]

I INTRODUCTION

i The transport finance industry

Situated in the centre of the Mediterranean, some 58 miles to the south of Sicily, Malta's location has throughout the centuries ensured its strategic importance as a major maritime transport hub. Malta gained its independence from Britain in 1964 and became a republic 10 years later. The Malta flag formally came into existence as an 'open' register in 1973 with the promulgation of the Merchant Shipping Act.[2] It has experienced significant and constant growth since it inception, particularly following Malta's accession to the European Union in 2004, and has now established itself among the largest registries in the world in terms of tonnage.

This is due in no small part to a legislative regime that deliberately offers holders of Maltese mortgages security and strength in difficult situations, thus making Malta an attractive jurisdiction to financiers. Practically all the leading international ship and aviation finance banks and credit institutions have utilised Maltese mortgage security at some time or another, while a significant proportion does so on a regular and consistent basis. Over recent years, in addition to more traditional financiers, Malta has also seen an increase in the number of alternative finance providers taking Maltese security over Maltese aircraft and vessels. This is a positive development that further confirms the success of the Maltese legislative regime, which is strong enough to cater for the diverse needs of different financiers.

Malta's aviation finance sector is a relative newcomer to the scene that has steadily grown over the years as a result of a carefully planned drive to implement a legislative and infrastructural framework aimed at attracting major international financiers. While not yet as fast-growing as the Ship Register and the ship finance sector, Malta's aviation register and aviation finance sector are expanding, particularly since the ratification by Malta of the Cape Town Convention and related Protocol.

ii Recent changes

Locally, there are no key lenders to the transport industry; therefore, we cannot provide feedback on this point.

Nonetheless, we have seen a shift in key lenders that are providing finance to shipping and aviation clients from European-based lenders to Asian-based lenders, and in particular leasing houses.

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1 Matthew Xerri and Caroline Risiott are senior associates at Ganado Advocates.

2 Chapter 234 of the Laws of Malta.

II LEGISLATIVE FRAMEWORK

i Domestic and international law and regulation

Shipping

Malta's successful shipping finance industry is due to a sophisticated legislative framework that successfully embraces both common law and civil law features. The Maltese Civil Code[3] is heavily based on the Code Napoleon and sets out the rules of contract applicable to finance documents that are subject to Maltese law. Additionally, it regulates certain forms of security that may be availed of by the financier of a Maltese-registered ship or aircraft, such as pledges, irrevocable powers of attorney granted by way of security and security by title transfer. The Civil Code also regulates issues such as the ranking of creditors and causes of preference.

Another important piece of legislation within Malta's shipping legislative framework is the Companies Act,[4] which regulates the creation, operation and dissolution of Maltese companies. The provisions of the Merchant Shipping (Shipping Organisations – Private Companies) Regulations are also of particular relevance within Malta's shipping legislative framework as they provide for a special type of company, known as the shipping organisation, which is often used as a shipowning entity as it is subject to simplified and less onerous requirements than a traditional company set up under the Companies Act. The same Regulations cater for the dissolution and consequential wind-up of companies, and recent legislative amendments to these Regulations cater for the provision of the continuation outside Malta of shipping organisations and the continuation in Malta of a foreign company.

The Merchant Shipping Act,[5] which regulates the registration and operation of Maltese vessels as well as the creation and registration of mortgages over Maltese vessels, is modelled closely on the UK Merchant Shipping Act, and consequently practitioners in Anglo-Saxon jurisdictions find much common ground with the Maltese provisions, particularly in enforcement scenarios. The concept of a mortgage is limited only to the shipping and aircraft finance regimes – the relative ease of enforcement of a mortgage was one of the factors that led to its introduction under Maltese law, on the basis that a jurisdiction that was creditor-friendly in its approach would attract more business.

Finally, the Code of Organisation and Civil Procedure (COCP)[6] sets out the various remedies available to creditors to satisfy the debt owed to them and the methods of enforcement specific to vessel financiers, including the arrest of ships, judicial sales by auction and court-approved private sales.

Aviation

The main legislation for aviation matters in Malta is the Aircraft Registration Act.[7] In the process of enacting the Aircraft Registration Act, it was realised that in order to promote the aviation industry in Malta, it was essential to attract financiers and lessors. Hence, it was crucial that Malta implemented the Cape Town Convention and the Aircraft Protocol.

By enacting the Aircraft Registration Act and implementing the Cape Town Convention, innovative concepts were introduced into Maltese law. Furthermore, the concept of security

3 Chapter 16 of the Laws of Malta.
4 Chapter 386 of the Laws of Malta.
5 Chapter 234 of the Laws of Malta.
6 Chapter 12 of the Laws of Malta.
7 Chapter 503 of the Laws of Malta.

interests not only was widened to include mortgages and privileges, but also made it possible to secure the rights of a conditional seller under a title reservation agreement as well as the rights of a person who is a lessor under a lease.

The Aircraft Registration Act was further amended in 2016 to improve the legislation. Amendments included revised definitions of airframes and aircraft engines, the introduction of new rules in the existing insolvency regime for aircraft companies and the reinforcement of remedies available to the mortgagee. Further amendments were made in 2021:

a to facilitate further the registration of aircraft, including the creation of a greater pool of available registration marks;

b to introduce specific regulations for the registration, deregistration and enforcement of irrevocable deregistration and export request authorisations (IDERAs) as well as the appointment of certified designees; and

c to introduce a new warrant of ejectment or expulsion.

Other legislation that is relevant to aviation includes the COCP, the Civil Code, the Interest Rate (Exemption) Regulations and the Financial Institutions Act.

ii Specific practices

In relation to shipping, the Merchant Shipping Act and the Malta mortgage are recognised by all of the major banks and financiers. The fact that the Malta mortgage can be rendered executive is attractive to financiers.

Regarding aviation, although the Aircraft Registration Act is viewed positively by financiers, the main legislation that gives the necessary comfort to financiers is the Cape Town Convention, through which international interests can be registered in the international registry.

III FINANCIAL REGULATION

i Regulatory capital and liquidity

The main legislation that regulates the local business of banking is the Banking Act,[8] which sets out the regulatory framework for credit institutions that operate in or from Malta. The Banking Act, which is supplemented by subsidiary legislation and the underlying Banking Rules issued by the Malta Financial Services Authority (MFSA), regulates, inter alia, capital and liquidity requirements of such institutions. There is also the transposition of several European directives, particularly the Capital Requirements Directive IV (CRDIV). The CRDIV package, which also includes the Capital Requirements Regulation (CRR) (which is directly applicable in Malta), is complemented by a number of binding technical standards, guidelines and lists issued by the European Banking Authority and the European Commission. The CRDIV package reflects the Basel III key principles.

ii Supervisory regime

The financial services regulator in Malta is the MFSA. The supervisory regime is in line with the Single Supervisory Mechanism that is implemented in the European Union. The ongoing supervision of the three significant institutions is carried out jointly by the European Central

8 Chapter 371 of the Laws of Malta.

Bank and MFSA through joint supervision teams, while generally the supervision of less significant institutions, such as general on-site responsibilities and supervisory reporting, fall within the remit of the MFSA.

IV SECURITY AND ENFORCEMENT

i Financing of contracts

Shipping

A Maltese ship may constitute security for a debt or other obligation either by agreement or by operation of the law:

a by means of a mortgage that is a special charge over a vessel;

b by a general hypothec that attaches to all the assets of a debtor, including any vessel such debtor may own; or

c by a special privilege upon the vessel (these arise in virtue of law, and no debt or other obligations other than those specified at law shall be secured by a special privilege).[9]

Under Maltese law, ships form separate and distinct assets within the estate of the owners for the security of actions and claims to which the vessel is subject. In the case of bankruptcy of the owner, all actions and claims to which the ship may be subject shall have preference over all other debts of the estate. Thus, a creditor having security over a ship would rank ahead of other creditors of the estate.

The most common and certainly the strongest form of security available to ship financiers is the registered mortgage. The Maltese mortgage offers a number of advantages to financiers, making it particularly attractive to financiers:

a a mortgage constitutes an executive title (where the secured obligation is a debt certain, liquid and due) and may be enforced immediately upon default without the need for a prior court judgment or order to that effect; thus, the mortgagee can proceed directly with enforcement without applying to the Maltese courts;

b claims secured by a mortgage enjoy a relatively high ranking at law; the Maltese Merchant Shipping Act provides that registered mortgages will rank only after the following specified privileged claims:

- tonnage dues;
- wages and expenses for assistance, recover of salvage and for pilotage;
- wages of watchmen and related expenses;
- rent of warehouses;
- expenses for preservation of the ship;
- wages due to the master, the officers and the members of the vessel's complement;
- damages due to seamen for death or personal injury;
- moneys due to creditors for labour, work and repairs prior to the departure of the ship on her most recent voyage;
- ship agency fees due for the ship after her most recent entry into port; and
- debts due to the ship repairer or shipbuilder for building or repairs;[10]

9 Article 37B(1) and 37B(2) of Chapter 234 of the Laws of Malta.

10 Article 50 of Chapter 234 of the Laws of Malta.

c vessels subject to a registered mortgage may not be deleted from the vessel register by the owner without the mortgagee's prior written consent;

d a vessel may not be struck off its register by the competent authorities without at least one month's notice being given to the mortgagee by the Registrar-General of Shipping and Seamen; in the event that the vessel is deleted in these circumstances, this is done save for any registered encumbrances, and consequently the mortgage continues to attach to the vessel;

e further mortgages or transfers of vessels without the prior written consent of the mortgagee may be prohibited by a specific clause in the mortgage instrument;

f the mortgage attaches to the insurance proceeds and to the proceeds from indemnities for mishaps;

g once a mortgage is registered, special privileges or liens not previously recorded on appurtenances or accessories of a vessel do not affect the mortgagee's position;

h a mortgage may be registered in favour of a security trustee acting on behalf of a person or a syndicate to whom a debt or other obligation is due; and

i a registered mortgagee may register the assignment of part of a debt or other obligation secured by a registered mortgage.

The Maltese Merchant Shipping Act[11] provides for a statutory form of mortgage. There is one statutory form that must be used for all types of mortgages, whether principal and interest or account current. The mortgage must be in English or in Maltese.

Mortgages are only registered at the Registry of Ships in Malta and rank among themselves from the date and time of their registration in the vessel register. Only one original form is delivered and registered. A copy is retained by the Registrar of Shipping and Seamen and certified copies are issued in any number. The original is returned to the mortgagee following registration. Once registered at the Registry of Ships, no further steps need to be taken to perfect the mortgage.

A vessel currently under construction may be registered under the Malta flag as long as, when built or equipped, it would qualify as a ship registrable under the Merchant Shipping Act.[12] In the case where registration of a vessel under construction has occurred under the ownership of a particular party, a mortgage may be registered over such vessel while it is still under construction. The documents required are the same as those required for the registration of a mortgage on a Malta-flagged vessel. Maltese law imposes a possessory lien in the shipbuilder's favour over a vessel under construction. This entitles the shipbuilder to retain possession of the ship until the shipbuilder's dues have been settled: any debts secured by a Maltese mortgage would rank after the debt owed to a shipbuilder and secured by a possessory lien in favour of the shipbuilder.

Aviation

Similar to the Merchant Shipping Act, the Aircraft Registration Act also treats aircraft as a particular class of movables whereby they form separate and distinct assets within the estate of their owners for the security of actions and claims to which the aircraft is subject. In the

11 Chapter 234 of the Laws of Malta.

12 Chapter 234 of the Laws of Malta.

case of bankruptcy or insolvency of the owner of an aircraft, all actions and claims to which the aircraft may be subject shall have preference, on the said aircraft, over all other debts of the estate.

For such purposes, the term aircraft includes:

a all data, manuals and technical records; and

b the airframe, all equipment, machinery and other appurtenances as accessories belonging to the aircraft, which are on board or which have been temporarily removed therefrom, and any engines owned by the owner of the aircraft, whether attached to the aircraft or not, as well as any replacement engines that are designated for use on the aircraft and owned by the owner of the aircraft but are temporarily not attached to the aircraft.

The main form of security in a financing structure involving a Malta-registered aircraft would be the registration of a mortgage, which can also be registered as an international interest. However, one innovative concept that has been introduced as part of the implementation of the Cape Town Convention is the notion of having a lease registered as a security interest. Under Maltese law, a lease is not a security interest and does not give ranking to the lessor; however, if this is registered as an international interest then the lease will be given ranking under the Cape Town Convention. Any international interest registered in the international registry after the effective date will rank higher than any mortgage registered in the Malta Aircraft Register.

Another innovative concept was the introduction of irrevocable mandate. One such mandate takes the form of an 'irrevocable deregistration and export request authorisation'. Therefore, the creditor will be able to deregister and export the aircraft upon default without the consent of the debtor. Furthermore, it is also possible for the authorised person under the irrevocable deregistration and export request authorisation to appoint a certified designee, whereby the rights under the irrevocable deregistration and export request authorisation are designated to the designee.

ii Enforcement

Shipping

In terms of Maltese law, creditors seeking to enforce their rights against a debtor will need to resort to the courts to obtain a judgment in their favour, whereupon creditors would then be able to resort to a number of warrants to enforce their rights, such as a warrant of arrest, a warrant of seizure or a garnishee order, and to recover the amounts due to them from the assets of their debtor.

The situation is somewhat different for creditors having a registered mortgage over a Maltese vessel. Because Maltese mortgages are executive titles and consequently provide that the amount due is certain, liquidated and due, the mortgagee would be able to enforce the mortgage without the need to obtain a prior court judgment.

Maltese law affords mortgagees several self-help remedies and, indeed, in the event of default of any term or condition of a registered mortgage or of any document or agreements referred to therein, the mortgagee shall, upon giving notice to the mortgagor:

a be entitled to take possession of the ship or share therein in respect of which he or she is registered; except insofar as may be necessary for making a mortgaged ship or share

available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship or share; nor shall the mortgagor be deemed to have ceased to be the owner thereof;

b have power absolutely to sell the ship or share in respect of which he or she is registered, but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee; and if the proceeds of sale, after discharging the mortgage debt, show a surplus in his or her hands, the mortgagee shall deposit the same for the benefit of other creditors and of the mortgagor; and

c have power to apply for any extensions, pay fees, receive certificates and generally do all such things in the name of the owner as may be required to maintain the status and validity of the registration of the ship.[13]

In practice, most mortgagees seeking to enforce their claims would proceed to arrest the vessel and request a judicial sale by auction or a court-approved private sale of the vessel. The court-approved private sale of the vessel is a relatively recent development under Maltese law. Before its enactment, a mortgagee would only be able to resort to a private sale or judicial sale by auction of the vessel. Although these two remedies – private sale and an application for judicial sale – have advantages, they also have their disadvantages. While a private sale allows a mortgagee to negotiate the sale of the vessel with a private buyer at the right price, the vessel is not sold free and unencumbered, which may put off potential buyers. In a judicial sale, however, although the vessel is sold free and unencumbered, the prices fetched at judicial sales by auction are frequently below market value, especially since there can be no minimum reserve prices.

The court-approved private sale enables the creditor to seek court approval for the sale of the vessel at a determined price to a specific buyer. The price must be equal to or superior to two previously obtained valuations attesting to the value of the vessel. The mortgagee files an application in court, exhibiting copies of the memorandum of agreement and the valuations obtained, and requesting court approval for the private sale to proceed and requesting the appointment of a person who can transfer the vessel by means of a bill of sale to the new buyer for the agreed price. The vessel is then sold to the buyer free and unencumbered. The mortgagee can therefore negotiate the price for the vessel (thus avoiding the pitfall of the low prices typically obtained at judicial sales by auction) and the buyer obtains a free and unencumbered vessel (thus doing away with the disadvantages afforded by a private sale). Proceedings are swift and expedient, since the application is appointed for hearing within 10 days of its filing. Court intervention is usually minimal.

Aviation

The holder of a registered mortgage, without prejudice to any remedies under the Cape Town Convention, shall in the event of default and upon giving notice in writing to the debtor:

a be entitled to take possession of the aircraft or share therein in respect of which he or she is registered;

b have power absolutely to sell the aircraft or share therein;

13 Article 42(1) of Chapter 234 of the Laws of Malta.

c have the power to apply for any extensions, pay fees, receive certificates and generally do all such things in the name of the owner or registrant as may be required to maintain the status and validity of the registration of the aircraft;
d have the power to lease the aircraft so as to generate income therefrom; and
e have the power to receive any payment of the price, lease payments and any other income that may be generated from the management of the aircraft.

Further remedies are also applicable under the Cape Town Convention, and these are available to the following persons: in favour of a chargee under a security agreement (such as a mortgage); in favour of a person who is a conditional seller under a title reservation agreement; or in favour of a person who is the lessor under a leasing agreement.

In relation to the chargee, should there be an event of default, such person may take possession or control of any aircraft object charged to it; sell or grant a lease of any such aircraft object; and collect or receive any income or profits arising from the management or used of any such aircraft object.

As regards the conditional seller or the lessor, such person may terminate the agreement and take possession or control of any aircraft object to which the agreement relates; or apply for a court order authorising or directing either of these acts. Additional remedies available to any creditor include deregistration of the aircraft and the export and physical transfer of the aircraft object from the territory in which it is situated.

iii Arrest and judicial sale

Shipping

The law on ship arrest in Malta was, until 2006, governed by outdated and unclear rules and the Maltese admiralty jurisdiction was still being regulated by legislation that could be traced back to the mid-19th century position in England. These provided very limited heads of jurisdiction *in rem* based on which a ship could be arrested and, in particular, did not regulate the substance of the action *in rem*. Problems arose in relatively more recent cases connected with bareboat charterers, for which no provision had been made. Furthermore, there was no right of sister ship or of associated ship arrest, or any provisions for court-approved private sales of ships.

All this changed with the statutory amendments introduced in 2006, as further amended in 2008. Although Malta is not a signatory to the Arrest Conventions of 1952 and 1999, the list of maritime claims that can be found under the current Maltese legislation reflects the lists found under these two Conventions and also closely adheres to the British Supreme Court Act of 1981.

Ships are arrested in Malta by a warrant of arrest issued on any one of the grounds listed in Article 742B of the COCP giving rise to the *in rem* jurisdiction of the Maltese courts. There are 25 maritime claims under Article 742B, which include:

a claims to possession or ownership of a vessel;
b hypothecary or mortgage claims;
c claims for damage; and
d loss of life, salvage, pilotage, crew wages and registry fees.

Maltese law provides both for the arrest of the vessel *in rem*, that is, against the vessel for any of the 25 reasons listed under Article 742B of the COCP, as well as *in personam*, meaning that the vessel is arrested not because of a claim personally addressed against it, but is arrested

because of a claim addressed against the vessel's owner. This latter option can only be exercised where the Maltese courts or a court of any other EU Member State would have jurisdiction to deal with the matter at hand in accordance with Article 31 of Council Regulation (EC) No. 44/2001.

Ships may also be arrested in Malta in security of arbitration proceedings commenced against the shipowner. Lastly, ships may be arrested in Malta pursuant to the provisions of Article 31 of Council Regulation (EC) No. 44/2001, dealing with provisional, including protective, measures, in cases where the courts of another Member State have jurisdiction as to the substance of the matter.

The warrant is executed when notice is served on the executive officer of the authority that has the sea vessel in its hands or under its power or control, and a copy of the warrant of arrest is also served on the person whose ship or vessel is arrested, the master or other person in charge of such ship or vessel, or the agent of such ship or vessel. Furthermore, the authority that has in its hands or under its control the seagoing vessel against which such warrant of arrest has been issued shall take all necessary measures to display the court order for the general attention of third parties.

The claim against the vessel needs to exceed a minimum amount and has to be valid, since any claimant who maliciously arrests a vessel shall be held liable and exposed to penalties in accordance with the law. The claimant is usually requested to provide sufficient background relating to the facts of a case to establish whether there is a valid cause of action against the vessel, which could be substantiated by relevant documentation such as unpaid invoices or similar documentary evidence. However, such documentation is not strictly required at this stage, since the warrant of arrest is used for precautionary measures.

The owner of the arrested vessel has the right to request the court to order that the claimant provides a counter-security to be deposited in court in relation to the arrest. Since it is a means of safeguarding the owner's rights, such a request is usually accepted by Maltese courts. The claimant who successfully arrests a vessel has 20 days from the date of the issuance of the warrant to bring an action before a court.

Maltese law also caters for sister ship arrests. In fact, in the maritime claims listed in Article 742B(d) – (y) of the COCP, an action *in rem* may be brought against:

a that ship, where the person who would be liable on a claim for an action *in personam* (relevant person) was, when the cause of action arose, an owner or charterer of, or in possession or in control of, the ship if, at the time when the action in brought, the relevant person is either an owner or beneficial owner of that ship or the bareboat charterer of it; or

b any other ship for which, at the time when the action is brought, the relevant person is the owner or beneficial owner as respects all shares in it.

Thus, in these cases sister ship and associated ship arrest is possible.

Judicial sales by auction

Malta has long been an excellent jurisdiction to have vessels that are arrested in Maltese waters sold by public auction under court supervision as a means of enforcement by creditors of their executive titles.

The reputation that Malta enjoys in the sector has come about following the efficient manner of the court administration, the auctioneer and all involved parties in managing judicial sales by auction, and the relatively low costs to complete the procedure. Typically, ships are sold within a few months from their arrest and related costs are reasonable.

Judicial sales by auction are held in public, and any person may offer bids for the purchase of the vessel. The bids offered by participants are not sealed bids. The vessel is then sold to the highest bidder, free from encumbrances. There is no reserve price. The price is then either deposited in court or, if the bid is offered *animo compensandi* by a creditor of the ship, it is set off against the relative debt. The time-proven procedure works well, is fair and transparent and is typically concluded within a few months, with the ship then leaving Malta in the hands of her new owners.

Aviation

The COCP also deals with the arrest and judicial sale of aircraft. It is possible to request a warrant of arrest as security for a debt or any other claim whatsoever subject to a number of limitations. In relation to aircraft, in all cases, the amount of the claim must not be for less than €7,000, while in the case of aircraft being used for public air transport of passengers or goods, for aircraft permitted to carry less than 10 passengers, the claim must not be for less than €250,000, and for aircraft permitted to carry more than 10 passengers, the claim must not be for less than €1 million.

In the case of engines, if the engine is not attached to the aircraft, the claim must be for not less than €7,000; if, however, the engine is attached to an aircraft that is used for public air transport of passengers or goods and the aircraft is permitted to carry less than 10 passengers, then the claim must not be for less than €50,000. If the engine is attached to such an aircraft that carries more than 10 passengers and the engine is not owned by the owner of the aircraft, the claim must not be for less than €100,000. The €1 million requirement also applies in relation to an engine that is attached to an aircraft that carries more than 10 passengers and where the owner of the engine and the aircraft are the same.

The limitations on the amount of the claim stated do not apply to any claims made by holders of a mortgage or an international interest or a security interest when such mortgage or interest has been registered in the Aircraft Register or in the international registry.

V CURRENT DEVELOPMENTS

i Recent cases

Shipping

Case law in the field of Maltese asset finance is particularly rich and continuously developing the principles on which this industry is based. The *Indian Empress* cases[14] generated considerable media interest both locally and internationally and are landmark judgments in several ways, most notably because this was the first time that a Maltese court imposed certain eligibility requirements for the bidders in a judicial sale by auction of vessels, including that

14 *Melita Power Diesel Limited (C2376) v. M/Y Indian Empress* (IMO No. 1006245), decided by the First Hall, Civil Court, 31 January 2019, Reference No. 911/2018, and *Fenech Tonio Av Dott Noe v. M/Y Indian Empress* (IMO No. 1006245), decided by First Hall, Civil Court.

of making a cash deposit in court prior to the sale taking place, and providing guarantees for a certain threshold value or providing other evidence as to the bidders' ability to complete the vessel purchase.

Aviation

Although it cannot be regarded as a recent case, we mention the proceedings in relation to two aircraft that at the time were owned by two Irish entities and were leased to an Italian operator, WindJet SpA (the lessee). The aircraft were registered in Ireland. The lessee had entered into insolvency proceedings and had a number of dues owed to Società Aeroporto Catania SpA. The latter had a special privileged claim over the aircraft in terms of Italian law. Therefore, the airport applied for, and obtained, an order from the Italian court for a precautionary arrest warrant.

In the meantime, the owners of the aircraft terminated the lease agreements and flew the aircraft to Malta (which is a contracting state under the Cape Town Convention) in order to protect the aircraft from the claim of the airport. Once in Malta, the airport applied to the Maltese court for a precautionary warrant of arrest in terms of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

The courts of Malta referred to Article 31 of Brussels I and mainly focused on Maltese procedural law, and in particular whether the airport had, prima facie, a case against the lessors or otherwise to detain the aircraft. The Maltese courts accepted the application of the airport and dismissed the claims of the lessors, even though the latter claimed that they had a right of repossession under the Cape Town Convention. This case highlighted the potential conflict between Brussels I and the Cape Town Convention.

Furthermore, in a recent court judgment, the Maltese court rejected the issuance of a warrant of prohibitory injuction to withhold a company from enforcing their rights under an IDERA and in particular the deregistration of aircraft from the Malta Aircraft Registry. The court understood and stressed that issuing a warrant of prohibitory injunction in the applicant companies' favour would inhibit the proper adoption of the Cape Town Convention and any principles under the Aircraft Registration Act (Chapter 503 of the Laws of Malta).

ii Developments in policy and legislation

Shipping

Procedures for an arrest of vessel in Malta have been recently upgraded to enable, for the first time in Maltese legislative history, privately engaged bailiffs to formally serve a warrant of arrest on ships that are in Maltese territorial seas. Act XXXI is the law that brought these changes into force, effective as of 18 December 2019. The new law changes the traditional rule that required that service of warrants of arrest must necessarily be done by a court official, typically a court marshall. The new law introduces flexibility into the procedure for service of an arrest in that it enables the creditor to engage a private bailiff (identified *a priori* to the court) to physically serve upon and notify the warrant of arrest to the ship's master and proceed to seize the ship's papers for them to be lodged in court. Under the newly promulgated procedure, a privately engaged bailiff will work hand in hand with court officials, thus ensuring that all steps remain subject to court scrutiny.

The new procedure is specifically intended to facilitate the arrest of ships in difficult weather conditions, particularly where ships are miles away from Maltese shores, on anchorage and when sea conditions are bad. Now, more appropriately, rather than having

court personnel shipped out to vessels to enable notification of an arrest warrant, lawyers acting for creditors can tap the private sector to engage individuals that are apt to go out to sea in such weather conditions in place of the court marshall.

Aviation

In 2016, a number of amendments were made to the Aircraft Registration Act in terms of Act No. LII of 2016. These amendments can be summarised as follows.

General amendments

A number of general amendments were introduced to correct a number of inconsistencies or lacunas in the 2010 law and, in particular, revised definitions of airframes and aircraft engines to make the distinction between the two in specific contexts more clear; updating of fees; and allowing the registrar in Malta to cancel the registration of an aircraft if the person who is registering the same is no longer a qualified person or is no longer entitled to operate such aircraft under a temporary title.

Insolvency

The amending bill introduced some new rules in the existing insolvency regime for aircraft companies. The law has been amended to provide for beneficial procedural treatment for actions enforcing mortgages or international interests.

Enforcement

The amending bill has introduced a number of rights that the mortgagee can exercise in the case of an enforcement of a mortgage, such as that of set off, whereby the mortgagee can acquire the aircraft and set off the value of the aircraft against the amounts that are due to it.

Furthermore, in 2021, a number of other amendments were made to the Aircraft Registration Act (the ARA) in terms of Act 37 of 2021. These amendments can be summarised as follows.

Registration marks

The ARA was amended in order to have a greater pool of available registration marks. The registration marks have been extended to a group of three to five characters, which can be a combination of capital letters in roman character or Arabic numbers, or both.

Flexibility in the registration of aircraft

An element of flexibility has been introduced in the ARA in relation to the registration of aircraft. The details to be included on the fire-proof plates have been limited to the Malta registration marks, thus making it easier to prepare these in advance and also facilitating the sale and purchase of aircraft.

Furthermore, the Registrar General has been provided with discretionary powers to proceed with the registration of an aircraft, even though not all the documents that are required for registration have been provided. Nonetheless, it is important to note that this discretionary power is not unlimited and certain documents must be provided at all times.

Unmanned aircraft

The definition of unmanned aircraft has been included in the ARA to allow for the registration of such aircraft 'operating or designed to operate autonomously or to be piloted remotely without a pilot on board'. The design of unmanned aircraft is subject to certification under the Basic EASA Regulation.

Regulations of IDERAs

The introduction of IDERAs in the ARA in 2010 was groundbreaking. Further specific regulations of the registration, deregistration and enforcement of the IDERA were deemed necessary, as well as the need to introduce timelines within which the Director of Civil Aviation would need to register and enforce the IDERA, thus providing more certainty to IDERA holders. Furthermore, although the concept of certified designee was already mentioned in the ARA, clear procedures have been introduced whereby IDERA holders could nominate certified designees with the latter being authorised to enforce the IDERA and deregister and export the aircraft.

Enforcement of IDERAs

Although the ARA had already catered for the IDERA enforcement procedure, the relevant provisions have been amended in order to outline the procedure with more clarity and insert deadlines. Prior to the amendments, the ARA did not specify how many IDERAs could be registered and by whom. These amendments clarify that only one IDERA can be registered and it has to be issued by the registrant, which is usually the operator of the aircraft. Furthermore, the law states that upon the enforcement of an IDERA, the IDERA shall be acted upon by the Civil Aviation Directorate; in other words, that the aircraft is deregistered at all times without the Civil Aviation Directorate having to enter into the merits of the case, unless there is an international interest that ranks higher in priority to the registered IDERA.

Warrant of ejection or expulsion

A new warrant has been introduced whereby an aircraft or vessel owner or any mortgagee can request the issuance of a warrant of ejection or expulsion, so that the operator or lessee, or other occupants of the vessel or aircraft, must leave the aircraft or vessel within a specific time. This complements the already existing warrant of arrest.

iii Trends and outlook for the future

Malta aims to consolidate its position as the largest flag in the European Union in terms of registered tonnage, but also to maintain the high standards it embraces and has become reputed for with shipowners, charterers and financiers. Malta will continue to be an active advocate of maritime affairs both at the IMO as well as the EU level, and will continue to fine tune its legislation from time to time to adequately meet international standards and demands.

The same applies in relation to aviation. The number of aircraft operators in Malta has increased quite substantially, and Malta's aim is to create an aviation-friendly environment for operators, aircraft financiers and lessors.

Appendix 1

ABOUT THE AUTHORS

MATTHEW XERRI

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Matthew Xerri is a senior associate in the firm's shipping and aviation team, with a particular focus on ship and aviation finance, including the implementation of alternative financing methods. Matthew regularly represents financial institutions in ship finance transactions and alternative ship finance structures. He has been involved in the drafting of charterparties. Furthermore, Matthew assists aircraft lessors in complex aircraft transactions, including the registration of international interests. He also regularly assists aircraft operators with air operators certificate and air operators licence applications and corporate law-related matters. Matthew has recently assisted with amendments to the aircraft legislation.

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Caroline Risiott is a senior associate in the firm's banking ship finance team. She regularly assists leading international banks and financial institutions involved in the financing of Maltese-registered vessels by perfecting the registration of mortgages and security interests on such vessels. Caroline was also involved in several legal drafting projects.

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