

WHAT YOU KNOW AND DON'T KNOW ABOUT THE PANAMA SHIP MORTGAGE

WISTA LUNCHEON SEMINAR & NETWORKING

October 3, 2012

WISTA – Women's International Shipping and Trading Association, Singapore Chapter

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- ✓ Introduction to the Panama Registry and the institution of the Panama Ship Mortgage, from a Historical Perspective

- ✓ What You Know
 - ✓ Brief Review of the Mortgage, as generally understood
 - ✓ Formal Requirements
 - ✓ Mortgage of a Vessel under Construction
 - ✓ Enforceability

- ✓ What You Don't Know
 - ✓ General discussion on FAQ received at our firm
 - ✓ Can a Panama Ship Mortgage be novated
 - ✓ Can a Panama Ship Mortgage secure more than one obligation
 - ✓ Is a Panama Ship Mortgage valid even if the owner has yet to receive legal title of a vessel
 - ✓ Is the Panama Ship Mortgage a unilateral act or an agreement by both parties.
 - ✓ Alternatives to the registration of the usual 40-page mortgage instrument – How to save a few bucks and make the Borrower happy while keeping the Lenders' interest secured.

*Introduction to the Panama Registry and
the institution of the Panama Ship
Mortgage,
from a Historical Perspective*

WHAT YOU KNOW

***BRIEF REVIEW OF THE MORTGAGE,
AS GENERALLY UNDERSTOOD***

FORMAL REQUIREMENTS

ARTICLE 260. THE SHIP MORTGAGE AGREEMENT MAY BE EXECUTED WITHIN OR OUTSIDE OF THE REPUBLIC PANAMA, IN ANY LANGUAGE, IN WRITING, BY PUBLIC DEED OR PRIVATE DOCUMENT.

IF EXECUTED AS A PRIVATE DOCUMENT, THE SIGNATURE OF THE PARTIES MUST BE AUTHENTICATED BY A PUBLIC NOTARY OR BY A CONSUL OF THE REPUBLIC OF PANAMA, IN THE EXERCISE OF HIS NOTARIAL POWERS.

IN ADDITION, THE SHIP MORTGAGE AGREEMENT MAY BE EXECUTED IN ACCORDANCE WITH THE FORMALITIES OF THE COUNTRY IN WHICH IT IS EXECUTED.

IN ANY EVENT, THE MORTGAGE AGREEMENT MUST BE LEGALIZED WITH AN APOSTILLE OR BY A CONSUL OF THE REPUBLIC OF PANAMA PRIOR TO BEING SUBMITTED TO THE PUBLIC REGISTRY.

The mortgage deed may contain all provisions that the parties deem advisable, however must contain, in every case:

Article 260, Law No. 55 of 6 August 2008

1. The name and domicile of the mortgagor and of the mortgagee.

2. The fixed or maximum principal amount secured or of the obligations secured.

The mortgage shall also secure, in addition to the principal or obligations secured, all earned interest, court costs, collection expenses, amounts due as a result of fluctuations in currencies or payment methods, and any other sums agreed upon in the mortgage agreement.

It is presumed that, as between the parties and in respect of third parties, unless proved otherwise, any sums owed whether it be principal, interest or any other sums secured by the mortgage, shall be the amounts mentioned in the writ of complaint.

ON OPEN MORTGAGES:

If the mortgage secures a debt whose existence or amount cannot be ascertained at the time of the execution of the mortgage agreement, if the essential particulars which allow the obligation to be identified and the maximum secured amount are included, this shall be deemed sufficient.

3. The date of payment of the principal or of the performance of the secured obligations and interest, or the method for determining such dates, unless the mortgage secures obligations payable on demand, future obligations or obligations subject to conditions precedent.

4. If interest has been agreed on, the mortgage agreement must include the interest rate agreed upon, or the method in which it may be determined.

Interest may be provided by reference, among other things, to the rate prevailing in a given market, or as the rate provided by banks to certain borrowers in any market or at the rate of the cost of funds. The rate adopted may be the rate prevailing at the time that the agreement is signed or in accordance with the fluctuations occurring during the term of the loan.

Loans secured by a mortgage shall not be subject to a maximum interest rate, and therefore shall not be subject to legal provisions restricting these. Nevertheless, the Superintendent of Banks may prescribe a maximum interest rate for these loans if the vessel secured by a mortgage lien is engaged in domestic trade.

5. The name, registration number and call sign, if any, and the registered tonnage and measurements. The provisions of Article 263 shall be applicable if the mortgaged vessel is a newbuilding.

6. If several vessels are mortgaged to secure one loan, the amount or share of the lien secured by each party may be stipulated. If such stipulation is not made, the mortgagee may claim against any or all of the vessels for the total amount secured. The provisions referred to in paragraphs 3 and 4 of this Article may be included in the mortgage agreement or in extracts, contracts, or schedules attached to and to be registered with the mortgage agreement.

If the mortgage secures a debt whose existence or amount cannot be ascertained at the time of the execution of the mortgage agreement, if the essential particulars which allow the obligation to be identified and the maximum secured amount are included, this shall be deemed sufficient.

We also suggest that the following provisions be included in your mortgage:

1.Private Sale Clause

(Article 272, second paragraph) Any agreement entitling the mortgagee to sell the mortgaged vessel extra-judicially in the event of default by the mortgagor shall be valid. The owner of the vessel may issue an irrevocable power of attorney to the mortgagee for such purpose.

2. Management Clause

(Article 273) The ship mortgage agreement may provide that the mortgagee may take possession of, and manage the vessel if he deems it advisable in order to protect his debt, and may collect freight, and apply it to the payment of sums owed.

MORTGAGE OF A VESSEL UNDER CONSTRUCTION

Article 263. To secure a mortgage for a newbuilding, the title of the vessel must be registered at the Public Registry and evidence thereof shall be provided by means of a builders' certificate setting forth the following particulars:

- 1. The name of the person for whom the vessel is being built.**
- 2. The assigned navigation and radio license numbers.**
- 3. The measurement, tonnage and type of service to be provided by the vessel.**
- 4. The place, name and address of the ship builder.**
- 5. Confirmation of the intention of the builder to transfer the title of the vessel to the person for whom it is being built, and the latter's acceptance thereof.**

The effect of the preliminary registration of title and mortgage in the case of newbuildings shall be retroactive to the date and hour on which the application for preliminary registration was recorded in the Journal of the Public Registry.

ENFORCEABILITY

Article 272. A vessel subject to an enforceable maritime lien may be arrested and sold by a court, in whatever port it may be located and at the request of the lawful mortgagee. The master shall represent the owner in the pertinent proceedings.

Any agreement entitling the mortgagee to sell the mortgaged vessel extra-judicially in the event of default by the mortgagor shall be valid. The owner of the vessel may issue an irrevocable power of attorney to the mortgagee for such purpose.

The extra-judicial sale of the vessel shall be subject to the following rules:

- 1. The mortgagee shall give notice to the owner of his intention to sell the vessel at least twenty days prior to the date of sale. Should any other mortgages be registered, said notice shall also be given to the other registered mortgagees.**
- 2. The mortgagee shall be liable for any damage caused in the exercise of his mandate.**
- 3. The title of the vessel sold extra-judicially in the manner prescribed in this Article shall transfer to the buyer together with all debts and encumbrances, with the exception of the mortgage lien giving rise to the sale, which shall be extinguished.**

Article 273. The ship mortgage agreement may provide that the mortgagee may take possession of, and manage the vessel if he deems it advisable in order to protect his debt, and may collect freight, and apply it to the payment of sums owed.

The mortgagee may exercise such right even if the vessel is in possession of third parties.

The mortgagee shall be liable for damages arising from the management of the vessel.

The owner may request a court to deprive the mortgagee of possession of the vessel for mismanagement thereof.

Unless otherwise agreed, the mortgagee shall be obliged to render an account of his management to the owner every three months, and at the end of his management.

Where there are mortgagees with a different rank, the right to take possession and manage the vessel shall be exercised in accordance with the order of priority of the pertinent mortgages.

Article 244. The following liens shall take priority over the vessel and shall attach to the proceeds of sale thereof in the order set forth in this Article:

1. Court costs incurred in the common interests of all maritime creditors.
2. Expenses, compensation and wages, for any assistance and salvage due for the last voyage.
3. Wages, remuneration and compensation owed to the master and crew for the last voyage.
- 4. Ship mortgages.**
5. Debts owed to the Panamanian government for rates and taxes.
6. Salaries and wages due to stevedores and dock workers hired directly by the owner, operator, or master of the vessel, for loading or discharge upon its last arrival at port.
7. Any compensation payable for damages due to fault or negligence.
8. Amounts due for general average contributions.
9. Debts incurred in procuring the vessels' necessaries and provisions.
10. Bottomry loans for the ship's hull, rigging, stores, equipment and outfit, if the contract was entered into and signed before the vessel left the port in which the obligations were undertaken, together with insurance premiums for the last six months.
11. Wages of pilots, watchmen, and the cost of the ship's maintenance and custody, rigging and stores, after its last voyage and entry into port.
12. Compensation payable to shippers and passengers for failure to deliver cargo or for damage thereto sustained on the last voyage and attributable to the master or crew.
13. The price obtained for the ship's last sale and any interest owed for the last two years.

WHAT YOU DON'T KNOW

***Can the ship mortgage be novated under
Panamanian law?***

NO

Can the ship mortgage secure more than one obligation?

Yes, no, maybe...

- **PRO –YES**

The mortgage deed may contain all provisions that the parties deem advisable, however must contain, in every case:

.....

2. The fixed or maximum principal amount secured or of the obligations secured.

*The mortgage shall also secure, in addition to the principal or obligations secured, all earned interest, court costs, collection expenses, amounts due as a result of fluctuations in currencies or payment methods, **and any other sums agreed upon in the mortgage agreement.***

- **PRO-NO**

Their argument is based on the fact that the law itself indicates the ship mortgage is a 'Civil Law' mortgage and that under the Civil Law doctrine one mortgage can only secure one principal obligation. They indicate that if a mortgage secures more than one obligation, then you technically have two first priority mortgages and in case of foreclosure it would be very difficult, if not impossible, for the courts to determine how much should be paid from the sale proceeds in respect of each of the loans.

OUR POSITION

**Given that there are no judicial precedents, extreme caution is advised!
Hence, if the parties agree to this, the following should be considered:**

- Both loans should be extended by the same lender or mortgagor.**
- The separate obligation should not be valid beyond the main loan.**

Article 271. Any foreclosure proceedings shall be extinguished together with the secured obligation.

***Is a Panama Ship Mortgage valid even if the owner
has yet to receive legal title of a vessel?***

Article 255. Only the owner or lawful representative thereof with sufficient power therefore may constitute a mortgage over a vessel.

Any owner who has secured the preliminary registration of a vessel whose title is pending registration at the Public Registry may mortgage the vessel. After the title is registered in the Public Registry, the interested party shall register the mortgage thereon at the Public Registry which shall thereafter be binding on third parties.

Article 7. Ownership of the vessel or any part thereof shall be transferred as prescribed by this Law.

This requirement shall be satisfied when the parties state in the contract that ownership immediately transfers to the buyer.

Upon execution of the contract, the seller shall be obliged to deliver to the buyer a certificate confirming the registration of the vessel at the Public Registry, as of the date of sale.

The title of a vessel and any encumbrance thereon subject to registration may only be submitted to the Public Registry of Panama for registration in accordance with the provisions of this Law.

***Is the Panama Ship Mortgage a unilateral act
or an agreement by both parties?***

***Alternatives to the registration of the usual
40-page mortgage instrument –
How to save a few bucks and make the Borrower happy
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A signed extract of the ship mortgage agreement on the basis of which the application for the preliminary registration was processed may be registered permanently through an attorney qualified to practice law in the Republic of Panama, which shall be submitted to the notary together with the original ship mortgage agreement, provided that it contains the clauses referred to in Article 260 of this Law as well as any other deemed necessary.

Said extract of the original agreement filed at the corresponding notary shall be recorded as a deed by the notary for subsequent registration at the Public Registry.

Q&A

¡Muchas gracias!

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Ávila & Co. - Attorneys at Law
Clearly your choice!

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