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New Proceedings to Enforce Naval Mortgages in Law 12 of January 23, 2009

Eduardo de Alba Panama Maritime IX-February 9, 2009

In Article 545-A of Law 12 of January 23, 2009, amending the existing Code of Maritime Procedure originally adopted by Law 8 of March 30, 1982, as first amended by Law 11 of May 23, 1986, a new procedure for the enforcement of naval mortgage liens has been adopted.

Previously, the applicable procedure to enforce naval mortgage liens was the same as that corresponding to the enforcement of any other maritime lien or privilege.

The procedure to enforce a naval mortgage lien is available in respect of the enforcement of a naval mortgage on a Panamanian registered vessel or on a vessel registered in another registry.

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The particulars of the new procedure are as follows:

- The mortgagee must petition for the attachment or arrest of the vessel and file together therewith the complaint asserting its claim and its mortgage lien.

- Together with its complaint, the mortgagee must present *prima facie* evidence of a) the vessel's registration with annotation of the naval mortgage lien to be enforced; and b) the amount secured that is outstanding and summary details thereof.

- The *prima facie* evidence of the vessel's registry and of the registered mortgage must not be older than 30 days prior to the date of filing of the complaint.

Particulars of the new procedure – cont'd.

- The complaint shall be brought *in rem* against the vessel as defendant party and it shall be understood served with process upon completion of the physical attachment of the vessel by the Marshall of the Panama Maritime Court as ordered by the corresponding Maritime Judge. Thereafter, the defendant shall have 30 days to answer.

- The procedure for attachment of the vessel to enforce the mortgage lien is essentially the same as existed prior to the amendments of Law 12 of 2009. The petition is based on the enforcement of the maritime lien or privilege and bond for US$1,000 for acting in good faith and an advance for US$2,500 to cover the initial Marshall's expenses of conservation and custody of the vessel must be consigned with the Court.

Particulars of the new procedure – cont'd.

- The attachment is perfected once the Marshall takes physical control of the vessel in Panamanian waters and of its navigation documents. If it is a Panama registered vessel, notation of the attachment is made at the Panama Public Registry.

- With the answer to the complaint, the defendant (shipowner on behalf of the mortgaged vessel demanded *in rem*) shall assert all its defenses and exceptions regardless of whether or not any of these should be decided before judgment.

- The Court will convene the parties to a hearing to be held within 30 days following admittance of the answer to the complaint, to resolve upon the enforcement petition. At such time, the parties to the proceedings will present to the Court all relevant evidence.

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Particulars of the new procedure – cont'd.

- If the complaint is not answered by the defendant (shipowner on behalf of the mortgage vessel), the judge will immediately order the interlocutory sale of the vessel without prejudice to the right of the defendant to appear in court to join the proceedings at the stage at which these might be. Interlocutory sale shall also be ordered by the judge if the attachment has lasted more than 30 days or when the Marshall's custody and maintenance expenses exceed the expected sale value of the vessel.

- The interlocutory judicial sale of the vessel, in case the defendant appears to be forfeiting the proceedings or the vessel has been attached for too long, is new also and it has been expressly introduced in the Code of Maritime Procedure in Law 12 of 2009.

- The Court will issue judgment and the common rules for ordinary proceedings will thereafter apply to notice of process and appeal before the new Maritime Appellate Court.

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Creditors' Concursus

•Before ordering the judicial sale of the vessel, whether or not after judgment or in interlocutory fashion, if it is a Panamanian registered vessel the judge will obtain a certification of mortgages and other liens, attachments and other real charges on the vessel's ownership. This will not be necessary if the vessel is of another registry.

•If the registry certification evidences the existence of liens that exceed the value of the vessel, or if this fact is notorious to the court from the pending proceedings involving the vessel of which the court is aware, it shall decree a creditors' concursus and give public notice of the judicial sale by publication during five consecutive days in a Panamanian daily. In the case of the judicial sale of a Panamanian vessel, the notice shall also be annotated for 10 days at the Public Registry.

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Creditors' Concursus – cont'd.

•Once 15 days have expired since the last publication without an opposition having been filed, or if the opposition has been resolved summarily, the judicial sale shall proceed and the product of the sale shall be deposited in an interest earning account in the National Bank of Panama, at the rates paid on 30 days fixed term deposits.

•If the creditors, who have timely asserted their liens in the creditors' concursus, cannot agree on the proper distribution of the proceeds of sale, the Court will appoint a trustee for the concursus.

Creditors' Concursus – cont'd.

- The trustee's role shall be the following:
  a. verify the asserted credits and liens and determine their priority.
  b. set a 20 day period for any other creditors who have instituted proceedings with claims against the sales proceeds to present their titles to justify their credits, their corresponding liens, and their respective priorities. A five day term shall be established also for creditors who have timely appeared in the concursus, to file any oppositions to the verifications of liens and priorities made by the trustee.
  c. set the date when the trustee shall present to the Court its proposal of verification of liens and priorities for approval.

- The Court shall then rule on the trustee's report.

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Creditors' Concursus – cont'd.

- The naval mortgage lien that has been subject to the special enforcement proceedings already discussed in this presentation shall follow the rules of the concursus for recognition and payment of the credit thus secured from the sales proceeds of the vessel, in accordance with the relevant priorities.

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Ranking of naval mortgage liens

•Under Article 247 of Law 55 of August 6, 2008, which entirely subrogated Book II of the 1917 Panama Code of Commerce, the naval mortgage lien ranks fourth in preference after the following: a) common creditors’ judicial expenses; b) aid and salvage for last voyage; c) compensation of master and crew for last voyage.

• Before this 2008 amendment, the naval mortgage lien ranked eighth in preference. It was preceded additionally by a) compensation of stevedores and wharf employees on last arrival; d) indemnities due to fault or negligence, and c) contributions to general average.

•In the case of vessels of other registries, under Article 557 of the Code of Maritime Procedure, as amended by Law 12 of 2009, the existence of maritime liens, including the mortgage, and their priorities should be determined in accordance with the laws of the country of registry.

Conclusions

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•The new procedure should be more expeditious.

•It allows for less delays for sale of the vessel of a non-responsive ship owner.

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End of presentation

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