

THE LAW
OF SHIP
MORTGAGES

SECOND EDITION

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AND
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informa law
from Routledge

THE LAW OF SHIP MORTGAGES

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To Alison, Catherine, Philip and Minnie

FOREWORD

When I appeared in the Admiralty Court as junior counsel, sometimes seeking to enforce a ship mortgage, at other times seeking to resist the enforcement of a ship mortgage and on yet other occasions seeking to assert the rights of other claimants *in rem* in opposition to those of the ship mortgagee, the only textbook on the subject, *The Law Relating to the Mortgage of Ships* by Constant was, as the authors of this book say, 'quite old' (see paragraph 3.1.1 footnote 5). When difficult issues arose concerning the rights and duties of ship mortgagees or the competing priorities of ship mortgagees and other claimants *in rem* or when a shipowning company went into liquidation and there appeared to be a conflict between the interests of the ship mortgagees in the Admiralty Court and the interest of unsecured claimants in other courts, typically the Companies Court in the Chancery Division, there was little guidance to be found, save in *Constant* (if one could locate a copy), in those passages in *Temperley's Merchant Shipping Acts*, which dealt with mortgages, in the relatively few cases on the subject and in an examination of how similar issues concerning mortgages of land were dealt with.

The authors of *The Law of Ship Mortgages*, whose firms are well known to the Admiralty Court, obviously considered, notwithstanding the publication of recent works dealing with the subject, that there is a place for a modern textbook seeking to deal in some detail with the many issues to which ship mortgages give rise. The questions covered are comprehensive and include the nature of a ship mortgage (as to which there is 'surprising uncertainty'; see paragraph 3.1.1), priorities between mortgagees and other secured claimants, the mortgagor's obligations, the duties of the mortgagee to third parties (as to which there is 'confusing case-law'; see paragraph 13.1.1), the effect of insolvency (and in particular of cross-border insolvency) on the rights of ship mortgagees and the relationship between the ship mortgagee and the insurance on the ship arranged by the mortgagor. These and other topics are covered in depth. Most helpfully, the law is not just stated but is analysed and a critical and experienced eye cast over it.

Ships traverse the globe and so disputes concerning the enforcement of ship mortgages may arise in one of many maritime jurisdictions. It is therefore desirable, where Admiralty courts in different jurisdictions have to tackle the same problem, that practitioners and courts are aware of how the particular problem has been approached not only in England but elsewhere. This is particularly so in matters concerning the arrest and sale of ships by the Admiralty Court. The authors have therefore made reference to the approach of the Admiralty courts in Hong Kong,

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Singapore, South Africa, Canada and Malta. One example is the question of the extent to which, if at all, a sale by the Admiralty Court can take place without appraisal by the Admiralty Marshal but in circumstances where the mortgagee has found a buyer and has provided the court with evidence as to the value of the vessel (see paragraphs 14.4.12–14.4.15 and the accompanying footnotes where there is a valuable account of the history of such sales and of the approach to the question of the Admiralty courts in the common law jurisdictions). I suspect that the recent decision of the English Admiralty Court dealing with this matter, for which I was responsible, did not meet with the authors' approval, but they have kindly not said so in terms.

So *The Law of Ship Mortgages* is entitled to a warm welcome. I have no doubt that its comprehensive, learned and critical discussion of the many issues to which ship mortgages give rise will be of great assistance to practitioners in the field and indeed to the judges who must decide cases concerning ship mortgages.

Mr Justice Teare
The Admiralty Judge
Royal Courts of Justice
April 2016

PREFACE AND ACKNOWLEDGEMENTS

Since the first edition of this book was published in 2001 there has been a global financial crisis and, partly as a result, a long and major downturn in many sectors of the shipping industry (still continuing in some sectors) and now in the offshore oil industry. The finance and shipping industries, and hence the ship finance industry, are very different from what they were in 2001. There have also been significant developments in the case law in a number of important areas over this period. Among these are: mortgagees' duties on enforcement (*The Tropical Reefer* and *Alpstream*); liabilities to charterers and cargo interests (*Anton Dürbeck v Den Norske Bank*); the conflict of laws (*Blue Sky* and *The WD Fairway*); marshalling (*Highbury v Zirfin*); court sales (*The Union Gold*) and cross-border insolvency, both within and outside the EU, including its impact on the Admiralty jurisdiction of the High Court (*The Sanko Mineral*). All this has led to some changes in emphasis and structure from the first edition. Further and more radical issues are potentially presented for the global shipping industry by the fall-out from the 'Panama papers' affair and the impact of the trend towards full transparency as regards all matters relating to taxation; such issues are outside the scope of this book.

Recent legal changes which are directly relevant to this book, however, and whose effect has not yet been fully felt include the Insurance Act 2015 and the recast EU Insolvency Regulation. No attempt has been made to anticipate the ultimate private law consequences of Brexit. There is renewed consideration of whether there should be a Protocol for ships (and possibly wider maritime assets) to the 2001 Cape Town Convention on International Interests in Mobile Equipment; if that were to come about it would necessitate an extensive re-write.

This book is not a comparative encyclopaedia of ship mortgage law (or enforcement) in different jurisdictions. Its focus is English law; no attempt is made to address consumer protection laws, however. The international nature of ship finance, the importance of the laws of other flag states and the impact of other laws on the rights of a mortgagee might lead to a charge of Anglo-centric parochialism. Whilst there is some reference to the laws of other common law jurisdictions – and to a minimal extent to the laws of civil law jurisdictions – such a charge might well be justified. The focus is on mortgages of British ships, although the chapters on enforcement and insolvency necessarily relate to issues where the flag of the ship is not relevant, or is only incidentally relevant. The authors are in any event put to shame by the venerable and distinguished example of Benjamin Constant, whose

classic work,¹ written nearly 100 years ago, had appendices addressing the position under selected foreign laws. Time did not permit us to draw in contributions from lawyers in other jurisdictions so as to follow his exemplary lead; the first edition benefited from the Canadian law expertise of Kevin McGuinness, some of which can still be seen in this new edition. Nor is this book a guide to ship finance. All the authors are practitioners rather than academics, so there are inevitably references to issues arising from practical experience – but not we think quite enough to make it appropriate to change the name to ‘The Law and Practice of Ship Mortgages’.

We have tried to concentrate on those aspects of the law that are specific or peculiar to ship mortgages. It is, however, necessary to some extent to address wider areas of law, such as those relating to marine insurance, charterparties, assignment, security generally and insolvency (two of the cases mentioned in the first paragraph above – *Alpstream* and *Blue Sky* – relate to mortgages of aircraft). These wider areas are covered more fully (and authoritatively) in other works and we have referred to them where addressing the issues to the extent we believe necessary; it is hoped that an appropriate balance has been struck. One of the more interesting (and tantalising) features of English law relating to ship mortgages is the extent to which it stands apart from the law relating to security more generally or, on the other hand, the extent to which it is subsumed. The answer is not always obvious – and differs according to context.

Most of this book has been a collaboration between Graeme Bowtle and David Osborne, with the latter producing first drafts of the majority of chapters. Charles Buss was primarily responsible for Chapter 14 and made substantial contributions to Chapters 11, 12 and 15.

We are most grateful to the following who kindly read and commented on drafts of all or some parts of the book and/or who have participated in valuable discussion: Elaine Ashplant, Frank Dunne, Andrew Hutcheon, Charles Smallwood, Mike Vernell, Andrew Ward, David Warder and Martin Watson; the authors of course remain responsible for all errors.

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Martin Karst providing excellent editorial assistance while studying for two LL.Ms simultaneously at the Universities of Swansea and Aarhus, respectively; his efforts were tireless.

There has been assistance from a number of partners of Watson Farley & Williams on references to the laws of jurisdictions other than England and Wales – in particular Al Yudes, Chris Belisle and John Kissane on aspects of US law.

Four Brazilian law firms have been most helpful in analysing the case relating to the FPSO *OSX3* addressed in Chapter 4, section 4.14: Basch & Rameh, Kincaid, Souza Cescon and Veirano.

The management of Watson Farley & Williams has been most supportive and indulgent, not least in giving David Osborne a break from client work, but for which this book would not have happened. Thanks are also due to a number of

1 Benjamin Constant, *The Law Relating to the Mortgage of Ships* (Syren & Shipping, Limited 1920).

partners who have carried an extra burden as a result. The Information and Research Department at the firm provided invaluable assistance and support throughout, with Vola Walker and Helena Marshall bearing the brunt. Document production was also heavily relied upon, with Clare Morgan and her team, along with Charlie Homewood, being ever-cheerful and efficient.

Others who have provided background assistance, support, wisdom or influence in one way or another (directly or obliquely – and not always knowingly) and to whom thanks are due are: Elaine Anderson, Alan Berg, Len Berkowitz, Andrea Bhamber, Nils Blythe, Liz Buchan, Orsolya Dobos, the late Dan Briden, Frank Dunne (again), Mark Dougherty, Mike Edwards, Alastair Farley, Jane Freeberg-Sarma, Michael Greville, the late Peter Hill, John Hopkins, Chloe Kenilworth, Mark Lawson, Meinwen Llewellyn, Chris Lowe, Kirsten Middleton, Richard Munden, Professor Edwin Peel, Douglas Potter, the late Ted Spencer, Sarah Roe, Andrew Savage, Natasha Seel, Enrique Sibauste, Professor Baris Soyer, Richard Stephens and Edmund Sweetman.

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Finally, we should like to thank Caroline Church, Jackie Day and Marie Louise Roberts for their help and guidance through the editorial process.

We have attempted to state the law as at 31 May 2016.

London EC2
Midsummer 2016

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