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First published 2014

Sixth edition

ISBN 978-1-83862-134-6

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Ship Finance

## 2019

**Contributing editor****Lawrence Rutkowski****Seward & Kissel LLP**

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Ship Finance*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Switzerland.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Lawrence Rutkowski of Seward & Kissel LLP, for his continued assistance with this volume.



London

June 2019

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This article was first published in July 2019

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# Sweden

Gudmund Bernitz

HFW

## DUE DILIGENCE

### Demonstrating title or legal ownership

- 1 How does one demonstrate title to or legal ownership of a vessel registered under the laws of your jurisdiction?

The Swedish Maritime Code separates vessels into boats and ships. Ships and certain boats used for commercial purposes must be registered. See question 11 for more details.

For a registered ship, an extract of the register can be obtained from the Swedish Register of Ships. This will evidence the title of the registered owner.

### Liens

- 2 How can one determine whether there are any liens recorded over a vessel?

Maritime liens do not need to be registered under Swedish law, so any such liens affecting a vessel would need to be determined through ad hoc enquiries.

The extract of the register will show any mortgages issued in respect of a ship.

- 3 How does one determine whether there are any security agreements, liens, charges or other encumbrances granted by a vessel owner or affiliated party who might be a borrower, guarantor or other credit party in connection with a vessel finance transaction?

See question 2 in respect of mortgage security over a ship. It may also be relevant to conduct searches of the registers of aircraft, real estate and intellectual property rights.

A Swedish company may create a company mortgage or floating charge over its tangible movable assets by registering it with the Swedish Companies Registration Office. A certificate listing such mortgages and floating charges may be obtained from the Swedish Companies Registration Office (subject to the payment of a fee).

### Public registry searches

- 4 Can one determine whether an obligor registered in your jurisdiction is duly organised and in good standing from a search of a public registry?

Certificates of Registration for Swedish companies may be obtained from the Swedish Companies Registration Office. Such a Certificate of Registration will, among other things, evidence that the company is registered with the Swedish Companies Registration Office.

- 5 Can the shareholders or other equity interest holders, directors and officers or other authorised signatories of an obligor organised in your jurisdiction be determined from a search of a public registry? If not, how are these parties customarily identified?

The identity of the members of the board of directors, authorised signatories and auditors can be found on the Certificate of Registration of a Swedish company. The shareholders will not be included on the certificate, but the company (or Sweden's central securities depository, Euroclear Sweden, if the company's shares are registered there) must maintain a share register open to public inspection, which will include the identity and holdings of the company's members.

### Debt obligation

- 6 What corporate or other entity action is necessary for an obligor to enter into or guarantee a debt obligation? When is action by the board of directors or other governing body required? Must shareholders approve a guarantee?

The signing authority described in the Certificate of Registration will serve as prima facie evidence of who is authorised to bind the obligor. In addition, financiers will often require copies of the articles of association of the relevant obligor (to ascertain that any restrictions or specific procedures are complied with) as well as evidence of the board's approval.

### Obligations of foreign lenders

- 7 Must foreign lenders qualify to do business in your jurisdiction to extend credit to a borrower organised in your jurisdiction? Will foreign creditors be deemed resident as a consequence of making a loan or other extension of credit to an obligor within your jurisdiction?

Subject to general principles, such as EU or UN sanctions and antiterrorism legislation, Sweden places no restriction on either receiving credit from, or the granting of security to, a foreign lender. A foreign creditor will not be deemed resident in Sweden only as a result of lending to a Swedish entity.

## REPAYMENT

### Central bank and regulatory approval

- 8 Is central bank or other regulatory approval required for repayment of a loan in foreign currency?

There are no specific regulatory approvals required for the repayment of a foreign currency loan. However, the relevant party will need to comply with any sanctions legislation that may be applicable to

the relevant currency as well as complying generally with legislation aimed at preventing money laundering and terrorism. There will also be reporting obligations for certain payments.

### Usury laws

- 9 | Do usury laws limit the interest payable to a lender in respect of a vessel financing?

Usury is defined in the Contracts Act (1915:218) as taking advantage of another person's misfortune, lack of judgement or dependence for personal gains, when these gains are clearly disproportionate to the services rendered. If found to be usurious, the financing transaction can be declared void.

### Withholding taxes

- 10 | Are withholding taxes payable on principal or interest payments to non-resident lenders?

Payments of principal to non-resident lenders are not subject to Swedish withholding tax. Further, there are no such taxes on interest or service fees paid to non-resident lenders.

## REGISTRATION OF VESSELS

### Eligibility for registration

- 11 | What vessels are eligible for registration under the flag of your country? Are offshore drilling rigs or mobile offshore drilling units considered vessels under the laws of your jurisdiction? What is the effect of registration?

Under the Swedish Maritime Code, all vessels deemed Swedish ships must be registered on the Swedish Ship Register. With effect from 1 February 2018, a ship is any vessel with a length exceeding 24 metres (prior to this date, a vessel with a length of at least 12 metres and a width of at least 4 metres constituted a ship), and a ship is deemed Swedish if more than 50 per cent of the ship is owned by Swedish citizens or Swedish bodies corporate. Sweden's membership of the European Union (EU) provides an exception to this rule: a Swedish ship may be registered in another EU state if the ship carries out commercial activity in that state and the operation and management of the ship is run from that same state, or if the ship is usually physically present in another EU state and the majority of its shares are owned by citizens or residents of the same state. Vessels from other EU states may be registered in Sweden under the same conditions.

The Ship Register may register ships that are not otherwise registrable where the owner is domiciled in Sweden or if the planned use of the ship is under substantial Swedish influence.

Ships under construction may also be registered, but this is not compulsory. There are no age restrictions on ships registered with the Ship Register.

Ships cannot be registered in Sweden if they are already registered in another country, so proof of deregistration from the previous flag state or a statement that the ship has not previously been registered will be required by the Ship Register.

As set out in question 1, registration will provide prima facie evidence of the registered owner's title to the ship.

Different rules apply to boats and their registration.

- 12 | Who may register a vessel in your jurisdiction?

See question 11.

### Registry for international shipping operations

- 13 | Is there an alternate registry for international shipping operations?

There is no international ship register in Sweden.

## SHIP MORTGAGES AND OTHER LIENS OVER VESSELS

### Types of ship mortgage

- 14 | What types of ship mortgages exist and what obligations may a ship mortgage secure? Can contingent obligations, including swap obligations, be secured? Are there standardised forms?

See questions 15 and 16.

### Required form

- 15 | Give details of any required form for ship mortgages in your jurisdiction.

To create a ship mortgage, the registered owner must apply to the Ship Register pursuant to Chapter 3 of the Swedish Maritime Code. The registrar will then inscribe the mortgage on the register and issue a short-form deed of mortgage, which is a bearer instrument.

It is possible for more than one mortgage to be created in respect of a ship. A ship mortgage will have priority in relation to other ship mortgages over the same ship in the order the mortgages have been applied for. Ship mortgages applied for on the same day will have equal priority.

A ship mortgage will secure a specific amount, which can be expressed in Swedish or foreign currency. Stamp duty of 0.4 per cent on the face amount of the mortgage is payable on its creation.

In order to create a mortgage security in favour of a creditor, the shipowner needs to pledge the deed of mortgage to the creditor (and surrender the original deed of mortgage to the creditor). The creditor will then need to retain possession of the physical deed of mortgage for the duration of the security period.

The Ship Register can add a notification on the register identifying who keeps possession of the deed of mortgage.

### Registration of mortgages

- 16 | Who maintains the register of mortgages? What information does it contain and where are such filings to be made? What is the effect of registration?

The register of ship mortgages is kept by the Ship Register in Norrköping. The register will include information on the existing number of mortgages, the amounts secured by them and the priority between them.

The registration of the mortgage will constitute the creation of it and the rights of a mortgagee under the Swedish Maritime Code (which includes an interest in the vessel's insurances) will be conferred on the bearer of the deed of mortgage.

It is common practice that the shipowner and the mortgagor will enter into a pledge agreement that will include additional rights for the mortgagee and regulate the return of the deed of mortgage to the shipowner at the end of the security period.

- 17 | Must the total amount of the mortgage be stated therein? Must the mortgage contain a maturity date? Must the underlying debt instrument be filed with or attached to the recorded mortgage?

The mortgage will state the amount secured by it. It will not have a maturity date. It is not possible to file the underlying debt instrument.

**18 | Can a mortgage be registered in the name of an agent or trustee for the benefit of multiple lenders?**

The mortgage deed can be held by a security agent for the benefit of multiple lenders.

The common law concept of a trust is not recognised under Swedish law, but under Swedish law loan documentation security can be held for other parties under a contractual arrangement.

**Filings on transfer**

**19 | If the mortgagee is an agent or trustee for a lending syndicate, must any filings be made upon transfer of a portion of the underlying debt among existing lenders or to a new lender?**

No.

**20 | If the mortgagee transfers its interest to a new lender, agent or trustee what filings are required? Is the mortgagor's consent required?**

The mortgagor's consent is not required for a transfer of the mortgage by the mortgagee, unless contractually agreed between the parties.

The outgoing mortgagee transfers its interest by handing over possession of the original deed of mortgage to the new mortgagee. The Ship Register should be notified of the identity of the new mortgagee so that any notification on the register can be updated accordingly.

**Maritime liens**

**21 | What other maritime liens over vessels are recognised in your jurisdiction? Do these claims give rise to a right to arrest a vessel? In what circumstances may associated ships be arrested?**

The Swedish Maritime Code recognises the following main categories of maritime liens (listed below in order of priority):

- master and crew wages;
- port, canal and pilotage dues;
- personal injury-related claims caused in direct connection with the operation of the vessel;
- tort claims for property damage caused in direct connection with the operation of the vessel; and
- salvage remuneration, compensation for removal or wreck and contribution in general average.

Certain exceptions apply to the order of priority.

The International Convention Relating to the Arrest of Sea-Going Ships 1952 is incorporated into Swedish law, including the list of claims that give a right of arrest.

An associated ship may be arrested under Swedish law if (i) the two vessels had the same owner at the time the claim arose, or (ii) the associated vessel is owned by another person against whom the claim may otherwise have been directed. This does not apply to disputes relating to vessel ownership, the possession of a vessel, the earnings of a ship-ping venture or a vessel mortgage.

**22 | What maritime liens rank higher than a mortgage lien?**

The maritime liens (as listed in question 21) will have priority to any other claims. These are followed by a builder's or repairer's possessory lien over the vessel, with the mortgage ranking thereafter.

**Non-mortgage liens**

**23 | May non-mortgage liens be recorded over a vessel?**

The Swedish Ship Register will only record ownership and mortgage rights.

**'Foreign' flag vessels**

**24 | Will mortgages on 'foreign' flag vessels be recognised in your jurisdiction? If so, do they share the same priority as those on vessels registered under the laws of your jurisdiction?**

Under the Swedish Maritime Code, a mortgage granted over a foreign vessel will be recognised in Sweden provided that:

- the mortgage has been granted and registered in accordance with the law of the state of registry;
- the mortgage register (and any relevant instrument) in the state of registry is public; and
- the mortgage register (and any relevant instrument) in the state of registry specify the name and address of the person in whose favour the mortgage has been effected or the right has been effected in favour of the holder of a deed of mortgage or corresponding document as well as the amount secured and the date and other particulars, which, according to the law of the state of registry, determine the rank in relation to other such rights.

Such mortgages will rank after maritime liens and certain possessory liens in the same way as Swedish mortgages.

**Enforcement of mortgages**

**25 | What is the procedure for enforcing a mortgage in your jurisdiction by way of foreclosure? Are interlocutory sales permitted? How long does a judicial sale take? What are the associated court costs and how are they calculated?**

The rules for arresting a vessel in Sweden are the same for foreign- and Swedish-flagged ships. There are, however, exceptions: (i) where the applicant has its principal place of business in Sweden and is seeking to arrest a Swedish-flagged ship different procedural rules apply, and (ii) certain foreign and Swedish vessels operated by the state cannot be arrested.

The arrest of a foreign registered vessel is governed by the Arrest Convention of 1952, as incorporated into Swedish law, and is subject to the jurisdiction of the maritime courts. The arrest of Swedish and unregistered vessels is governed by the procedural code and handled by the ordinary courts.

The process of arranging for a judicial sale based on the claimant's rights under a mortgage is initiated by the claimant applying to the Enforcement Agency and submitting relevant evidence to them (including the mortgage). The sale will always take place by way of a public auction and it should take place within four months of the application being made (subject to certain exceptions). The Enforcement Agency will charge an ad valorem fee.

**Sale by mortgagee**

**26 | May a vessel be sold privately by a mortgagee? Will the sale discharge liens over the vessel?**

A judicial sale will always be executed by way of a public auction.

However, the pledge agreement (see question 15) or other finance documents will usually contain covenants allowing for the vessel to be sold privately at the direction of the mortgagee in the event of default by the borrower. The private sale will not, however, discharge liens over the ship unless they are settled with the proceeds of the sale.

### Default under mortgage

- 27 | Will the courts of your jurisdiction enforce mortgage provisions stipulating the appointment of a receiver on default under the mortgage?

Under Swedish law, an official receiver would be appointed by the court. The recognition of actions by a receiver appointed under a foreign law mortgage would depend on, among other things, whether insolvency proceedings have been commenced against the shipowning company in the courts of Sweden or an EU member state.

### Limitations on rights of self-help

- 28 | What are the limitations on rights of self-help by a mortgagee?

This will vary depending on the terms of the financing documentation entered into by the mortgagor and the mortgagee.

### Duties to owner or third-party creditors

- 29 | What duties does a mortgagee owe to an owner or third-party creditors?

The mortgagee will need to have regard to its contractual obligations to the owner.

## COLLATERAL

### Finance leases

- 30 | May finance leases or other charters be recorded over vessels flagged under the laws of your jurisdiction?

Only ship mortgages can be registered against a Swedish registered ship (see question 15). Therefore, a finance lease or charter cannot be separately registered unless obligations under those documents are secured by a mortgage against the ship, which is generally unlikely.

- 31 | May finance leases be recharacterised by a court as a financing contract? If so, is there any procedure for protecting the lessor's interest against third-party creditors?

A Swedish court will consider the substance of the transaction; however, it is unlikely that a lease will be recharacterised as a financing contract if the lessor is the registered owner.

### Security interests

- 32 | How is a security interest created over earnings of a vessel, charter contracts, insurances, etc? How are these security interests perfected?

Security over receivables under charter contracts, etc, can be created by way of a pledge, and other rights can be transferred by means of a security assignment. Both forms of security are created by the relevant party and the lender entering into an agreement, and are perfected by the relevant debtor being notified of such agreement.

A ship mortgage will confer certain rights over any proceeds of the ship's insurances.

- 33 | Must security interests against non-vessel collateral be registered to be enforceable? If so, where are such filings made?

The two most common types of non-vessel related collateral are security over the shares in the borrower and security over the borrower's bank account.

Security over the shares in a Swedish limited company is created by way of a pledge. Assuming that the borrower is a private company, the security will be perfected by the lender taking possession of the share certificates or, where no share certificates have been issued, notifying the board of directors. A note of the pledge should also be made in the company's register of members.

Security over cash deposits is created by way of a pledge agreement. That security will be perfected by the blocking of the account.

- 34 | How is a security interest over a deposit account established? How is a security interest perfected?

See question 33.

- 35 | How are security interests in non-vessel collateral enforced?

To enforce security interests in non-vessel collateral, the lender would need to acquire an enforcement order. Such orders may be obtained via the courts or through arbitration, and a simplified procedure via the Enforcement Agency is available for undisputed claims. Once an enforcement order is obtained, the lender can seek enforcement through the Enforcement Agency, which will arrange for the borrower's assets to be seized.

### Share pledges

- 36 | How are share pledges for vessel financings established? Are share pledges or share charges common in your jurisdiction?

Share pledges are common in Sweden. See question 33 for more detail.

- 37 | Is there a risk that a pledgee, before or after exercise of the share pledge, may be exposed to debts or other liabilities of the pledged company?

As a general principle, Swedish law will recognise the corporate veil principle (whereby the company will be treated as a completely separate legal person from its shareholders). However, in a few cases the Swedish courts have held a parent company liable for the liability of its subsidiary where that subsidiary has, among other things, been fully controlled by the parent.

There is no specific legislation dealing with shadow directorship, but it may be possible for a person who has not been formally appointed as a director to incur director's liability if that person in effect carries out the role of a director.

## TAX CONSIDERATIONS FOR VESSEL OWNERS

### Domestic taxation

- 38 | Is the income earned by the owners of vessels registered in your jurisdiction subject to domestic taxation? At what rate?

Except as set out in question 39, Swedish vessel owners are subject to domestic taxation in the usual way.

## Tonnage tax

39 | Is there an optional tonnage tax exempting vessel owners from tax on income?

Sweden has recently introduced a voluntary tonnage tax system where the tax payable is based on the relevant vessel's net tonnage as opposed to the profit earned.

To qualify for tonnage tax the following criteria need to be met:

- the company must be engaged in the transport of goods or passengers with qualified vessels (a qualified vessel having at least 100 GT);
- the company must have its strategic and financial management based in Sweden;
- the qualified vessels must primarily be used in international trade or foreign cabotage; and
- a minimum number of the vessels in the company's fleet must be registered in an EU or EEA flag state.

## Tax incentives

40 | What special tax incentives are available to shipowners registering vessels in your jurisdiction?

See question 39.

## Other tax provisions

41 | Are there any other noteworthy tax provisions specifically applicable to shipping, shipping income or ship finance?

The Swedish government offers a crew subsidy to employers. For an operator to qualify for the subsidy, the crew needs to work on Swedish-flagged vessels that are subject to international competition.

## INSOLVENCY AND RESTRUCTURING

### General scheme of reorganisation or insolvency administration

42 | Is there a general scheme of reorganisation or insolvency administration in your jurisdiction?

The Business Reorganisation Act (1996:764) allows for the restructuring of corporates that are facing financial difficulty but have a potentially viable business.

The application for restructuring may be filed by the debtor or, if the debtor agrees to it, a creditor. The application is filed with the court and will need to set out, among other things, a description of the debtor's financial difficulties and its prospects of achieving a successful reorganisation. The court will order a restructuring and appoint an administrator only if it is satisfied that the debtor is unable to pay its debts (or will be unable to pay them in the near future) and that there are reasonable prospects for a reorganisation to succeed.

When a restructuring has been ordered by the court, the debtor will be protected from the commencement of insolvency and enforcement proceedings (with certain exceptions) during the restructuring period. The court will appoint an administrator who will examine the debtor's affairs, prepare a restructuring plan and negotiate with the creditors. The debtor is obliged to cooperate with the administrator during the restructuring period.

During the restructuring period, the debtor can apply for a public composition to settle its debts (up to a 75 per cent reduction in unsecured debt). For the court to grant its approval the relevant threshold of unsecured creditors voting in favour of the composition must be met. If it is proposed that the unsecured creditors will receive more than 50 per cent of their outstanding debt, then at least 60 per cent of them (in number and by value) must vote in favour of the proposal. If it is proposed that the unsecured creditors will receive less than 50 per cent

of their outstanding debt, then at least 75 per cent of them (in number and by value) must vote in favour.

## Foreign court rulings

43 | Will the courts of your jurisdiction respect the rulings of a foreign court presiding over reorganisation or liquidation proceedings?

As a member of the European Union, Regulation 1346/2000 applies in Sweden. Consequently, other EU insolvency proceedings are automatically accepted by the Swedish courts. Insolvency proceedings outside the EU are also generally accepted.

## Model Law on Cross-Border Insolvency

44 | Has your jurisdiction adopted the Model Law on Cross-Border Insolvency promulgated by the United Nations Commission on International Trade Law?

Sweden has not adopted the UNCITRAL Model Law.

## Order of priority

45 | What is the order of priority among creditors? In what circumstances will creditors be required to disgorge payments from an insolvent company?

In brief, under the Preferential Claims Act (1970:979) the following order of priority generally applies in a corporate insolvency:

- debt secured by a mortgage and maritime claims;
- expenses and remuneration of the receiver;
- expenses and remuneration of an administrator;
- audit costs;
- debt in relation to which the Enforcement Authority has secured assets before the insolvency;
- debts secured by a floating charge;
- employee wages;
- unsecured debt; and
- members' equity.

For claims against a vessel see questions 21 and 22.

Certain transactions can be set aside and property can be recovered under the Insolvency Act (1987:672). Under the general recovery rule, transactions can be set aside and property recovered if:

- a creditor has been preferred;
- property has been put beyond the reach of creditors; or the debtor's debts have increased;
- the recipient knew or ought to have known of the debtor's insolvency and the circumstances that made the transaction improper; and
- the transaction took place not more than five years before the filing of the insolvency petition.

In addition, there are specific recovery rules (with shorter hardening periods) relating to, among other things, the payment of debt and the granting of security.

## Security provision by vessel owner

46 | May a vessel owner provide security on behalf of other related or unrelated companies? What are the requirements for it to be enforceable?

A Swedish company can grant security for the obligations of a third party. However, the company's actions must be in the company's own best interest. Further, transactions that are in breach of the Swedish financial assistance rules may be declared void.

### Law of fraudulent transfer

- 47 | Is there a law of fraudulent transfer that permits a third-party creditor to challenge, for example, the grant of a mortgage because of insolvency of the mortgagor or insufficient consideration received by the mortgagor in exchange for the grant of the mortgage?

See question 45.

### Petitions by creditors

- 48 | How may a creditor petition the courts of your jurisdiction to declare a debtor bankrupt or compel liquidation of an insolvent obligor?

A creditor can file a petition for insolvency to the Swedish court under the Insolvency Act (1987:672). The applicant needs to provide evidence that the debtor is insolvent. Under Swedish law, insolvency means that the debtor is unable to pay its debts, and that this inability is not merely temporary.

There are no restrictions on the evidence that the applicant creditor can submit to prove this, but common evidence presented includes attempts by the Enforcement Authority to enforce an execution (see question 25 in respect of ship mortgages) within six months before the application that revealed that the debtor did not have sufficient assets to cover the claim.

Once the court has declared a company insolvent a receiver will be appointed to liquidate the company and distribute its assets.

### Model Netting Act

- 49 | Has your jurisdiction adopted the Model Netting Act of the International Swaps and Derivatives Association (ISDA)?  
If not, may a swap provider exercise its close-out netting rights under an ISDA master agreement despite an obligor's insolvency?

Sweden has adopted both domestic and EU netting legislation that is recognised by ISDA, and close-out netting rights under an ISDA master agreement are generally enforceable under Swedish law.

## UPDATE AND TRENDS

### Emerging trends

- 50 | Are there any emerging trends or hot topics that may affect shipping finance law and regulation in your jurisdiction in the foreseeable future?

The Swedish fleet has been growing over the past year and it is anticipated that it will grow further during 2019.



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