

Shipping Finance in the Marshall Islands: Overview

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A Q&A guide to shipping finance in the Marshall Islands.

This Q&A provides a high level overview of key practical issues, including: applicable conventions and legislation; financing options; transfer of title; applicable forms of security; registration requirements for ships, ship mortgages, and other forms of security; transfer of security; enforcement of security; deletions of ships from the ship register and discharge of ship mortgages; reform and recent developments.

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Contributor Profiles

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- Hoyoon Nam, Partner

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Conventions and Legislation

1. To which major maritime treaties is your jurisdiction a party?

The Republic of the Marshall Islands is an active member of the United Nations' International Maritime Organization (IMO), maintaining a permanent representative in London, and is party to all of the major safety and environmental protection conventions. The Republic of the Marshall Islands is also an active member of the International Labour Organization, and has ratified the Maritime Labour Convention 2006 (MLC, 2006) and the Seafarers' Identity Documents Convention 2003 (C 185).

While the Republic of the Marshall Islands is a party to the International Convention on Maritime Liens and Mortgages 1993, it is not a party to the Brussels Convention Relating to the Arrest of Seagoing Ships 1952 or the International Convention on Arrest of Ships 1999, which is not yet in force.

2. What is the principal domestic legislation applicable to ship finance?

The principal legislation relevant to ship finance in the Republic of the Marshall Islands is the Maritime Act 1990, Title 47 of the Marshall Islands Revised Code (Maritime Act).

Financing Options

3. What are the main options available for financing the purchase of a ship? How are ship purchases typically financed?

Financing the purchase of a Marshall Islands ship is most typically done using customary vessel financing methods, such as debt financing, equity financing and sale leaseback financings, or a combination of them.

Debt Financing

The most common debt structure is a secured loan agreement or secured notes with a single bank or lending institution or a syndicate of lenders, where the owner grants a preferred mortgage over the ship as collateral for the loan.

Equity Financing

Some owners opt to acquire vessels using equity financing, in which case no mortgage is granted over the ship. The owners will:

- Use cash on hand.
- Raise cash through:
 - accessing capital markets in a public offering (such as a special purpose acquisition company (SPAC) structure);
 - a private placement; or
 - using joint venture partners or a private equity sponsor.

Sale Leaseback Financing

Some owners acquire Marshall Islands vessels through sale leaseback financing, where the owner sells the ship to a company (typically a leasing company) that charters the vessel back to the owner, and has a mandatory purchase requirement at the end of the term. The Marshall Islands registry amended the Maritime Act in 2013 to allow for the recording of financing leases, to be treated similarly to a preferred mortgage, with the documented owner of the ship (for example, the financing provider) being deemed to be a mortgagee. This can be important where a sale-leaseback transaction is re-characterised in an insolvency proceeding as a disguised financing, as without a recorded finance lease the documented owner may no longer have title to, or a security interest in, the ship.

4. What are the issues arising in relation to the various financing options?

Because the Maritime Act is derived from and incorporates United States common law, issues can sometimes arise in financings for Marshall Islands vessels with non-US based financiers and their counsel because their local laws differ from that of the US. For example, many US practitioners take the position that proof of the indebtedness being secured must be annexed to the mortgage instrument. Because a preferred mortgage must be recorded to perfect the preferred mortgage lien in the ship, the mortgage and anything exhibited becomes part of the public record. This occasionally causes concerns that competitors may gain access to sensitive information, such as pricing and other negotiated terms.

Another difference between mortgages recorded under the Maritime Act and those recorded in other jurisdictions is that Marshall Islands mortgages are not "account current" mortgages. They can therefore secure the obligations agreed or committed to at the time of the mortgage filing, but a new future agreement or commitment cannot be secured without amending the mortgage. For example, a mortgage will need amending to secure an upsize in a facility that is not already committed. This is also relevant where an International Swaps and Derivatives Association (ISDA) Master Agreement is entered into and the parties would like the mortgage to secure a borrower's liabilities arising under an interest rate hedging transaction with the mortgagee. Because an ISDA Master Agreement provides the framework for hedging transactions but does not create on its own an obligation between the counterparties until there is a transaction under it, there is no indebtedness that can be secured by the mortgage. Once a transaction is entered into under the Master Agreement, the mortgage, assuming it was already entered into and filed, can be amended to secure those swap liabilities.

Finally, while some jurisdictions allow a ship mortgage to be held by an agent, preferred mortgages created under the Maritime Act are contingent grants of title. Historically, this has been interpreted to mean that they cannot be held by a mere agent when granted for the benefit of others, but must be held by a trustee. While this interpretation of the Maritime Act is not universal, it is as a result customary for a trust relationship to be created between the trustee and the other finance parties, typically in the loan agreement, but occasionally in a separate trust agreement where the laws governing the loan agreement do not recognise a trust.

Transfer of Title

5. How is legal title to a ship transferred?

Legal title in a ship is transferred by delivering and accepting a title document, for example:

- A builder's certificate in the case of a newbuild.
- A bill of sale in the case of a second-hand ship.

For a shipowner to document its title in a Marshall Islands ship, the title document, together with the other documentation requirements outlined in the Marshall Islands Vessel Registration and Instrument Recording handbook (MI-100), must be submitted to a Marshall Islands Registry office, which are located worldwide.

To transfer title in a ship already registered under the Marshall Islands flag, the title transfer document must be recorded with the Marshall Islands Maritime Administrator. To be accepted for recording, the title transfer document must be acknowledged or submitted with any other proof of execution required by Marshall Islands regulations, for example, acknowledgement before a notary public. The Marshall Islands registry does not require the bill of sale to be authenticated by apostille, or legalised. The registry modified its requirements for the recording and acknowledgment of instruments (including bills of sale) as a consequence of COVID-19, for example, acknowledgements can be completed via a video conference with a Marshall Islands special agent. These temporary modifications remain in place as at the law-stated date of this Q&A.

There is no prescribed form of sales contract for a ship to be registered in the Marshall Islands. Sales contracts for second hand vessels are often negotiated using the Norwegian or Nippon Saleform. Newbuild contracts generally follow a similar form "construction contract". As with most jurisdictions, not all liens arising against a ship are recordable and a purchaser will need to search the public record, for example, to obtain:

- A certificate of ownership and encumbrance from the registry for a Marshall Islands flagged ship.
- Customary representations and warranties from the seller that the ship is free from charters, encumbrances, mortgages and maritime liens or any other debts.

Security

Mortgages

6. What types of ship mortgage are available? What requirements must be met to ensure a ship mortgage is valid?

Unlike jurisdictions that have a prescribed statutory form of mortgage (which is publicly filed) and a collateral deed of covenant (which is not usually filed) the Marshall Islands follows the US model of mortgage registration. This entails a single instrument being filed that contains the information required by statute to be recorded as a preferred mortgage, as well as sections typically covering representations and undertakings of the shipowner, events of default, and importantly, what contractual remedies are available.

To be valid, a mortgage must contain, when made:

- The name of the vessel and the names of the parties to it.
- The interest in the vessel being mortgaged (which effectively must be 100%).
- The amount or amounts of the direct and contingent obligations that are or may become secured.

The requirements for recording a preferred mortgage are relatively straightforward and include the:

- Original preferred mortgage signed by or on behalf of the mortgagor, and duly acknowledged or notarised (four originals).
- Original memorandum of particulars signed by or on behalf of the mortgagor (one original).
- Original or certified copy of the power of attorney or corporate resolutions for the mortgagor.
- Copy of consent from the mortgagee (only required if a prior mortgage is currently recorded).
- Payment of recording fees (see [Question 12](#) for more information).

As mentioned in [Question 4](#), while it is not a universally held position, most practitioners will annex to the mortgage a copy of the loan agreement or other document evidencing the indebtedness being secured.

A preferred mortgage can secure most indebtedness that is financial in nature, for example, term or revolving loans and hedging obligations.

7. Will a registered mortgage take priority over other mortgages and charges over the ship?

A preferred mortgage lien has priority over all claims against the vessel, except for:

- Maritime liens for damages arising out of tort.
- Maritime liens for fees and expenses due to the registry.
- Maritime liens for crew wages, general average and for salvage (including contract salvage).
- Expenses and fees allowed and costs taxed by the court.

(Section 318, Maritime Act.)

A preferred mortgage will also be subordinate to certain liens arising prior in time to the recording of the preferred mortgage, for example, maritime liens arising under a charter, unless these liens are subordinated to the lien of the preferred mortgage.

Only mortgage liens and finance charter liens are recordable in the Marshall Islands.

Other Forms of Security

8. What forms of security, other than a mortgage, can be taken over a ship?

While only mortgage liens and finance charter liens are recordable in the Marshall Islands, there is an expansive category of liens that can be described as a claim on a ship arising in respect of:

- Service done to it.
- Injury caused by its instrumentality.
- Credit given on its security.
- Otherwise arising out of the incidents of maritime navigation.

These maritime liens can arise statutorily, for example, under section 319 of the Maritime Act, which grants a lien to anyone who furnishes repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any foreign or domestic vessel on the order of the owner or person authorised by the owner. What constitutes a "necessary" furnished to a ship is a broad category which is a fact-specific and highly litigated matter.

A holder of a maritime lien has a right to seek the arrest of a ship.

"Sister ship" or associated ship arrests are not valid to commence an *in rem* arrest action, but maritime attachment is available under certain procedural rules where a claimant has a maritime claim (not necessarily a lien claim) and the claimant can attach property from the defendant, provided that the defendant is not found within the Marshall Islands where the property is located for jurisdictional and service of process purposes. Some parties may try to pierce the corporate veil in arrest proceedings to reach associated vessels.

Transaction Security

9. What forms of transaction security can be taken in a ship finance transaction?

In addition to a preferred mortgage granted over a Marshall Island flagged ship, other typical collateral for Marshall Islands ship finance transactions include:

- A pledge of the equity interests of the shipowner.
- An assignment of the earnings, insurances and requisition compensation of the ship.
- Security in any long-term charters.
- Pledges of bank accounts, for example, earnings, drydock reserve accounts, and so on.

Other than the mortgage, none of the agreements creating the security need to be governed by Marshall Islands law and people prefer to select the laws of another jurisdiction due to familiarity or the ability to ensure perfection, since the Marshall Islands does not have a central register to perfect the above types of security.

Registration Requirements

10. What is the procedure for registration of a ship?

The procedures and the relevant application forms to register a ship under the Marshall Islands flag are available on the Marshall Islands Maritime Administrator's website (www.register-iri.com). In summary, any sea-going vessel engaged in foreign trade, wherever built, owned by a citizen or national of the Republic, or a foreign maritime entity qualified in the Republic can be registered, provided that the ship is not over 20 years old without first obtaining a discretionary waiver for documentation from the Maritime Administrator.

In addition, the shipowner must submit a written application and furnish proof:

- As to its ownership of the ship.
- That any foreign marine document for the ship has been surrendered with the consent of the mortgagee or has been legally cancelled or otherwise terminated.
- That the ship is in a seaworthy condition.
- That the owner has paid the prescribed initial registration fee and tonnage tax.
- That the markings of name, official number, home port and draft have actually been made.
- Of third party liability insurance including, but not limited to, coverage for pollution liability risks and shipwreck removal.
- Of the shipowners' repatriation obligations under Section 843, Maritime Act, Regulation 7.52, Maritime Regulations and the obligations of the ILO Standards, which include coverage to repatriate seafarers to their own country.

11. How are registered vessel interests certified?

When the documentation requirements are complied with, the Maritime Administrator will issue a provisional certificate of registry, entitling the documented ship to the privileges of a Marshall Islands flagged vessel engaged in foreign trade. There are additional requirements to obtain a permanent certificate of registry, but according to the Maritime Administrator as published in the MI-100, an unexpired provisional certificate:

- Has the same validity and legal standing as a permanent certificate.
- Is prima facie evidence that the vessel to which it has been issued is duly registered.

In addition, any third party can obtain from the Maritime Administrator a certificate of ownership and encumbrance, evidencing the documented owner of a Marshall Islands registered ship as well as any mortgages, liens or other encumbrances of record.

12. What is the procedure for registration of ship mortgages?

Mortgages and other instruments are recorded with the Maritime Administrator through one of the worldwide offices of International Registries Inc (IRI) by filing:

- Four original mortgages signed by a representative of the shipowner whose signature is duly acknowledged by a notary public or special agent.

- Evidence of the signer's authority to execute the mortgage.
- A memorandum of particulars (which is a summary of the information that that IRI maintains in its records for recorded instruments).
- The relevant filing fee. The fee is a flat fee per instrument and is not calculated on the number of pages submitted for filing or as a percentage of the amount of the mortgage.

The mortgage must contain the:

- Name and official number of the ship.
- Name of the shipowner (mortgagor) and the person(s) to whom the mortgage is granted (mortgagee).
- A statement that the mortgage is granted on the whole of the vessel.
- Details of the amount or amounts of the direct and/or contingent obligations that are or may become secured by the mortgage.
- Instrument that evidences the direct and/or contingent obligations secured by the mortgage, including the date and the parties.
- In certain limited circumstances, a date of maturity.

A provisionally registered Marshall Islands flagged ship has the same entitlements as that of a permanently registered ship, so a mortgage can also be granted over the ship without a diminution of priority or perfection.

The mortgagee does not need to execute a mortgage, but they must execute instruments that amend a recorded mortgage, as well as certain other documents. Generally, there is no limitation on who can be a mortgagee, however, many practitioners take the position that a mortgage held on behalf of others must be held by a trustee of the beneficiaries rather than a mere agent.

13. What other forms of security over a ship can be registered?

Only mortgage instruments and financing charters can be registered in the Marshall Islands. However, ships that are temporarily registered with the Marshall Islands by its bareboat charterer may record notice of a mortgage granted over the ship and recorded by the owner with the ship's underlying flag state.

14. What is the effect of registering those other forms of security?

No other security can be recorded over a Marshall Islands flagged ship other than mortgage instruments and financing charters. A notice of a foreign mortgage recorded on a ship that has been temporarily registered by the bareboat charterer is nothing more than a notice, that is, it does not create or perfect security in the ship.

15. Can finance leases or other charters be registered? If so, what is the procedure for registration?

Finance charters can be registered in the Marshall Islands. The process for recording the finance charter is substantially the same as for recording a mortgage, with the principal exception that a finance charter must be signed by both parties, whereas a mortgage can be a unilateral grant signed only by the owner.

16. How is registration of a security interest certified?

When a mortgage instrument is recorded, the Marshall Islands registry acting through IRI certifies three of the originals submitted as filed (one as a recorded copy for the mortgagee and two as certified copies of the shipowner, one being for its internal records and the other for placement on board the ship). As mortgage instruments are publicly filed, a search of the public record of that ship can be made by any person by requesting a certificate of ownership and encumbrance, which will evidence the owner of the ship and any mortgages or other recordable instruments.

17. What is the effect of registering a ship?

Registering a ship, whether provisionally or permanently, entitles it to the privileges of a Marshall Islands flagged vessel engaged in foreign trade. Registration also provides presumptive evidence of the actual owner of the ship.

18. What is the effect of registering a ship mortgage?

Unless a mortgage is recorded, the security interest in the vessel itself will not be perfected and the mortgage will not convey the rights that the Maritime Act bestows on a registered mortgage. The Maritime Act provides that perfected preferred mortgage

liens have priority over certain other maritime liens and claims. However, lien priority is a complicated question and the laws of the forum where a ship is arrested can determine where the claims against the ship rank with respect to the mortgage (and these laws can point to other jurisdictions' laws, including where the ship is registered and flagged or the laws of the jurisdiction in which the claim arose).

Transfer of Security

19. Is it possible to transfer security interests over a ship? Are there specific issues of local law when transferring security interests?

A mortgagee can assign its interests in a mortgage to another party. For the assignment to be effective, it must be recorded. The procedure for recording a mortgage assignment is similar to that of recording a mortgage and are set out in further detail in the Maritime Act and [Question 12](#).

20. Is a transfer of security subject to any registration requirements?

Assignments must be recorded with the Maritime Administrator at one of the worldwide offices of the Marshall Islands registry acting through IRI to be effective.

Enforcement of Security

Mortgages

21. In what circumstances can a mortgagee take possession of or arrest the ship and sell the ship (either through a private or judicial sale)? What requirements must the mortgagee comply with?

As is the law in many jurisdictions, a mortgagee cannot take possession of a ship or commence a foreclosure action unless a default has occurred under the mortgage or other credit documents. The first step is to send a default notice to the mortgagor

listing details of all defaults under the mortgage and other credit documents. That notice must be sent in accordance with the requirements outlined in the credit documents.

If the mortgage or other credit documents specifically provide for a self-help remedy, self-help is an alternative to arrest, provided that the right is recognised by the state or jurisdiction in which the action is brought and exercise of the remedy does not involve a breach of the peace. Self-help is generally discouraged by the law and subjects the mortgagee to liability from third parties, meaning that one negative aspect is that the private sale of the ship or operation of the ship as a business through this process will not extinguish other valid maritime liens against it, in essence converting the creditor into a title insurer against future claims after the ship is sold or taken. Negotiations with numerous lien claimants after self-help could offset any savings in arrest costs. As a general rule, many jurisdictions do not recognise a right of self-help repossession. Self-help is, however, sometimes used as a temporary measure to bring the vessel into a "friendly" jurisdiction for the purposes of arresting the vessel in an *in rem* proceeding.

The procedure for arresting a ship in the Marshall Islands is covered in [Question 22](#), but given international trade routes, it is highly unlikely that a ship would be arrested within the Marshall Islands.

22. What is the procedure for a mortgagee taking possession of or arresting a ship and selling a ship (either through a private or judicial sale)?

The Marshall Islands is not a signatory to international conventions with respect to ship arrest. In the Marshall Islands, actions involving ship arrests are governed under the substantive law of the Republic and the Marshall Islands Rules of Civil Procedure (MIRCP). All causes of action arising under the Maritime Act fall within the jurisdiction of the High Court of the Marshall Islands, sitting in admiralty. Under section 113 of the Maritime Act, the Marshall Islands has adopted the non-statutory general Maritime Act of the US as the general Maritime Act of the Republic. Therefore, US admiralty law will govern many questions in the absence of a relevant statute.

Maritime lien creditors and those with statutory rights can enforce them *in rem* against a vessel. Arrested vessels are governed under the MIRCP by Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Supplemental Rules), which provides that a vessel can be arrested to enforce any maritime lien, or where a statute provides for *in rem* proceedings.

There is no associated or sister ship arrest regime under US general maritime law. However, property of the defendant may be attached under Rule B of the Supplemental Rules and, where the defendant owns a vessel and if the requirements of Rule B are met, that vessel may be seized.

23. Will local courts recognise a choice of foreign law in a ship mortgage? Are there any mandatory local rules that apply, despite a choice of foreign law?

Mortgages recorded over a Marshall Islands ship cannot be governed by a law other than the laws of the Republic of the Marshall Islands.

24. Will local courts recognise and enforce a foreign court judgment in favour of a mortgagee?

The courts of the Republic of the Marshall Islands should recognise as valid and enforce any judgment for a sum of money (other than a judgment for taxes or a fine or other penalty) obtained by a mortgagee in the court of a foreign country where both of the following are true:

- It is final and conclusive.
- It is enforceable in the jurisdiction in which it is rendered, even though there is an appeal pending, or the judgment is still subject to appeal, although the Marshall Islands court may stay enforcement proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

The action to recognise a foreign judgment must be started either while the foreign judgment is effective in the foreign country, or 15 years from the date that the foreign country judgment became effective, whichever is earlier.

A court of the Republic of the Marshall Islands will not recognise a foreign judgment if:

- It was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.
- The foreign court did not have jurisdiction over the subject matter.

A court of the Republic of the Marshall Islands is not obliged to recognise a foreign judgment if:

- The defendant in the proceedings in the foreign court did not receive notice of them in sufficient time to be able to defend them.
- The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.
- The cause of action on which the judgment is based is repugnant to the public policy of the Republic of the Marshall Islands.
- The judgment conflicts with another final and conclusive judgment.
- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was settled otherwise than by proceedings in court.
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

- The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.
- The specific proceeding in the foreign country leading to the foreign judgment was not compatible with the requirements of the due process of law.
- The foreign country does not recognise or enforce the judgments of any other foreign nation.

Other Forms of Security

25. What is the procedure for taking possession of a ship if a security interest other than a mortgage is held over that ship?

There is no requirement of *in personam* owner or demise charter liability for a vessel to be arrested. Under section 319 of the Maritime Act, vessel arrests can proceed *in rem* against the vessel as long as necessaries are supplied on the order of the owner or a person authorised by the owner. Under the statute, charterers are generally presumed to have authority to procure necessaries for the vessel and suppliers of necessaries are also generally presumed to rely on the credit of the vessel unless they have notice of or, through reasonable diligence could have ascertained, the presence of a "no lien" clause in the charter. Notably, a vessel owner has a potential defence under section 319(3) of the Maritime Act, which provides that no lien will arise when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering necessaries was without authority to bind the vessel.

Unlike the analogous US statute (now codified as part of the Commercial Instruments and Maritime Liens Act (CIMLA), at 46 U.S.C. §§ 31341 – 31343), which was amended in 1971 to eliminate any duty of inquiry on suppliers to examine charter parties for "no lien" clauses, owners can argue under Marshall Islands law that a necessaries supplier could have ascertained by due diligence that the charterer was not authorised to bind the vessel to a lien.

Deletion and Discharge

26. What is the procedure for and effect of deletion of a ship from the ship register?

Under Marshall Islands procedures, a ship must be deleted from the registry when it is sold or otherwise transferred and is not re-registered with the Marshall Islands. Similarly, a ship being sold for scrap must be deleted. To delete a ship, the following steps must be followed:

- The shipowner must apply for permission to transfer.
- The permission to transfer will approve the deletion of the ship and issuance of a cancellation certificate provided the requirements are met. These are typically:
 - release of any recorded liens;
 - payment of any outstanding fees due to the Maritime Administrator;
 - payment of the fees associated with the deletion of the ship; and
 - evidence of the transfer of title (if the ship is being sold).

An original wet ink cancellation certificate will be issued and will cite the reasons for the transfer. The original cancellation certificate is issued promptly, but in sale and purchase situations it is customary to allow four weeks for it to be issued.

27. What is the procedure for and effect of discharge of a ship mortgage?

The requirements to record a release of a preferred mortgage are much the same as recording a preferred mortgage. Prior to recording, the registry must receive:

- Two duly notarised or acknowledged original copies of the release of preferred mortgage signed by or on the behalf of the mortgagee.
- One original memorandum of particulars signed by or on the behalf of the mortgagee.
- An original or certified copy of the power of attorney, corporate resolutions, or a copy of the bank signature specimen page of the mortgagee.
- The recording fee.

Once recorded, the registry will issue a free and clear certificate of ownership and encumbrance evidencing the release of the mortgage, one blue back to be attached to the back of the original release of preferred mortgage and distributed to the mortgagee, and a recording index page. These documents are issued once recorded, which generally takes place the same day.

Reform and Recent Developments

28. Are there any proposals for reform in the area of ship finance?

The Marshall Islands is considering an amendment to the Maritime Act which would allow for mortgages to secure indebtedness whether or not the indebtedness arises under a commitment existing at the time the mortgage is recorded.

29. What are the key developments (key cases, judgments and legislation) of the past year relevant to ship finance?

In response to COVID-19, the Marshall Islands temporarily modified the requirements for mortgage instrument recordings and acknowledgements, as well as the acceptance of electronic copies. These modifications are still in place and provide the following:

- Where a mortgage, instrument, or other document must be acknowledged or notarised under the Maritime Act or Maritime Regulations, this requirement may be satisfied through electronic means or processes approved by the Maritime Administrator.
- Where the requirement exists for recording or submitting an original (hard copy) mortgage, instrument or other document, the Maritime Administrator will accept an electronic copy as the original if the document was signed with wet ink and submitted as an electronic copy.

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