COMITE MARITIME INTERNATIONAL

PRESIDENT

22 January 2013

Dear President

Cross-Border Insolvency

Attached please find a copy of Karl Gombrii's letter dated 2 May 2012, together with the Introduction and Questionnaire prepared by the CMI International Working Group on Cross-Border Insolvency. As you will recall, the subject was part of the Beijing Conference work programme in October 2012, and the IWG is in the process of formulating its recommendations to the Executive Council on this important and topical subject based on the replies received to date from the following NMLAs: Canada, China, Croatia, France, Ireland, Italy, Japan, Malta, Norway, Spain and the United States.

Needless to say, it would be helpful to receive replies to the Questionnaire from as many Associations as possible before the IWG finalizes its recommendations. Thus, I would be grateful if those Associations that have yet to submit replies could respond to the Questionnaire as soon as possible (and would request those Associations that initially responded to Section I, Questions 1-29, to also provide input on Section II, Questions 30-59).

I very much appreciate your Association's input and look forward to hearing from you.

Kind regards

Stuart Hetherington

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COMITÉ MARITIME INTERNATIONAL

PRESIDENT

To the Presidents of all member associations of the CMI

cc. All Titulary Members

Oslo 2 May, 2012

Dear President,

Attached please find the Introduction and Questionnaire that have been prepared by the CMI International Working Group on Cross-Border Insolvency. The IWG is chaired by Christopher Davis of the United States and includes both civilian and common law practitioners and professors (Beiping Chu of China, Sarah Derrington of Australia, Sebastien Lootgieter of France, and William Sharpe of Canada).

As you know, the subject of cross-border insolvency remains topical as evidenced by recent high-profile bankruptcies that continue to receive coverage in Lloyd's List, TradeWinds and other publications. Additionally, the subject will be part of the Beijing Conference work programme in October 2012.

Thus, I would be grateful if your Association could respond to the Questionnaire in a timely manner, ideally by 30 June 2012, so as to enable the IWG to study and summarise the replies well ahead of the October 2012 Beijing Conference.

While responding to Questionnaires such as this one is time consuming, a comparative law

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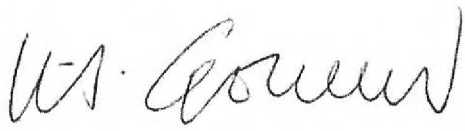
analysis of cross-border insolvency will benefit the maritime industry and legal practitioners, and is likely to promote uniformity and harmonisation of the law governing cross-border insolvency. Thus, your Association's input is important, particularly if your country has adopted the UNCITRAL Model Law or is part of the European Union and is subject to EC Regulation No. 1346/2000 on insolvency law (this applies equally to countries that have adopted other domestic, regional or international instruments such as the OHADA or SAOC Treaties in Africa). Given the length of the attached Questionnaire, may I suggest that your Association focus initially on Section I (Questions 1-29), and time permitting, subsequently provide input on Section II (Questions 30-59).

I look forward to hearing from you and seeing you in Beijing and Shanghai in October 2012.

Best regards,



COMITÉ MARITIME INTERNATIONAL

International Working Group on Cross-Border Insolvency

QUESTIONNAIRE

SECTION I

CROSS-BORDER MARITIME INSOLVENCY ISSUES

Part 1 General Insolvency Principles Applicable to Foreign Creditors

1. Has your country adopted any specific rules on cross-border insolvency (such as the UNCITRAL Model Law or any specific domestic, bilateral or multilateral instrument)? If so, please provide a general description based on the topics discussed in this questionnaire.

2. Do your laws recognize the standing of a foreign creditor or other person (such as a foreign flag authority of a locally domiciled shipowner or a foreign administrator of insolvency proceedings) to start or oppose an insolvency proceeding in respect of a local ship operator or in respect of assets located locally? If so, describe in detail those rights or restrictions upon such rights of such foreign entities which differ from those of local creditors, insolvency administrators or public authorities.

3. Do your laws have a procedure for supervising the activities in your country of a foreign insolvency administrator?

4. If an administrator is unwilling to pursue a claim by the insolvent ship operator, can foreign creditors apply to an insolvency tribunal for a transfer of the subject matter of the claim from the estate of the insolvent ship operator to a creditor or group of creditors?

5. Do your laws permit foreign creditors to apply to a court for supervisory orders if they consider the administrator is acting inefficiently or wrongly? If so, describe the procedure generally.

6. Do your laws permit foreign creditors to commence legal proceedings against

administrators if they consider the administrator has acted negligently or wrongly?

7. If a foreign creditor or claimant against a ship operator foresees it will suffer a loss or commercial disadvantage because of the appointment of a private receiver or the way the private receiver is acting, does such a foreign claimant have any legal remedies against the receiver, such as applying to a court for supervisory orders or to put the ship operator into bankruptcy?

Part 2 Subject Matter or Territorial Jurisdiction

8. Do your laws permit assertion of insolvency jurisdiction generally over any asset of an insolvent ship operator domiciled in your country, regardless of the location of the asset within or outside your country? Please comment whether this scope of jurisdiction differs between a ship of your country's registry owned by persons domiciled in your country, or a ship of another flag owned by persons domiciled in your country.

Part 3 Notice to Foreign Creditors

9. Do any legal or procedural requirements have to be followed to ensure the insolvent ship operator or the insolvency administrator identifies all known foreign creditors?

10. Do your laws require administrators of insolvency proceedings to give notice of the proceedings to foreign creditors? As a general practice, how is such notice given to foreign creditors?

11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors? As a general practice, how is such notice given to foreign creditors?

12. If the insolvent business is a shipowner, do your laws require notice of insolvency proceedings to be given to the ship registrar for domestically registered vessels?

13. Do your laws require notice of insolvency proceedings to be given to diplomatic or consular officials of the flag states of foreign registered vessels which are assets of a local insolvent ship operator?

14. If a foreign creditor later learns of the existence of insolvency proceedings, is the foreign creditor permitted to file late claims or have a right to claim against any of the assets of the insolvent ship operator which have not yet been distributed to creditors?

Part 4 Recognition of Foreign Claims

15. Please describe the conflict of laws rules for recognition of foreign maritime claims in insolvency proceedings. For example, if the claim is a maritime lien under the law of the place where the claim arose but not in the country where the insolvency proceeding is being conducted, will the insolvency administrator or tribunal recognize the foreign maritime lien?

16. Apart from the characterization and priority of claims, are there any other procedural differences in the handling of claims between those by foreign creditors and those by local creditors? With reference to the types of claims listed in the table, please describe any differences in detail.

17. Does your law recognize rights of claims to property rights, sale or enforcement given by foreign law to particular types of creditors, such as, for example, to financial institutions or spouses for their entitlement to business property interests of the other spouse on separation or divorce?

18. Is the recognition of foreign arbitral awards for purposes of proof of claim in insolvency proceedings different from the recognition of foreign arbitral awards for general legal purposes? Please explain any differences.

19. If the insolvent ship operator is a state-owned enterprise, are there any differences in the rights or procedures available to a foreign creditor under your country's insolvency law?

Part 5 Recognition of Foreign Insolvency Proceedings

20. Do your laws permit the administrator of a foreign insolvency proceeding to publish notices of such proceedings in local news media or to communicate directly with local creditors concerning proofs of claim and payment of any recoveries in the insolvency proceedings? If there any legal restrictions on direct handling of claims by foreign administrators, please provide details.

21. Will your country's courts recognize a request for the recognition of foreign insolvency proceedings?

22. Will such a request be recognized if it comes directly from a foreign trustee in bankruptcy, liquidator or administrator, or does the request have to be in the form of a

letter of request issued by the foreign bankruptcy tribunal?

23. What legal standards do your country's courts apply for the purpose of recognition of foreign insolvency proceedings? Please provide details.

24. Do your laws have a procedure for a request for the recognition by a foreign insolvency administrator or insolvency court of a local insolvency proceeding? Are such requests generally made by the administrator or the insolvency court? Generally describe the procedure.

25. Can an administrator of insolvency proceedings request the courts of your country for assistance in obtaining recognition of insolvency proceedings of foreign insolvency administrators or foreign courts? Generally describe the procedure.

26. Will your courts enforce any compulsory transfer of a contractual obligation involving a vessel formerly owned by an insolvent ship operator, if this contractual obligation affects parties located in your country?

27. Does your legal system have a procedure for the coordination of concurrent insolvency proceedings involving maritime assets, insolvent ship operators or creditors in your country and abroad? Is this procedure set out in laws or regulations or has it been developed through practice of insolvency tribunals? Please provide details including any generally used precedent forms of procedural orders.

28. Is your country a party to any bilateral or multilateral agreements for the coordination of multi-country insolvency proceedings or the recognition of foreign insolvency proceedings? Please list such agreements.

Part 6 Need for Reform

29. Have any provisions of your insolvency law created legal uncertainty or difficulties in the administration of cross-border maritime insolvencies? Please refer to any legal commentary or case law.

SECTION II

GENERAL MARITIME INSOLVENCY ISSUES

Part 7 General Insolvency Issues Applicable to Ship Operators and Maritime Property

30. Are ships registered in your country or ship operators incorporated in your country subject to insolvency laws of general application or do your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators?

31. If your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators or ships under your registry as distinct from assets of commercial enterprises generally, please provide details of how these rules applying to ships or ship operators differ from general insolvency administration.

32. Is there a monetary or asset value threshold for the application of various forms of insolvency procedure? For example, is there a form of simplified insolvency administration for ship operators with assets of limited value?

33. Do rights to commence insolvency proceedings or insolvency procedures differ if the debtor ship operator is a natural person as distinct from a legal entity? Describe any differences generally.

34. If creditors are asserting claims against all or substantially all the assets of an insolvent ship operator, does this result in distinct or additional procedural or legal requirements?

35. Are insolvency procedures administered by courts of general jurisdiction, or by specialized courts or tribunals exercising commercial or insolvency jurisdiction?

36. Describe generally the threshold tests set out in your law for the status of insolvency.

37. If the threshold tests for insolvency proceedings in your country differ for a foreign ship operator with assets in your country which wishes to begin insolvency proceedings in your country, describe these differences in detail.

38. Do your laws permit a private creditor to obtain a court order to begin insolvency

proceedings against a ship operator? If so, describe generally what facts or legal grounds the creditor must show to obtain such an order.

39. Do your laws permit a public authority to obtain a court order or to exercise its own jurisdiction to begin insolvency proceedings against a ship operator other than procedures available to private creditors? If so, describe generally what are the factual or legal grounds for such public authority to begin such insolvency process?

40. Does a ship operator have rights to defend or oppose an insolvency proceeding begun by private creditors or public authorities? If so, describe generally what defences are available.

41. Do your laws permit a ship operator to voluntarily begin an insolvency proceeding? If so, describe generally what facts or legal grounds a ship operator must demonstrate to begin voluntary insolvency proceedings.

42. Do creditors or any other persons with legal standing (such as public authorities, shareholders or employees of a ship operator) have rights to oppose a ship operators' voluntary insolvency proceeding? If so, describe generally what classes of persons other than creditors have such legal standing and what grounds of opposition are available.

43. Do your laws provide for a time bar for filing of claims in insolvency proceedings which is different from limitation periods or prescription for commencement of maritime claims generally? If insolvency proceedings have different time bars for filing of claims, are these time bars set out in legislation or are they decided by insolvency administrators or tribunals on a case-by-case basis?

44. Do your laws permit an insolvency administrator to carry on the ship operator's business for a temporary period in order, for example, to complete voyage or charter party commitments?

45. Do your laws permit an insolvency administrator to disclaim or otherwise set aside future contractual obligations such as charter parties or contracts of affreightment?

46. Do your laws permit or require an insolvency administrator to compulsorily transfer contractual obligations such as contracts of affreightment or employment agreements with crew from the insolvent ship operator to the purchaser of the vessel from the estate of the insolvent owner?

Part 8 Acceleration of Remedies

47. Do your laws permit a creditor to contract for immediate repayment of an entire debt, such as future obligations under a ship mortgage, if a ship owner becomes insolvent?

48. If there are differences in the application of these laws to acceleration remedies by foreign creditors as distinct from local creditors, describe these differences in detail.

Part 9 Classes of Claims and Creditors

49. Do your insolvency laws apply differently to differing types of claims or creditors? Please respond to this question using the attached table. For example, is a bank or financial institution permitted to enforce a ship mortgage by procedures outside of an insolvency which would not be available to a ship mortgagee other than a bank or financial institution?

50. Does the existence of an insolvency proceeding under your country's law alter the priority of creditors' claims against a ship owned or operated by an insolvent person? Please respond to this question with reference to the types of claims listed in the attached table.

51. If a shipowner commences proceedings to establish a limitation fund under the LLMC Convention or to establish a limitation fund under domestic law, describe the relationship between such fund and any insolvency proceedings involving that shipowner. For example, can creditors begin insolvency proceedings if a limitation fund has been established? Can an insolvent shipowner establish a limitation fund?

Type of Claim Arising	Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)	Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)	Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)	Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)	Additional Comments
title, possession or ownership of a ship or any part interest in a ship					
between co-owners of a ship including use or earnings of the ship					
mortgages or hypotecs on a ship or share in a ship					
bottomry or other contractual liens on a ship					
wages, benefits, or repatriation of master or crew					
loss of life or personal injury in connection with operation of a ship					
salvage awards					

unpaid suppliers of goods or services to a ship
general average
collision
other types of tortious or delictual physical damage caused by ship
cargo loss or damage
contracts of carriage, including charterparties, other than for cargo loss or damage
towage (other than salvage)
pilotage
hull insurance
p&I insurance
port, canal and harbour dues
wreck removal by public authorities
environmental damage

unpaid contributions for social benefits programs (workers' compensation, health etc)
criminal or regulatory fines or penalties
fraud or intentional wrongdoing in connection with operation of ship

Part 10 Proposals for Reorganization or Compromise

52. Do your laws permit an insolvent ship operator to make a proposal for the reorganization of its business or compromise of claims in which the ship operator would continue to operate into the future if the proposal is approved?

53. Do your laws permit such proposals to be conducted through private contractual arrangements between an insolvent ship operator and some of its creditors, or do such proposals need to be conducted under supervision of a court or with approval of all identifiable creditors?

54. If it is lawful to conduct a proposal through private contractual arrangements, are such private contractual arrangements affecting a ship legally binding on other claimants against that ship who have not participated in such private contractual arrangements?

55. If a proposal is required to be conducted under supervision of a court or approval of all known creditors, please provide a general description of the reorganization procedure.

56. Are secured creditors of an insolvent shipowner subject to court orders approving a reorganization or compromise?

57. Do your laws permit an insolvent ship operator to transfer an insolvency proceeding into a proceeding for reorganization or compromise?

Part 11 Receiverships

58. Does your law permit a private creditor such as a ship mortgagee to take over the business of a ship operator or to sell part or all of its fleet or generally act to recover a debt without needing to commence insolvency proceedings for the benefit of all creditors?

59. Does your law set out minimum requirements which a private receiver of an insolvent shipowner must follow such as giving notice to other registered ship mortgagees, the procedure for sale, etc.

An Introduction to Cross-Border Maritime Insolvency

As has been observed, insolvency law is tricky enough to navigate in the context of domestic insolvency proceedings brought against companies registered and operating in the forum. Where foreign companies and/or windings-up are involved, they are murky and treacherous and must be navigated with care.[1] However, it is impossible to ignore the interaction between the admiralty process and insolvency proceedings, however underdeveloped that interaction may be – as to which Thomas put the position aptly:[2]

> The law of [insolvency] seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceedings into the legislative language of the relevant statutes which regulate [insolvency proceedings]. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in [insolvency proceedings]. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which prevails and which mode of legal process is available for the satisfaction of the claim.

CMI has as one of its main aims the harmonisation of maritime law. By harmonisation we do not necessarily mean uniformity. We aim, however, for a level of "predictability" in the application of maritime legal principles internationally wherever a dispute may fall to be determined. What is peculiar to maritime law is the centuries old interconnection between the international parties involved in international transactions and enterprises and the consequent juxtaposition of national and transnational laws which are all required to deal with similar legal issues. Consequently, since the earliest days of sea trade there has developed a remarkable homogeneity in maritime law around the world so that maritime parties can expect their legal disputes to be dealt with on relatively similar footings, whether they are seeking to resolve their dispute in Australia, Hong Kong, China, France, Argentina or wherever.

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[1] Derrington & Turner, The Law & Practice of Admiralty Matters (OUP, 2006), 200.
[2] D R Thomas, *Maritime Liens* (1980), para 99.

Now, the same is not true of most other areas of the law, where international conventions and bilateral and multilateral treaties have been superimposed on areas of the law that have only relatively recently become international in character, without the benefit of centuries of organic development.

The *Model Law on Cross-Border Insolvency*

Cross-border insolvency is one such example. Indeed, it was not until the recession of the late 80s that states turned their minds to the need for such an international convention. The *Model Law on Cross-Border Insolvency* represents an attempt to impose a universalist approach.

In the Asia-Pacific region, it has been adopted only by the US, Australia (*Cross-Border Insolvency Act 2008)*, New Zealand, Korea and Japan but notably not in Hong Kong. It is enacted in Canada, although Canada has not proclaimed the Model Law. If one compares this number with the more than 100 parties to the Hague Rules, we can see that the *Model Law on Cross-Border Insolvency* has some way to go to catch up with uniform régimes in maritime law. Nonetheless, the promulgation and adoption of the Model Law is yet another example of what we might call newcomers to transnational law seeking to impose uniformity on an area of law without regard to maritime law as a whole or to whether uniformity is in fact necessary to achieve a coherent and harmonised system of law.

Article 1 of the Model Law provides that the Law applies where:

(a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under [a law of the enacting State in relation to insolvency];

(c) A foreign proceeding and a proceeding under [a law of the enacting State in relation to insolvency] in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in a proceeding under [a law of the enacting State in relation to insolvency].

Article 4 provides:

> The functions referred to in the present Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [the courts competent to provide those functions in the enacting State].

The recognition of foreign insolvency proceedings as "main proceedings" gives rise to an automatic stay which will apply to certain types of creditor actions including: the commencement of proceedings concerning the debtor company's assets, rights, obligations or liabilities; execution against its assets and/or the transfer or disposal of its assets.[3] The Model Law makes no specific reference to admiralty claims but makes reference to the preservation of rights *in rem* in Article 32 which preserves, to some extent, the position of secured claims or rights *in rem*.

If a State has enacted the Model Law, the logical order of enquiry as to its impact, if any, on *in rem* proceedings is as follows:

(1) *Whether there is a foreign proceeding and/or a foreign main proceeding.*
A foreign proceeding is a judicial or administrative proceeding pursuant to a law relating to insolvency; a foreign main proceeding means a foreign proceeding taking place where the debtor has the centre of its main interests.[4] This would normally be the place of its registered office although the term is not defined.

(2) *Whether an application has been made to the court for recognition of the foreign proceedings in which the foreign representative has been appointed.*
A foreign representative means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings.[5]

(3) *Whether the application has been brought in accordance with Article 15(2).*

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[3] Article 20.
[4] Article 2.
[5] Ibid.

Prior to the Model Law, the relevant question was whether the forum where the *in rem* action is proceeding will recognise the foreign liquidation.[6] In general terms, a foreign liquidation would be recognized if the shipowner was incorporated or traded in the jurisdiction in which the liquidation is being conducted (or if the law of its incorporation would recognise the liquidation), or if it submitted to the jurisdiction of the foreign court.[7] There is little room left for the exercise of any discretion as to whether or not to recognize the foreign proceedings.[8]

(4) *The consequences of recognition.*[9]

Article 20 provides that upon recognition of a foreign proceeding that is a main foreign proceeding:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
(b) Execution of the debtor's assets is stayed;
(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

The Model Law does not define the term 'execution.' It has been held in the Australian case of *Danny Morris & Anor v The Ship "Kiama"*[10] that the arrest and subsequent sale of a ship pursuant the judicial order of an admiralty court does not amount to a process of execution. The English authority on this precise issue is unsettled. It was held in *In re Australian Direct Steam Navigation Company*[11] and *The Constellation*[12] that a sale following an arrest is the equivalent of execution within the meaning of the Insolvency Act. The contrary view was reached in *The Zafiro*[13]and it was the latter view that found favour with Carr J in *The Kiama* on the basis that, "...as a matter of law, the arrest of the

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[6] Felixstowe Dock & Rly Co v United States Line Inc [1989] QB 360; Banque Indosuez SA v Ferromet Resources Inc [1993] BCC 112; Fournier v The Ship "Margaret Z" [1997] NZLR 629; *Turners & Growers Exporters Ltd v the Ship Cornelis Verolme* [1997] 2 NZLR 110.
[7] Smart, *Cross-Border Insolvency*, (2nd edition, 1998), p 182. See, too, Dicey & Morris, *The Conflict of Laws*, § 30R-091f.
[8] Article 17.
[9] Articles 20-21.
[10] [1998] FCA 256.
[11] 1875) LR 20 Eq 325 .
[12] [1966] 1 WLR 272.
[13] [1960] P 1.

> ship did not occur as part of a process of execution. It came about at the behest of the plaintiffs in accordance with the Admiralty Rules."

Where, however, no security has been obtained over a ship at the time when a foreign winding-up order is made, the result is likely to be that the maritime claimant will be unable to bring *in rem* proceedings, and – unless the foreign court grants permission to sue *in rem* – will be limited to proving in the foreign liquidation. This is, in part, because a court exercising admiralty jurisdiction will not be a court exercising jurisdiction pursuant to a law relating to insolvency and so admiralty proceedings, of themselves, cannot be "foreign proceedings" within the definition of Article 2 of the Model Law. It may have been desirable had the Model Law included a provision along the lines of Article 5.1 of the EU Insolvency Regulation, which provides that:

> The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets ... belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

However, it will be noted that this provision only operates where the relevant asset is elsewhere within the EU when the (winding up) proceedings are commenced, which may very well not be the case in relation to a ship. In any other case, the ranking of claims is a matter for the law of the court in which the liquidation is proceeding.[14] That means of course that there may be very different and often less desirable priority determinations for *in rem* claimants.

Insolvency law differentiates between a stay of proceedings in liquidation, where, as it were, the bar comes down to stop the race among creditors, and creditors' claims can then be swiftly and economically valued and the company's assets distributed to the creditors. In contrast, where a company is placed in administration, the purpose of a stay is to enable the company's business to survive as a going concern, by stopping its creditors from destroying the assets and selling them to satisfy its debts.

Where a ship is involved, a stark difference of approach emerges. We have on the one hand, maritime law's reliance on the *res*, which can be arrested and used to recoup the debt, and which is broadly

[14] art 4.2(i).

understood by all ships' creditors, especially financiers, as the primary source of the security. On the other hand, we have the emphasis that insolvency law places on protecting the interests of creditors. The lack of understanding of the interaction between admiralty and insolvency is neatly illustrated by the Canadian case of *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 907. In that case, the Bankruptcy Court in Canada, in effect, framed an anti-suit injunction to prevent the parties proceeding in the Federal Court of Canada to dispose of a ship that had been arrested.

The aim was to send the proceeds of the ship back to Belgium to satisfy the creditors in the Belgian liquidation. Happily, the Supreme Court of Canada made clear that the maritime jurisdiction was not obliterated by the supervening bankruptcy, and held that the Bankruptcy Court ought not to have made such an order.

In Australia, when the *Cross-Border Insolvency Act 2008* is invoked in an administration, creditors will be prevented from taking any action against any of the company's ships for the duration of the administration. This is a powerful weapon which may enable shipping companies to keep its ships trading and free from arrest, and as has been noted by Douglas Lindsay in *The Maritime Advocate*, the use of this provision could fundamentally alter the marine world, accustomed as it is to treating arrests and the Admiralty Marshal's sale of a vessel as the source of last recourse. He says:

> If this is now denied to creditors, including banks, we may have to start again from scratch in working out how financial redress is obtained in the maritime world.

There are already several examples of the difficulties that might arise in the application of the cross-border insolvency laws to maritime claims. One such example arose in *Harms Offshore AHT 'Taurus' GmbH & Co KG v Bloom* [2009] EWCA Civ 632; [2009] All ER (D) 276 – a decision of the English High Court. The case involved an offshore oil and gas company incorporated in the UK which chartered the appellant's vessels "*Taurus*" and "*Magnus*" pursuant to charter parties that were subject to English law and that contained a London arbitration clause. The company went into administration, and the Companies Court made an order authorising the administrators to enter into a loan agreement with specified lenders to raise funds for the post-administration liabilities.

Without notice to the administrators, the appellants obtained a Rule B attachment order in the New York District Court, thereby attaching the loan moneys that had been authorised to be raised by the English Court. The administrators sought an order vacating the attachments on the basis that the Bankruptcy Court in New York should recognise the administration order under principles of comity embodied in Chapter 15 of the US *Bankruptcy Code* . Simultaneously, the administrators sought relief in the English High Court which granted them an injunction restraining the appellants from taking steps in the substantive proceeding commenced in New York.

In this case the conduct of the appellants could be considered to be wholly unconscionable, and so the injunction was probably rightly granted, but what is of concern is the comment made by the English Judges. They said [26]:

> The question is not as to where a dispute as to liability or damages should be determined, but whether the appellants should be able to secure the benefit of their attachments, and thus promote themselves from unsecured to secured creditors.

This is the very point of the action *in rem*: maritime claimants can promote themselves to secured creditor status. It strengthens the view expressed in the note in *The Maritime Advocate*, referred to above, that maritime creditors may now need to rethink the basis of their underlying security. The result will now be in many cases that maritime creditors will be unable to commence *in rem*, and will be limited to proving in the foreign liquidation. This is illustrated by the decision of Justice Sotomayor in *In re Millenium Sea Carriers Inc* 419 F 3d 83 (CA2: 2005).

***Personal Property Securities* regimes**

It is not only the Model Law which does and will impact on the interaction between insolvency and admiralty law. An increasing number of States are enacting legislation, derived from the US Commercial Code, in relation to personal property securities.[15]

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[15] eg: *Personal Property Securities* Acts in various Canadian provinces; *Personal Property Securities Act* 1999 (NZ); *Personal Property Securities Act* 2011 (Cth of Australia).

These particular pieces of legislation tend to look to the substance, not form, of a security interest and will impact on the very existence of maritime claims in the event of insolvency, as well as on the ranking of priorities.

The legislation raises such issues as:

- whether the right of an insurer to take over maritime property the subject of a notice of abandonment under the constructive total loss provisions of the *Marine Insurance Act* is a security interest which must be registered in order to be enforced?
- whether a charterparty lien, a salvor's lien or a warehouseman's lien needs to be registered to be enforceable and attract priority
- the need to register mortgages and charges of ships and property associated with ships
- the need to register charters of vessels for an indefinite term or in excess of specified periods (usually 90 days) as they will be held to be security interests
- whether other charters might also be considered security interests.

Conclusion

In light of these, and no doubt many other issues of concern to particular States, it is the view of the working party that it is timely to survey the position of all member States with the object of ascertaining whether there is any scope for sensible harmonisation of the approach to the interaction between insolvency and admiralty law.

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