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REPORT ON THE WORK OF THE INTERNATIONAL WORKING GROUP ON CROSS-BORDER INSOLVENCY

BY CHRISTOPHER DAVIS

An International Working Group ("IWG") on Cross-Border Insolvency was formed in 2010, following the 2008 financial crisis which adversely impacted the maritime sector. The IWG held its preliminary meeting in Buenos Aires in October 2010, in conjunction with the CMI Colloquium held in that city, and currently consists of the following members from civil and common law jurisdictions:

Christopher DAVIS, United States of America (Chairman)
Sarah DERRINGTON, Australia (Rapporteur)
William SHARPE, Canada
Beiping CHU, China
Sebastien LOOTGIETER, France
Maurizio DARDANI, Italy
Manuel ALBA, Spain

The IWG's comprehensive questionnaire on cross-border insolvency was sent to National Maritime Law Associations ("NMLAs") in May 2012. 15 replies have been received to date, including 14 from NMLAs (Brazil, Canada, China, Croatia, Denmark, France, Ireland, Italy, Japan, Malta, Norway, Singapore, Spain, and United States of America), and one from a Titulary Member (Jose M. Alcántara).

A comparative analysis of the replies to the questionnaire received was presented during a panel discussion held in conjunction with the CMI Beijing Conference work programme in October 2012, which included Canadian, Chinese, Korean, Spanish and United States perspectives on cross-border insolvency.

Inasmuch as the subject of cross-border insolvency has remained topical, as evidenced by the continued filing of high-profile bankruptcies reported in Lloyd's List and TradeWinds, an updated (albeit shorter) panel discussion formed part of the Dublin Symposium work programme in October 2013, which included presentations by Olaf Hartenstein of Germany on the reform of German insolvency law and Prof. Martin Davies of Tulane Law School on the interrelationship between limitation of liability and insolvency proceedings.

The subject is also scheduled to be included in the seminar programme for the upcoming CMI Hamburg Conference in June 2014, where a speaker will address the topic of cross-border insolvency in the maritime context.

The IWG is continuing to receive replies to its questionnaire, which are being analyzed and uploaded to the CMI's website as they are received.

Analysis of the questionnaire replies received so far shows three principal legal settings for cross-border marine insolvencies. For insolvencies involving debtors and assets within the European Union ("EU") EC Regulation 1346/2000 regulates conflicts of law and jurisdiction between member states (some Scandinavian EU member states are parties to a Nordic convention on cross-border insolvency which is similar to the EU regulation). For those countries which have adopted domestic legislation based upon the UNCITRAL Model Law on Cross-Border Insolvency, there is a developing trend of mutual recognition and coordinated administration of cross-border insolvency proceedings with cooperation between courts. Outside of those settings, the effect, operation and outcome of creditors' enforcement of insolvency proceedings with multinational aspects is much less certain. Such uncertainty extends to cross-border insolvencies involving one jurisdiction to which EC Regulation 1346/2000 or the UNCITRAL Model Law applies and other jurisdictions which are not subject to either regime. Another area of uncertainty is the extent to which foreign recognition may be granted to reorganization proceedings such as those under Chapter 11 of the United States Bankruptcy Code, in which eventual restructuring of debt or payment to credits may differ from generally accepted priority ranking of creditors' claims against a ship.

The IWG is now looking ahead to determine the best way forward for its work and will forward its recommendations in due course to the Executive Council. Some of the proposals under consideration include recommending a protocol to the UNCITRAL Model Law specifically addressing *in rem* actions, developing a set of best practices based on the comparative analysis of the replies to the questionnaire received to date, identifying conflicts between existing cross-border insolvency legal regimes and international maritime conventions, promoting certainty and uniformity in the legal effect given to judicial sales of ships following a cross-border insolvency, and perhaps encouraging countries that have a substantial maritime sector and have yet to adopt a cross-border insolvency legal regime to do so in an effort to promote harmonization of the law in this area.

The IWG's preliminary view is that developing support for a protocol to the UNCITRAL Model Law addressing *in rem* actions may be unrealistic, and there are already some excellent guidelines or suggested best practices for handling cross-border insolvencies (albeit in a non-maritime context). Some of the less ambitious proposals referenced above may merit the IWG's future attention and work. At a minimum, highlighting the current difficulties and uncertainties that surround the various legal regimes that govern cross-border maritime insolvencies (as well as identifying issues and decisions of interest) and bringing same to the attention of NMLAs should remain a useful exercise.

Pursuant to the President's suggestion, the IWG's Chair has been in contact with John Bradley of the U.S. MLA, who is the Chair of the U.S. MLA Committee on Bankruptcy and Insolvency, to discuss the possible parameters of a joint presentation or panel discussion on cross-border maritime insolvency issues during the 2016 CMI Conference in New York (which is only 12 months away). The subject will likely remain topical given the depressed level of freight rates and recent insolvency filings by shipowners and charterers. Any input or

suggestions regarding the possible content of a presentation or panel discussion for the 2016 CMI conference by interested NMLAs would also be very welcome.

The IWG will provide a short report on the current status of its work during the 9 June 2015 Assembly in Istanbul.

New Orleans, 15 May 2015