

## **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 continues to adversely impact 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 (Chair)  
Sarah DERRINGTON, Australia (Rapporteur)  
Manuel ALBA, Spain  
Beiping CHU, China  
Maurizio DARDANI, Italy  
Olaf HARTENSTEIN, Germany  
Sebastien LOOTGIETER, France  
William SHARPE, Canada

The IWG's comprehensive questionnaire on cross-border insolvency was sent to National Maritime Law Associations ("NMLAs") in May 2012. 16 replies have been received to date, including 15 from NMLAs (Brazil, Canada, China, Croatia, Denmark, France, Ireland, Italy, Japan, Malta, Norway, Poland, Singapore, Spain, and United States of America), and one from a Titulary Member (José María Alcántara).

A comparative analysis of the replies to the questionnaire received (as of October 2012) was presented during a panel discussion held in conjunction with the CMI Beijing Conference work programme, 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 was also included in the seminar programme of the CMI Hamburg Conference in June 2014, where Patrick Kirby addressed the topic of cross-border insolvency in the maritime context, and again in the work programme of the CMI Istanbul Colloquium in June 2015, where Prof. Martin Davies of Tulane Law School followed up on his Dublin presentation

with a focus on the competing limitation funds (and claim priorities) between the UNCITRAL Model Law and traditional admiralty procedures of arrest and attachment.

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 (along with other documents and papers of interest).

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 EC Regulation 1346/2000). 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 creditors may differ from generally accepted priority ranking of creditors' claims against a ship.

The IWG is 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 (absent strong international support from those countries that have adopted the Model Law). However a new EU Regulation 2015/848, which repeals EC Regulation 1346/2000, and will apply from June 26, 2017, may encourage support for a protocol to the UNCITRAL Model Law providing a similar carve out for *in rem* claims. There are some excellent guidelines and/or best practices for handling cross-border insolvencies (albeit in a non-maritime context); thus, there is no perceived need for a new set of guidelines or best practices specifically addressing maritime cross-border insolvencies. 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 parameters of a joint presentation or panel discussion on cross-border insolvency issues during the 2016 CMI Conference in New York. A joint session of the CMI IWG and U.S. MLA Committee has been scheduled for Wednesday, 4 May 2016, with panelists to include Justice Steven Rares of Australia, Judge Robert Gerber (retired) of New York, and Professor Martin Davies of Tulane University School of Law. The joint session will address cross-border issues affecting shipping insolvencies, including the interplay of maritime and insolvency law and the potential need for a protocol to the UNCITRAL Model Law addressing *in rem* actions. Other specific issues we hope to debate during the joint session in New York include whether a debtor's center of main interests ("COMI") should be evaluated as of the date of the filing of the main insolvency proceeding or the date of the filing of the ancillary proceeding, whether a system of reciprocal comity may be the way to reconcile competing and conflicting admiralty and insolvency procedures, whether there is a need for further uniformity and treaty harmonization in this area, and whether the better approach may be to adhere to traditional conflicts of law principles when dealing with cross-border insolvencies and foreign security interests.

New Orleans, 5th April 2016