THE CANADIAN MARITIME LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DE DROIT MARITIME
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Response of the Canadian Maritime Law Association
TO THE CMI QUESTIONNAIRE
ON CROSS-BORDER INSOLVENCY

Defined Terms

Bankruptcy and Insolvency Act, R.S.C.1985, c.B-3 as amended: "BIA"

Companies' Creditors Arrangement Act, R.S.C.1985, c.C-36 as amended: "CCAA"

Winding-Up and Restructuring Act, R.S.C.1985, c.W-11 as amended: "WRA"

UNCITRAL Model Law on Cross-Border Insolvency: "the Model Law"

Canadian bankruptcy court: "the Bankruptcy Court"

Canadian bankruptcy proceedings: "Bankruptcy Proceedings"

Trustee in bankruptcy: "Trustee"

Bankruptcy and Insolvency General Rules: "General Rule(s)"

Canadian insolvency proceeding: "Insolvency Proceeding(s)"

Canadian insolvency court: "Insolvency Court"

Canadian Federal Court: "Federal Court"

Debtor-in-possession: "DIP"

Canada Shipping Act 2001: "CSA 2001"

Notice of intention: "NOI"

SECTION I

CROSS-BORDER MARITIME INSOLVENCY ISSUES

General Note: Overview of Canadian Bankruptcy and Insolvency Legislation

Canadian bankruptcy and insolvency law is essentially composed of the BIA, the CCAA, and the WRA, each of which serves different purposes.

The purpose of the BIA is to vest in a licenced trustee with the property of a bankrupt which allows him to appear as the owner of the property; it imposes an orderly distribution of the property of the bankrupt

to the creditors generally on a rateable basis; it permits the restoration of a debtor crushed by debt to active economic life; it allows for the recovery and reversal of transactions with third parties which deviate from the prescribed distribution of assets; and it provides to the debtor a means of release or discharge from both secured and unsecured debts.[1]

The purpose of the CCAA is to facilitate arrangements with a company's creditors that would avoid the liquidation or the bankruptcy of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees.[2]

The purpose of the WRA is to give a liquidator charge of all the property, effects and choses in action of a company under its custody and control, close up the business, sell ("liquidate") the assets and distribute the proceeds to the creditors, and any balance remaining after the creditors have been paid, to the shareholders.[3]

Both the BIA and CCAA contain provisions governing Cross-Border insolvencies which are similar, but do not necessarily replicate the Model Law. Canada adopted legislation based on the Model Law in 2005 which legislation was only brought into force in 2009.

For the purposes of responding to this questionnaire, responses will be given with reference to the BIA, although in some instances, other statutes may be referred to.

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.

   Answer: Yes. Both the BIA and the CCAA were amended in 2005 (which amendments came into force in 2009) using as a basis, but without replicating, the Model Law.

   In the statutes, "foreign proceedings" are defined as being proceedings under any law "relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation." A "foreign representative" is defined as someone authorized under the foreign law to act as a trustee to a bankruptcy or as a monitor to a reorganization. "Foreign proceedings" fall into two categories – a "main" proceeding in a jurisdiction where the debtor company has the centre of business, and a "non-main" proceeding which simply means a "foreign proceeding which is not a main-foreign proceeding."

   The Bankruptcy Court is empowered to grant recognition to a foreign representative, for the purpose of participating in Bankruptcy Proceedings, although the foreign representative cannot act as a Trustee in Bankruptcy Proceedings. The Bankruptcy Court may also grant recognition of the foreign proceedings and must specify in its order whether the foreign proceedings are "main-foreign proceedings" or "non-main foreign proceedings".

[1] Sarna, Lazar, Law of Bankruptcy and Insolvency in Canada, revised edition, paragraphs §1.2 and 1.4

[2] Ibid. §1.2

[3] Ibid. §1.2

The importance of the distinction is that the statute empowers the Bankruptcy Court to provide different remedies to the foreign representative. If the foreign proceeding is a "main" proceeding, the Bankruptcy Court may stay all proceedings taken or that might be taken under the BIA where the foreign representative is applying under the CCAA, restraining any further proceedings against the debtor, prohibiting the commencement of any proceedings and prohibiting the debtor from dispossessing itself of its property or otherwise dealing with it. However, if proceedings have been commenced under the BIA prior to the recognition of the foreign proceedings, the proceedings under the BIA take priority.

If the foreign proceedings are held to be "non-main" proceedings, the Bankruptcy Court may still provide assistance to the foreign representative, depending on whether there are BIA proceedings already commenced against the debtor. If BIA proceedings have been commenced prior to the foreign representative's application, then they prevail and procedure is provided in the BIA for the foreign representative to participate in those proceedings. If there are no BIA proceedings, then the Bankruptcy Court may provide assistance with respect to the examination of witnesses, the production of books and records, the recovery of property and its realization and, in general, permitting the foreign representative "to take any action that the court considers appropriate." The Bankruptcy Court may even permit the foreign representative to take advantage of provisions of the BIA which empower a Canadian Trustee in its administration.

At s. 275 et seq. of the BIA and at s. 52 et seq. of the CCAA, the statutes impose obligations on the Bankruptcy Court to cooperate with the foreign representative and the foreign court involved in the foreign proceedings and to review and revise any order it has already rendered with respect to the debtor to provide consistency and coherence to overall administration of the debtor's affairs and property.

It must be noted that in Canada all orders under the BIA are subject to the rights of secured creditors. Under Canadian case law, and notably *Holt Cargo v ABC Containerline* 2001 SCC 90, [2001] 3 SCR 907, if the debtor's asset is situate in Canada, however fortuitously, (for example, a ship calling on a Canadian port), then the Canadian court retains the right to determine whether a creditor, foreign or Canadian, is a secured creditor or not, notwithstanding the fact that the foreign court to whom the foreign representative is responsive would not recognize the security right under its foreign law.

General References:

Houlden, L.W. & Morawetz, G.B. *Bankruptcy and Insolvency Law of Canada*, four volumes, Carswell, 2009 continually updated; see Volume 3, pages 7-369 , 7-789 covering and annotating sections 267 to 284 BIA; Volume 4, pages 11-294.1 to 11-338 covering and annotating sections 44 to 61 of the CCAA.

Sarra, J., *Rescue! The Companies' Creditors Arrangement Act*, Thomson/Carswell, 2007

Baird, David E., *Practical Guide to the Companies' Creditors Arrangement Act*, Carswell, 2009, see Chapter 23, pages 361 to 407

2. Do your laws recognize the standing of a foreign creditor or other persons (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.

Answer: The BIA and the CCAA make no distinction between a foreign creditor or a Canadian resident creditor so long as the creditor as defined in s.2 of the BIA is someone who "has a claim provable in bankruptcy", that is, "any claim or liability provable in proceedings" under the BIA.

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

Answer: Yes.

1. Where a foreign insolvency administrator deals directly with Canadian creditors of foreign shipowner without seeking recognition in Canada of the foreign insolvency proceedings, the foreign insolvency administrator is potentially subject to general public order provisions with respect to communications or transactions carried out in Canada, such as compliance with international sanctions recognized under Canadian law.

2. Where a foreign insolvency administrator applies under the BIA or CCAA for the recognition of a foreign insolvency proceeding and an order recognizing a foreign proceeding is made, the foreign representative who applied for the order has statutory duties to advertise in Canada a notice of the recognition order and other information as the court directs. The foreign representative also must immediately inform the Canadian court of any substantial change in the status of the recognized foreign proceeding, any substantial change in the status of the foreign representative's authority to act and any other foreign proceeding concerning the same debtor that becomes known to the foreign representative (s. 276 of the BIA, s. 53 of the CCAA). Since a foreign insolvency administrator receiving a recognition order will have for that purpose attorned to the jurisdiction of the Insolvency Court, if the foreign insolvency administrator fails to comply with their statutory duties under s. 276 of the BIA or s. 53 of the CCAA, the Insolvency Court would have jurisdiction to grant relief. If the foreign insolvency administrator failed to disclose material facts in their application for recognition of the foreign proceeding, or having obtained a recognition order, acted in an arbitrary or oppressive way not authorized by the law of the foreign proceeding in dealing with Canadian creditors, the foreign administrator could potentially be subject to further directions of the Bankruptcy Court at least with respect to compliance with BIA Part XIV and CCAA Part IV . An Insolvency Court faced with such noncompliant activities of a foreign bankruptcy administrator, could, on the application of a Canadian creditor affected, vary or set aside the recognition order.

Under the BIA, Part 1, sections 5 to 41 create the offices of administrative officials who serve the public function of acting as neutral representatives on behalf of creditors over the estates of debtors who are petitioned into bankruptcy.

The administrative offices are those of the Superintendant of Bankruptcy who is appointed for a term of five years by the Governor in Council. His function according to s.5 (2) is to supervise "the administration of all estates" and matters to which the BIA applies. Pursuant to s. 5(3), he oversees the licensing and subsequent conduct of Trustees in bankruptcy who, upon appointment by the court exercising bankruptcy jurisdiction,

take charge of the administration of any individual estate of a bankrupt person (defined in s.2 to include not only an individual but also partnerships, unincorporated associations, corporations, cooperatives, successions of a person and other legal representatives of a person).

Pursuant to s.5(4), he may engage in internal investigations and outside investigations with respect to the administration of matters under the BIA including the possible commission of offences under the BIA and any other Act of Parliament, including the Criminal Code and makes reports to persons in charge of the provincial administration of justice with respect thereto.

Pursuant to s. 12, Official Receivers are appointed for each province who report to the Superintendant of Bankruptcy, who are considered officers of the court and perform various functions and responsibilities under the BIA.

The Trustee, who must be duly licensed to act as a Trustee by the Superintendant of Bankruptcy, is fully accountable for his administration of the estate of any bankrupt debtor both to the Superintendant and to the Bankruptcy Court.

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 state of the insolvent ship operator to a creditor or group of creditors?

Answer: Yes – where the Trustee neglects or refuses a proceeding at the request of a creditor that would benefit the estate, under s. 38 of the BIA that creditor, whether a foreign or a Canadian creditor, can apply to the Bankruptcy Court to assume the entire carriage, risk and expense of pursuing a claim of an insolvent ship operator against a third party and keep the benefit of any recovery to the exclusion of the Trustee. Under usual terms of s. 38 orders, other creditors of the insolvent estate may only participate in the claim in the name of the insolvent ship operator against the outside party if the other creditors undertake to be responsible for payment of legal expenses, and for payment of any adverse costs award by the successful outside party defendant, in proportion to the value of their claim to the total value of the claims of any other creditors who have agreed to participate in the claim against the third-party.

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.

Answer: Yes. Under s.37 of the BIA, a creditor, whether foreign or Canadian domiciled, who is aggrieved by any act or decision of the trustee may apply to the court and the court may confirm, reverse or revise the act or decision complained of and make any other order it considers just. A creditor is also entitled to complain about the Trustee's conduct to the Superintendant of Bankruptcy under s.10 of the BIA.

6. Do your laws permit foreign creditors to commence legal proceedings against administrators if they consider the administrator has acted negligently or wrongly?

Answer: Yes, three sets of procedures are available. Under s. 10 of the BIA, a creditor may complain to the Superintendent of Bankruptcy. Under s. 37 of the BIA, a creditor or insolvent debtor who considers they are prejudiced by the activities of a Trustee may apply without leave to the Bankruptcy court for directions.

An alternative procedure is to apply to the Bankruptcy court under s. 215 of the BIA for permission to commence legal proceedings in the ordinary courts against the Trustee, generally for negligence in the administration of the estate. The person seeking to commence legal proceedings against the Trustee must demonstrate that the issue can be dealt with more efficiently in the ordinary courts instead of the Bankruptcy Court and without prejudice to the administration of the estate, or that the Bankruptcy court is not able to provide an effective remedy through a s. 37 BIA order. A person seeking permission under s. 215 also has to show there is evidence of a factual basis for the claim and that such facts, if proven, would show a type of claim known to the law as a basis for the Trustee's liability.

Bankruptcy Courts prefer that concerns over the conduct of the Trustee be dealt with summarily by motions under s. 37 while the estate is still in the process of being administered rather than for the aggrieved person to wait and then attempt to seek leave to the Trustee under s. 215.

Under s.41 (8) of the BIA, upon discharge by the Bankruptcy Court when the Trustee applies, having completed his duties, the Trustee is discharged "from all liability (a) in respect of any act done or default made by him in the administration of the property of the estate, and (b) in relation to his conduct as Trustee" except where it is shown that the Trustee obtained his discharge through fraud or by suppression or concealment of any material fact.

Of potential significance in the reorganization of an insolvent ship operator under the CCAA, the assets remain vested in the debtor who is subject to the supervision of the Court appointed Monitor – a person who has the same qualifications as the trustee under the BIA.The Monitor is not responsible for any environmental damage which arose before the Monitor's appointment and is responsible for post appointment environmental damage only if such arose from the Monitor's gross negligence or wilful misconduct. In reorganization proceedings, the Insolvency Court on application by a creditor, may replace the Monitor with another Trustee (s. 11.7(3) of the CCAA).

7. If a foreign creditor is 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?

Answer: Yes. The BIA makes no distinction between a foreign creditor or a Canadian resident creditor so long as the creditor as defined in s.2 of the BIA "has a claim provable in bankruptcy", that is, "any claim or liability provable in proceedings" under the BIA. Pursuant to s.43 of the BIA, any one or more creditors may apply to the Bankruptcy Court for a bankruptcy order against a debtor.

Part XI of the BIA regulates the activities of private receivers if they are appointed either privately under a security agreement or under court order authorized by statute for the purpose of exercising powers against all or substantially all of the property of an insolvent person. Because the BIA permits secured creditors to exercise remedies against property of an insolvent person regardless of such person's bankruptcy, Part XI regulates the activities of receivers whether or not the insolvent person is also the subject of bankruptcy proceedings. The Part XI requirements therefore are likely to apply in the context of an insolvent corporation owning only one ship.

A secured creditor intending to exercise remedies against all or substantially all of the property of an insolvent person (whether or not a receiver is appointed) must give at least 10 days notice to the debtor (s. 244 of the BIA).

Once a receiver is appointed, any receiver exercising powers against all or substantially all of the property of an insolvent person:

a) is required to follow certain procedures such as giving notice to the Superintendent of Bankruptcy and all known creditors, and preparing an initial report on the circumstances of the insolvency and further and final reports to the Superintendent and creditors requesting copies (ss. 245-246 of the BIA); and

b) is required to act honestly and in good faith and deal with the insolvent person's property in a commercially reasonable manner (s. 247 of the BIA).

If the Superintendent, the insolvent person, (and the insolvent person's Trustee if the insolvent person is also bankrupt), or a creditor believes the receiver is acting inconsistently with its obligations under Part XI, these classes of persons can apply for a court order to control the activities of the receiver (s. 248 of the BIA).

Where Part XI BIA does not apply, under general principles of Canadian law, the insolvent debtor or its creditors could commence an action against a privately appointed receiver, or seek remedies from the court with respect to the conduct of a court-appointed receiver, if such persons have grounds to demonstrate the receiver acted outside its powers or negligently.

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.

Answer: The principle is stated in s. 71 of the BIA which states that upon bankruptcy, "a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall...immediately pass to and vest in the trustee..." The term "property" in s.2 of the BIA is widely defined to include "any type of property, whether situated in Canada or elsewhere..."

While the Trustee's rights to the bankrupt's property situate in Canada are incontestable, recognition by the foreign jurisdiction of his legal standing in the place of the bankrupt and the extra-territorial effect of s.71 of the BIA is problematic, and will depend on the private international law rules of the foreign jurisdiction where the asset is situate.

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?

Answer: Pursuant to s.102 of the BIA, within five days of his appointment, it is the duty of the Trustee of the bankrupt to inquire as to the names and addresses of the creditors of the bankrupt. Under s.16 of the BIA, the Trustee has the duty to take possession of all deeds, books, records and all property of the bankrupt and has the power to obtain search warrants for that purpose pursuant to s.189. Under s.168, the Trustee may even cause the bankrupt to be arrested, and his papers, books, and property seized for various purposes under the Act. The Trustee has a duty to call a first meeting of creditors within 21 days of his appointment, although that delay may be extended by the Superintendant of Bankruptcy.

A Monitor appointed under the CCAA has rights of access to the insolvent company's records, and the company must cooperate with the Monitor and provide information (s. 24 of the CCAA). There are detailed statutory requirements for the Monitor to prepare cash flow statements and give notice of the proceedings to all known creditors and publish newspaper notices (s. 25 of the CCAA) . After the initial notices, the Monitor must advise the company's creditors of the filing of their periodic reports, including any appraisal or investigation on the state of the company's business and financial affairs and the cause of its financial difficulties, reports of material adverse changes, and any Monitor's opinion as to the reasonableness of proposals in any plan of arrangement to preclude or restrict creditors from seeking orders for the assignment for creditors' benefit of claims in the name of the bankrupt under s. 38 of the BIA or to preclude or restrict creditors' seeking to set aside fraudulent or preferential transactions under ss. 95-101 of the BIA. (s. 23 of the CCAA). These notice and reporting procedures may be varied or supplemented by the terms of the CCAA initial order or subsequent procedural orders.

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?

Answer: Neither the BIA nor the CCAA make any distinction between Canadian resident creditors or a foreign creditor.

According to the General Rules, being a regulation passed under the BIA, pursuant to Rule 6, notices must be personally served or sent in a prescribed form through the mail, courier service, facsimile or by electronic transmission.

Pursuant to s.102 of the BIA, the Trustee must give a notice within 21 days of his appointment to each creditor of a first meeting of creditors, to confirm his appointment as Trustee, or substitute another Trustee, to discuss the causes of the bankruptcy, to receive proofs of claim by creditors, and to appoint inspectors to act on behalf of the creditors with respect to the administration of the estate.

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?

Answer: There is no special rule for foreign creditors. Pursuant to BIA s. 149(1) the Trustee may, but is not required and rarely does, give notice to creditors that if the claim is not proved in thirty days, then dividends may be paid without reference to the claim. The method of giving notice is found in General Rule 6(1) which allows notice by personal delivery, by mail, courier, fax or electronic transmission. The only requirement for

publishing notice in a newspaper is in BIA s. 102(4) which only requires publication in a local newspaper before the first meeting of creditors.

As a general practice, in CCAA proceedings 323 the Monitor sets up a website with hyperlinks to copies of notices, monitors reports, and court orders in the CCA proceedings. If there are significant identified foreign creditors, the Monitor or applicant insolvent debtor may apply, as part of the initial or subsequent orders, for a notice of the CCAA proceeding to be published in foreign or international shipping trade newspapers.

Under the CCAA process there is no specific deadline for filing claims in the legislation, however, typically the claims process order issued by the court includes a timeline for filing claims, after which they are barred.

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?

Answer: Yes, in the case of a Canadian registered vessel, according to section 58(1)(b) of the CSA, 2001, notice by the authorized representative must be given to the Registrar of Shipping that there has been a change of ownership brought about by the vesting of the asset in the Trustee pursuant to s.71 of the BIA.

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?

Answer: No.

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?

Answer: BIA s. 149(1) allows the creditor to seek a time extension from the court for filing a proof of claim late. The creditor must establish that its position is such that it deserves special consideration.

BIA s. 178(1)(f) provides that if the debtor is to blame for failure to give notice to the creditor, for example, if the debtor fails to disclose the claim to the Trustee, then the claim will survive the bankruptcy. The creditor will be entitled to payment from the debtor of the amount it would have received from the debtor even after the bankruptcy is over. A late filing beyond the deadline for filing claims of a CCAA claims bar order will not be recognized unless the claimant on application to the court, is able to demonstrate extraordinary reasons why a late claim should be received.

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?

Answer: The court will recognize the foreign law governing the contract – whether it be in virtue of an agreement between the parties, or of the place with which the contract has the closest connection – and that governing where the tort or delict was committed.

A Canadian court will generally recognize the maritime lien status of a claim under the law where the claim arose, even if the claim would not give rise to a maritime lien under Canadian law. The maritime lien will be recognized as a claim *in rem* against the ship in admiralty. However, a maritime lien would not generally be recognized against assets other than the ship in bankruptcy proceedings to which the lien attaches.

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.

Answer: There are no significant procedural differences between foreign and local creditors in making any of the types of claims listed in the table.

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?

Answer: Generally, yes. The Canadian court would apply conflict of law rules to determine the appropriate law applicable to characterize the property right sought to be enforced.

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.

Answer: Once the arbitral award is reduced to a claim in debt, then there is no difference between recognition of the foreign arbitral award in insolvency proceeding and for general legal purposes.

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?

Answer: The doctrine of sovereign immunity prevents the arrest or attachment of foreign ships used for government or public purposes. However, if the ship is used for commercial purposes, then ordinary procedures apply including the right to arrest under Canadian maritime 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 are any legal restrictions on direct handling of claims by foreign administrators, please provide details.

Answer: Yes. There are no general legal restrictions on advertisements of foreign insolvency proceedings or communications between foreign insolvency administrators and creditors or other interested persons in Canada. Payment of any recoveries may be made directly. Transactions involving foreign entities or money transfers can be

regulated in the context of international sanctions under the Special Economic Measures Act or United Nations Act (Canada).

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

Answer: Yes. See the answer to Question 1 above for more detail.

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?

Answer: Pursuant to s.269 of the BIA, the request for recognition must come directly from a "foreign representative" as defined in s.268, which includes someone authorized to administer the debtor's property and act as a representative in a foreign proceeding. Since Canada has adopted the Model Law, letters of request from the foreign tribunal are no longer necessary.

The normal practice is for a foreign representative (as defined in the BIA, s. 269) to bring an application under Part XIV of the BIA or Part IV of the CCAA. Canadian courts will not simply act on receipt of a letter of request from a 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.

Answer: There are two conceptual legal bases for the recognition of foreign insolvency proceedings, one derived from the common law and the other from statute. If the proceeding does not fall within the statutory definition of a "foreign proceeding", Canadian courts may exercise inherent jurisdiction to recognize such proceedings under the general law respecting recognition of foreign legal proceedings if the court is satisfied there is a real and substantial connection between the foreign jurisdiction and the foreign proceeding sought to be recognized: *Re Straumur-Badaras Bank hf.* (2009) 57 C.B.R. (5th) 256 (Ont., S.C.J. Commercial List.)

Reorganization

If the total of claims against the debtor company or affiliated debtor companies are more than $5 million, proceedings may be commenced under the CCAA.

Part IV of the CCAA largely follows the provisions of the Model Law. Under subparagraph 47(1), if the court is satisfied that the application relates to a foreign bankruptcy proceeding as defined and that the application is made by a foreign representative as defined, the court is required to make an order recognizing the foreign proceeding. However, if the conduct of the foreign proceedings could adversely impact Canadian parties affected by the foreign proceedings, or they could be deprived of a juridical advantage, the recognition order can be granted on terms: Re Lear Canada (2009) 55 C.B.R. (5th) 57.

The definitions of "foreign proceeding" and "foreign representative" follow those in Article 2 of the Model Law. Under subparagraph 47(2), similarly to the Model Law

concepts the court is required to classify whether the foreign bankruptcy proceeding is a main proceeding or a non-main proceeding.

Recognition of the foreign proceeding requires a two-step determination. First, do the foreign proceedings fall within the statutory definition? Secondly, is the foreign proceeding a main or a non-main proceeding? *Re Gyro-Trac (USA) Inc.* (2010) 66 C.B.R. (5^{th}) 159.

The recognition order must be consistent with orders that could be made under the CCAA, The court has a general discretion to impose whatever terms and conditions it deems appropriate in respect of proceedings (CCAA s. 49).

The making of a recognition order for foreign insolvency proceedings does not preclude the debtor company from commencing or continuing proceedings under the CCAA, the BIA.

Bankruptcy

Part XIII of the BIA largely follows the provisions of the Model Law. Under subparagraph 270(1) if the court is satisfied that the application relates to a foreign bankruptcy proceeding as defined and that the application is made by a foreign representative as defined, the court is required to make an order recognizing the foreign proceeding.

The definitions of "foreign proceeding" and "foreign representative" follow those in Article 2 of the Model Law.

Canadian law follows the Model Law concept of foreign main and foreign non-main proceedings. Under subparagraph 270 (2), the court is required to classify whether the foreign bankruptcy proceeding is a main proceeding or a non-main proceeding.

Under section 284 a Bankruptcy Court may apply any legal or equitable rule governing the recognition of foreign insolvency orders not inconsistent with the provisions of the BIA and provides that nothing in Part XIII prevents the Bankruptcy Court from refusing to do something that would be contrary to public policy.

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.

Answer: Yes. The Trustee under the BIA or the applicant debtor or monitor under the CCAA may bring a motion within the Insolvency Proceeding for an order requesting recognition by the foreign jurisdiction or for letters of request to be issued by the Canadian Insolvency Court. These days, a more common procedure would be for the Canadian Trustee or the CCAA applicant debtor or monitor to apply directly to the foreign insolvency tribunal for recognition of the Insolvency Proceedings, if the procedure of the foreign tribunal so permits.

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.

Answer: Yes. A foreign representative may commence a proceeding by way of originating notice of application before the superior Court of a province in which the debtor has assets or where creditors of that debtor are exercising activities in relation to claims against the debtor or the debtor has assets which the foreign representative seeks to control. The effect of obtaining a recognition order under the BIA or the CCCA is that the order, unless restricted by its terms, operates throughout Canada and if the type of proceeding recognized is a foreign main proceeding all Canadian legal proceedings by creditors of the foreign debtor are generally stayed (CCAA s. 48, BIA s.271). However, Canadian courts retain the discretion to grant such an order on terms. For example, if the foreign proceeding is a bankruptcy proceeding and not a reorganization proceeding, consistently with their rights under the BIA, the recognition order could permit Canadian secured creditors such as ship mortgagees to continue enforcement proceedings in Canada against the secured assets of the bankrupt. On the other hand, if the foreign proceeding is a reorganization proceeding analogous to the CCAA, the Canadian recognition order would probably stay all types of proceedings against the debtor, including claims by secured creditors.

A foreign representative may also seek leave to intervene in an existing legal proceeding in Canada for the purpose of seeking a stay of that proceeding as it relates to the debtor. Such a stay would be granted under the inherent jurisdiction of superior courts to grant a stay of proceedings if in the interests of justice. However a stay order granted under such a procedure would operate only in personam and bind only the parties to the particular legal proceeding.

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?

Answer: Generally, yes. If the Canadian parties to the relevant contract participated in the foreign insolvency proceedings, under Canadian conflict of laws principles such Canadian parties are considered to have attorned to the jurisdiction of the foreign insolvency tribunal and therefore are bound by its orders and determinations. If the foreign representative sought and obtained recognition in Canada of the foreign insolvency proceedings and the foreign insolvency proceeding is a main proceeding or the foreign insolvency proceeding is a non- main proceeding but the terms of the recognition order confirm such compulsory transfer, such compulsory transfer will be recognized.

If there was no attornment to the foreign tribunal by a Canadian contractual party affected or no recognition order for foreign insolvency proceedings was sought in Canada, the foreign compulsory transfer of the contractual obligation may be recognized as a matter of comity under general conflicts of law principles if there is a real and substantial connection between the foreign jurisdiction and the contractual obligations affected subject to the other party's rights to apply to the court for a declaration that the contract was cancelled due to the foreign insolvency proceedings.

Absent applicable treaties for mutual enforcement or recognition of criminal or fiscal measures, such a compulsory transfer of contractual obligation may not be recognized if it is penal, fiscal or confiscatory in nature or if it is contrary to Canadian public policy *Laane and Baltser v. Estonian SS Line* [1949] S.C.R. 530.

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.

Answer: Yes. These procedures are both set out in legislation and developed through court practice. As a general principle, if a foreign insolvency proceeding recognition order is made, the Canadian court and the Canadian insolvency monitors or Trustees are required to cooperate to the maximum extent possible with the foreign representative and the foreign court involved in the foreign proceeding. The forms of cooperation can include appointment of persons to carry out court directions, communication of information, including direct court to court communication, coordination of the administration and supervision of the debtor's assets and affairs, the approval or implementation of agreements concerning coordination of proceedings and coordination of concurrent proceedings concerning the same debtor (s. 275 of the BIA, s. 52 of the CCAA).

A form of initial CCAA order has been approved by the Ontario Superior Court Commercial List. Paragraph 49 and 50 of such an order provide:

> 49. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.
>
> 50. THIS COURT ORDERS that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada

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.

Answer: No. The usual wordings of multilateral or bilateral treaties on judicial cooperation to which Canada is a party exclude from their application insolvency proceedings. However, Canadian courts generally follow various guidelines on multinational insolvencies such as the American Law Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases: http://www.iiiglobal.org/component/jdownloads/finish/396/1521.html: http://www.ontariocourts.ca/scj/en/commerciallist/protocol.htm

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.

Answer: Yes.

While the BIA permits secured creditors such as ship mortgagees and maritime lien holders to continue enforcement proceedings against the debtor's ships outside of bankruptcy proceedings, such rights are not always accorded to secured creditors under foreign bankruptcy laws. In considering whether to grant recognition of foreign insolvency proceedings on terms, the deprivation of a juridical advantage available to creditors in Canada can be taken into account. For example, in *Holt Cargo Systems v. the "BRUSSEL' sub nom. Antwerp Bulkcarriers, N.V. (Re),* 2001 SCC 91, [2001] 3 SCR 951, the Supreme Court of Canada permitted a Federal Court in rem action against the ship by maritime lien creditor to proceed and set aside an initial recognition order obtained by the Belgian bankruptcy trustee. Because the priority ranking of creditors' claims is considered under Canadian conflict of laws principles to be a procedural matter governed by the law of the forum, legal uncertainties can arise if the law of the place of insolvency administration does not give the same priority status or rights of enforcement to secured creditors in rem as does Canadian law.

Where a foreign insolvency representative chooses to intervene in Federal Court proceedings, they are required to act consistently with the procedures and the obligations of parties before the court. In Global Enterprises International Inc. v. the "AQUARIUS" and others 2001 FCT 1311 a foreign syndic of the defendant shipowner published notice in Lloyd's List that the "Federal Court sale, was in the view of the syndic, illegal and that no bill of sale would be effective to delete the trawlers from the Polish shipping registry unless it was signed by the Syndic." The Federal Court found that the syndic had not demonstrated grounds for its claim to the entire sale proceeds and that its activity in abandoning appeals from procedural orders and publishing the advertisement was an abuse of process. The appropriate remedy for the foreign representative was to obtain a recognition order from the Bankruptcy Court.

The commencement of CCCA proceedings by an insolvent shipowner can change the usual ranking of admiralty priorities because the statute permits, and the invariable practice is that, the expenses of administration of the estate and debtor-in-possession financing be secured by first charges against the property of the debtor (s. 11.52). To the extent such charges relate to the creation of a fund for the benefit of all creditors, an analogy may be made to the high priority usually recognized by Canadian maritime law to the expenses of sale in rem and legal costs of the first creditor to arrest the vessel, regardless of the priority of its substantive claim. However, to the extent such expenses relate to financing for the continued operation of the ship during insolvency reorganization, not all operating expenses which could be secured through DIP financing would have a secured creditor priority under Canadian maritime law outside the CCAA. In a recent decision of *Re Vanguard Shipping (Great Lakes) Ltd. and Vanship Ltd.* CV-12-9655 the Ontario Superior Court Commercial List approved a sale process in which the purchaser of the assets agreed to assume responsibility for payment of such CCAA charges, along with any in rem claims as may be determined to rank in priority to existing ship mortgages. Where the CCAA court approves the sale of company assets and the

only fund available for payment of creditors is the proceeds of sale, the super priority given to administration and DIP charges could result in reduced recovery for maritime law secured creditors.

For a description of problems that arose in multiple jurisdictions (France, Canada and US), see Gouin, L. "Quelques défis de la faillite international: le cas de Quebecor World Inc." in volume 321 Développements Récents en Droit des Affaires Internationales – La Faillite Internationale, Editions Yvon Blais, 2010, pages 25-84; in the same volume, with respect to difficulties involving US, Canada and Mexico, see Plourde, N. "La Loi type sur l'insolvabilité international" at pages 225 to 243.

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?

Answer: Ships registered in Canada and ship operators incorporated in Canada are subject to insolvency laws of general application; Canadian laws do not provide for specific rules relating to the administration of the businesses of insolvent ship operators.

However, under maritime law the right of mortgagees and maritime lien holders to assert in rem claims against ships is generally unaffected by bankruptcy proceedings (domestic or foreign), subject only to (1) the ship's physical presence in Canada, and (2) notice being given under section 244 of the BIA when the secured creditor intends to enforce a security on all or substantially all of the insolvent's assets acquired for, or used in relation to, its business. It should be also noted that a Canadian trustee has the right to have postponed the secured creditor's realization of the security (the mortgage on a ship) by six months pursuant to section 69.3(2) of the BIA.

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.

Answer: Not applicable

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?

Answer: A creditor or creditors may not file an application for a bankruptcy order against a debtor under the BIA unless the debt or debts owing to the applicant creditor or creditors amount to at least one thousand Canadian dollars. The procedures to be followed under the BIA do not vary subject to the value of the debtor's assets – i.e. there is no simplified insolvency administration for debtor ship operators with assets of limited value.

Pursuant to s.3, the CCAA only applies to debtor companies or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies is more than $5 million CAD. The CCAA applies to all companies incorporated in Canada, and to companies incorporated elsewhere provided the latter have assets in Canada. The CCAA does not apply to individuals, associations of individuals or partnerships or other forms of business association other than companies

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.

Answer: The right to commence insolvency proceedings under the BIA does not differ depending on whether the debtor ship operator is a company or an individual. However, specific procedures under the BIA may vary depending on whether or not the debtor is a company or an individual. For example, debtor individuals are only eligible to apply for interim financing orders under section 50.6(1) of the BIA if they are carrying on a business.

The CCAA only applies to debtor companies and not to debtor individuals.

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?

Answer: There are special notice requirements that apply under the BIA where secured creditors intend to enforce a security against all or substantially all of the assets of an insolvent, where those assets were acquired for, or are used in relation to, a business carried on by the insolvent.

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

Answer: Insolvency procedures are administered by courts of general jurisdiction, not by specialized courts or tribunals. Under the BIA, the superior court of each provincial or territorial jurisdiction of Canada is granted jurisdiction in bankruptcy. Similarly, the superior court of each provincial or territorial jurisdiction of Canada is granted jurisdiction to receive applications under the CCAA. The Federal Court has no bankruptcy or insolvency jurisdiction (except for concurrent jurisdiction over insolvent railway companies under the Canada Transportation Act, ss. 106 to 110). However, the Federal Court does have jurisdiction to hear and adjudicate claims of secured creditors governed by maritime law claimants despite bankruptcy proceedings in another Canadian court or in another country. (per the Supreme Court of Canada's decision in Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of), 2001 SCC 90).

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

Answer: Under the BIA, a bankrupt is a person (corporate or individual) who has made an assignment or against whom a bankruptcy order has been made. Creditors may file an application for a bankruptcy order against a debtor if it is alleged that (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand Canadian dollars; and (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application. The BIA sets out a number of acts of bankruptcy, including the following (among others):

- the debtor makes an assignment of its property to a Trustee for the benefit of its creditors generally, whether it is an assignment authorized by the BIA or not;
- the debtor makes a fraudulent gift, delivery or transfer of the debtor's property or of any part of it;
- the debtor exhibits to any meeting of its creditors any statement of its assets and liabilities that shows that it is insolvent, or presents or causes to be presented to any such meeting a written admission of its inability to pay its debts;

- the debtor assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of its property with intent to defraud, defeat or delay its creditors or any of them;

- the debtor gives notice to any of its creditors that it has suspended or that it is about to suspend payment of its debts;

- the debtor defaults in any proposal made under the BIA; or

- the debtor ceases to meet its liabilities generally as they become due.

Under the BIA, certain procedures vary depending on whether the debtor is bankrupt or insolvent. An insolvent person is a person (corporate or individual) who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors amount to one thousand Canadian dollars, and

- is for any reason unable to meet its obligations as they generally become due,

- has ceased paying its current obligations in the ordinary course of business as they generally become due, or

- the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

The CCAA only applies to companies that are at least $5 million CAD in debt. A debtor company is defined under the CCAA to include a company that is bankrupt or insolvent or that has committed an act of bankruptcy within the meaning of the BIA.

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.

Answer: Not applicable

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.

Answer: The BIA permits a private creditor to obtain a court order to begin insolvency proceedings against a debtor ship operator. One or more creditors may file in court an application for a bankruptcy order against a debtor ship operator if it is alleged in the application that (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand Canadian dollars; and (b) the debtor ship operator has committed an act of bankruptcy within the six months preceding the filing of the application.

Initial applications under the CCAA may only be brought by the debtor company, not by its creditors.

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?

Answer: The BIA is binding on the Crown in right of Canada and its provinces. There is no separate regime under which a public authority would obtain a court order or exercise its own jurisdiction to begin insolvency proceedings against a debtor ship operator. A public authority would follow the same procedures available to private creditors under the BIA.

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.

Answer: Jurisprudence under the BIA has consistently insisted that the burden of proof is on the applicant to prove the elements necessary to bring a bankruptcy application. Thus it is open to the debtor to respond to the application by demonstrating that the applicant has not proven that it meets the two prerequisite criteria for bringing the application, specifically by arguing that no act of bankruptcy has been proven to have been committed or that the applicant has failed to establish that the alleged defaulting debtor owes the applicant more than $1,000.

S. 43 (7) of the BIA foresees that where the court is satisfied that a debtor is able to meet its obligations a bankruptcy order should not be made, hence this is a provision upon which the alleged debtor may rely to defend proceedings. The same provision grants discretion to a judge to decline a bankruptcy application where the debtor is able to show sufficient cause for the order not to be granted. Further, this subsection requires that the court be satisfied by the service of the application, hence a debtor may argue errors of form in defending an application.

If a debtor intends to dispute an application, it is incumbent on a debtor to file a notice setting out the grounds for this dispute and serve same on the applicant creditor at least two days before the hearing of the application. Any decision to remedy a failure to make such notice is at the discretion of the court.

Generally, any proceeding under the CCAA is always initiated by the debtor itself. However, private creditors or public authorities have the right to petition a debtor into bankruptcy under section 43 the BIA provided that they meet the conditions more fully described in the answer to Question 36 above.

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.

Answer: The BIA provides for a discrete proceeding in case of a voluntary submission to bankruptcy. S. 49 details the requirements and procedure for such an assignment into bankruptcy. The sole legal criterion provided is that the assigning person must be insolvent. Case law has defined an insolvent person pursuant to this provision as a person who is not bankrupt; who resides, carries on business, or has property in Canada; and who has liabilities exceeding $1,000. Hence it is incumbent upon an applicant to an assignment into bankruptcy to prove these elements.

The state of insolvency law encourages debtors to take the initiative by either proceeding under the CCAA where their indebtedness exceeds $5million with a view to coming to an arrangement with creditors and continue operating their business, or making a proposal or an assignment of their assets under the BIA.

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 operator's voluntary insolvency proceedings? If so, describe generally what classes of persons other than creditors have such legal standing and what grounds of opposition are available.

Answer: Where an assignment has been made and a bankruptcy order obtained, a creditor may bring a motion either for rescission or for annulment of the bankruptcy order entered. A rescission under s. 187 (5) is ordered when the order ought not to have been made, whereas an annulment is ordered where there were no grounds for the order to be made. Applications for each of these are often combined. One thinks typically in terms of a person challenging the assignment as being 'reactive' because the voluntary assignment mechanism does not have an express 'notice' requirement for creditors or other parties. An annulment will be granted where an applicant can show that the assignment was made by a person who was not insolvent, or was an abuse of process, or was done in order to defraud creditors. This decision will be premised on the facts as they stood at the time when the filing was made, as subsequent events will not be considered. An application must be brought before a court sitting in bankruptcy, and notice of the application must be served on the trustee, Divisional Office of the Superintendent and on the bankrupt. Interim measures may be ordered by the court pending the hearing.

43. Do your laws provide for a time bar for filing of claims in insolvency proceedings which is different from limitation periods or prescription from 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?

Answer: No specific time bar is provided in the BIA for the filing of claims in insolvency proceedings. There are two different procedures that should be addressed in response to this question: proceedings to be commenced by a person applying for an order declaring another to be bankrupt, as distinct from a process whereby a creditor wishes to file a claim against the estate of the bankrupt.

As to the first question, to bring an application for a bankruptcy order, an applicant must be a creditor of the debtor and the applicant must act prior to the expiration of the limitation period for enforcement of the obligation giving rise to the debt. The applicant must act within six months of the last act of bankruptcy relied on as the second prerequisite for bringing the application. An application should be prosecuted expeditiously however the courts will not dismiss an application on the grounds of delay where a satisfactory reason is provided for such delay.

For a creditor to bring a claim to share in the estate, a proof of claim must be filed in order to be entitled to a dividend. The BIA makes no provision with respect to the timing of filing of a claim, however if not filed prior to the trustee making initial payouts this will deprive the creditor of entitlement to share in those dividends already paid out. The creditor however does have preferred standing to be paid its share of prior dividends that would have been payable from the past dividend declaration from future monies which

the trustee recovers and declares as further dividends over those creditors who have already been paid under the initial declaration. Where a dividend has been declared but not yet paid, a satisfactory proof of claim filed after the declaration but before the payment will be considered in the distribution of the same dividend.

The laws provide for a claim process to be approved by the Court and such process usually includes a time limitation for the form, submission and adjudication of claim. The emphasis is on "usually" as the statute leaves this to the discretion of the Trustee / Monitor.

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?

Answer: The case law rendered under the BIA invests discretion into the trustee to elect whether to enforce pre-existing contracts. The benefit of pre-existing contractual relations of the bankrupt - other than when entered into on an intuitae personae basis – are the property of the trustee, however a trustee is not bound by the bankrupt's obligations. However if the trustee does not in a reasonable time specify that contractual obligations owed should be met, then the co-contracting party is permitted to deem the contract as broken. The case law has defined the first meeting of the creditors as a reasonable time by which a trustee should have expressed intent to enforce contractual obligations.

Under the CCAA, a DIP is allowed to continue to perform contracts and make expenditures subject to approval and supervision of a monitor.

Under the BIA, in theory, the continuation of the business is allowed, but in practice since the statute is considered not to protect the receiver/ trustee adequately against liabilities (particularly with respect to pollution), they are reluctant to be involved.

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?

Answer: Yes, under the CCAA. The case law under the BIA confers discretion upon a trustee as to whether or not to execute contractual obligations entered into by the bankrupt. Under the BIA, the contracts come to an end.

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?

Answer: No, not compulsorily.

Under the CCAA, any deal is possible provided that it meets the approval of the Court as being done in the general interests of the creditors. The transfer of first ranking crew claims against the vessel and contracts of (future) affreightment along with the vessel is generally seen as being in the general interest of creditors because one class of creditors is removed from the general body of creditors and the estate receives value for the contracts of affreightment.

Under the BIA, the Trustee has the power to sell any asset, however the trustee is subject to the provisions of the contract itself which might terminate upon bankruptcy.

Contractual obligations are entered into *in personae* and not *in rem*, thus the obligations terminate with the bankruptcy of the person and do not survive and invest in the vessel. Jurisprudence is unanimous in finding that employment contracts are terminated upon a bankruptcy application being brought by a creditor or an assignment being brought by the debtor.

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?

Answer: The rights of a secured creditor – which include any lien holder – are prima facie unaffected by the bankruptcy of the debtor. This is explicitly provided for by s. 69.3 (2) of the BIA. Therefore the rights of the lien holder to accelerated remedies are the same as they would be irrespective of the bankruptcy. The same provision of the BIA does however invest discretion into the courts to postpone realization of security, however for debts due at the date of bankruptcy or not later than six months thereafter, the right may not be postponed for a maximum of six months, and for debts due more than six months after the date of bankruptcy, the court may postpone right to realization of security by a secured creditor up to a maximum of six months after the due date, only if all interest installments in arrears by more than six months are fully paid as well as all other defaults older than six months.

The laws permit acceleration clauses, but they do not allow their enforcement once a debtor has filed CCAA or filed under the BIA.

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.

Answer: No such distinction is drawn under the BIA with respect to local and overseas creditors.

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 mortgage other than a bank or financial institution?

Answer: See attached

All maritime mortgagees have the same rights whether or not they are a bank or financial institution. Those rights are dictated by the following:

a. the terms of the collateral marine mortgage;

b. the CSA 2001, see sections 69 to 70; and

c. the right of the Trustee to postpone realization pursuant to section 69.3 of the BIA for up to six months.

Under sections 425- 436 of the *Bank Act*, Canadian chartered banks and foreign banks operating under Schedule II of this Act have additional statutory rights of enforcement outside of insolvency proceedings, of security interests in ships under construction given

by shipbuilders, and in fishing vessels given by fishers. In practice, other types of secured creditors may and typically do give themselves similar powers under contractual deeds of covenants as part of ship mortgage financing, but the granting of such powers to secured creditors other than banks which can rely on the above-mentioned statutory powers is a matter of voluntary contractual negotiation rather than a statutory right.

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.

Answer: An insolvency proceeding may result in a stay of proceedings; however this does not typically apply to traditional maritime lien claimants. If a general stay of litigation exists due to the insolvency, then maritime lien claimants should first seek leave of the insolvency court before commencing any action needed to preserve their maritime lien right against the ship or its owners. Creditors whose claims arise after insolvency proceedings have been initiated may be affected.

The priority of the claims themselves is generally not affected. However, there is some unsettled law as to the extent that security interests in a vessel which have been registered only in a registry set up by a province, and not also secured by the means of a maritime mortgage, may trump the traditional maritime priority rankings.

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?

Answer: In Canada, pursuant to the BIA / CCAA, the Bankruptcy Court exercises exclusive jurisdiction with respect to bankruptcy matters and pursuant to Part III of the *Marine Liability Act,* the Admiralty Court exercises exclusive jurisdiction with respect to the constitution and distribution of a limitation fund. The Supreme Court of Canada has decided in In Re Antwerp Bulkcarriers [2001] 3 S.C.R.951 that once the exclusive jurisdiction of one court has been engaged, the other court must defer to that court's exercise of exclusive jurisdiction.

Where the ship owner is not subject to bankruptcy or insolvency proceedings:

(a) it may commence a limitation of liability action under Part III of the *Marine Liability Act* and is not required to establish a fund*;*

(b) Once a limitation action is commenced, the ship owner can obtain from the Admiralty Court a stay of any current or future proceedings by any claimant in relation to the subject matter of the limitation action; and

(c) Any subsequent commencement of bankruptcy or insolvency proceedings against the shipowner would not affect the limitation action except any amounts determined to be payable by the Admiralty Court to unsecured creditors would be paid to the Trustee administering the ship owner's estate on behalf of the Bankruptcy Court for distribution in accordance with bankruptcy laws.

Where the ship owner is subject to bankruptcy or insolvency proceedings:

(a) its rights to commence the limitation action and/or constitute a limitation fund are vested in the Trustee and the ship owner itself has no capacity to initiate such action. If the ship owner is subject to CCAA proceedings, it may be permitted to commence a limitation action in the Admiralty Court and constitute a limitation fund, as part of its reorganization of its financial affairs.

(b) Depending on the circumstances, particularly if insurance is available, the Trustee may initiate the limitation action or simply defend actions brought against the bankrupt estate on the basis of limitation rights.

(c) Claimants who do not assert a maritime lien or are otherwise not secured creditors, may be, and probably will be, prevented from participating in the limitation action or commencing or continuing any action in the Admiralty Court.

(d) Any amounts determined to be payable by the Admiralty Court to unsecured creditors would be paid to the Trustee administering the ship owner's estate on behalf of Bankruptcy Court for distribution in accordance with bankruptcy laws.

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?

Answer: Yes. It may make a proposal to its creditors under s.50(1)(a) or if it is a company, and has liabilities exceeding $5 million, it may commence proceedings under the CCAA.

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?

Answer: A very qualified yes. It is possible under Canadian law for a debtor to negotiate a "soft" receivership with one or some of its creditors. These transactions are sometimes negotiated if the value of the ship or debts does not trigger the CCAA threshold or the expense of administration of a proposal in bankruptcy would not be cost-effective. As a matter of constitutional law, Canadian provincial laws respecting assignments and preferences and fraudulent conveyances may apply to insolvent ship operators. The law is clear that a ship operator cannot through private contractual arrangements grant a particular private creditor a higher priority to its claim than those available under law to other creditors having claims of the same class of priority which are not part of such contractual arrangements: *Royal Bank of Scotland v. Golden Trinity (Ship)*, 2004 FC 795 (CanLII) A ship operator in financial difficulties can negotiate refinancings or compromises with some of its creditors as long as these arrangements are commercially reasonable, are not intended to benefit non-arms length creditors, reflect a reasonable market value for the assets or cash flows which are the subject of such arrangements, and are not entered into with an intent to avoid or hinder payment to other creditors who are not part of such private contractual arrangements. If after entering into such private contractual arrangements the ship operator makes an assignment or is petitioned into bankruptcy, the ship operator and the restricted group of creditors with whom such

arrangements were negotiated can be faced with legal proceedings by other creditors or the trustee in bankruptcy to set aside such arrangements as fraudulent conveyances or under provincial assignments and preferences legislation, or as reviewable transactions under the BIA.

An insolvent debtor may negotiate a proposal with its creditors pursuant to the BIA. Alternatively, when total claims against a debtor company or affiliated debtor companies exceed $5 million, the insolvent debtor may negotiate a plan of compromise or arrangement with its creditors pursuant to the CCAA.

Under the BIA, a meeting of the creditors is called to vote on the proposal. The proposal must be made to all unsecured creditors; however, the proposal does not need to include all secured creditors. If the proposal does not include certain secured creditors it will not affect their rights if they do not vote on the proposal. For the proposal to be binding on each class of creditors, a majority of the proven creditors in that class, by number, together with two-thirds of the proven creditors in that class by dollar value, must vote to approve or accept the proposal presented to them. If a class of creditors approves or accepts the proposal, it is binding on all creditors within the class, subject to the court's approval. Upon court approval, the company continues forward as outlined under the proposal until it has satisfied the requirements under the proposal. If a class of creditors rejects the proposal or the court does not approve the proposal, the company is deemed to have made an assignment in bankruptcy and is automatically bankrupt. Because of the detailed procedural constraints on the conduct of commercial proposals under the BIA, if the business has any considerable cashflow or realizable value in its assets (so as to enable DIP financing and payment of Monitor's expenses), the insolvent debtor will prefer to proceed under the CCAA which gives the CCAA applicant and the Insolvency Court much greater discretion to reorganize the insolvent company.

Under the CCAA, the court plays a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved. The court has control over a decision to grant the initial order, the classification of creditors for the purpose of considering the plan conduct affecting the debtor company pending consideration of the plan and ultimate acceptability of any plan agreed upon by the creditors.

Under the CCAA, a meeting of the creditors is called to vote on the plan. For the plan to be binding on each class of creditors, a majority of the proven creditors in that class, by number, together with two-thirds of the proven creditors in that class, by dollar value, must approve of the plan presented to them. If a class of creditors approves the plan, it is binding on all creditors within the class, subject to the court's approval of the plan. If all of the classes of creditors approve the plan, the court must then approve the plan, ensuring it is fair and reasonable. Upon court approval, the company continues forward as outlined under the plan until it has satisfied the requirements under the plan.

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?

Answer: Any private contractual arrangements are not binding on non-parties and cannot prejudice them in any way. If the private contractual arrangement is not done within

the narrow confines of Question 53, the arrangement could amount to a fraudulent preference or conveyance or a reviewable transaction, as above, and be set aside.

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.

Answer: Once determining that the insolvent debtor is eligible for restructuring under either the BIA or CCAA, the following applies.

BIA: There are two options under the BIA – the first is to negotiate a commercial proposal with the creditors and file it with a licensed trustee. The Trustee then files the proposal together with a cash-flow statement and associated documents with the official receiver.

The other procedure is for the debtor to initiate proceedings by filing a NOI with the official receiver and the court. The Trustee is required to notify every known creditor of the notice of intention within five days of its filing. The debtor then must file a cash-flow statement and associated documents with the official receiver within ten days of the filing of the notice of intention.

Once the NOI is accepted, the debtor is granted an initial stay period of 30 days to enable the debtor to prepare its proposal. During this period, the company will usually continue operating. However, the stay period can be extended by application to the court up to a maximum of six months.

The debtor then develops a proposal, a formal agreement with its creditors, outlining how it intends to repay its debts. The proposal must be approved by a majority of creditors who hold at least two-thirds the value of the claims for each class of creditors in order for it to be binding on that class. If the proposal is approved, it is binding on all creditors in that class subject to court approval. Upon approval by the court, the debtor continues forward under the terms of the proposal.

CCAA: A party will make an application to a court for an initial order. In most cases, it is the debtor that brings this application. The application before the court must include projected cash-flow statements and copies of the financial statements prepared in the prior year.

The initial application usually requests various interim relief including, first, an order authorizing the debtor company to continue its business operations and continue in possession of its property. Second, a stay of proceedings against the debtor company that will apply to both secured and unsecured creditors, and a stay against termination of contracts with the debtor. Third, the appointment of a monitor to supervise the steps taken by the company while in CCAA proceedings, on behalf of all creditors, as an officer of the court. Fourth, an order authorizing the debtor to file a plan of arrangement. Fifth, an order creating charges against the property that secure administrative expenses etc. and that gives the charges super priority. Finally in many cases, the court will authorize DIP financing to the debtor and grant super priority charges over the assets of the debtor in favour of the DIP lender, if the court is of the view that additional financing during the restructuring is critical to the continued operations of the business.

The debtor then develops a plan of compromise or arrangement with its creditors. The plan must be approved by a majority of creditors who hold at least two-thirds the value of the claims for each class of creditors in order for it to be binding on that class. If the plan is approved by the creditors, it must then be submitted to the court for approval. This proceeding is known as the fairness hearing, determining whether the plan is fair and reasonable. Once the court sanctions the plan, it is binding on all creditors whose claims are compromised by the plan.

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

Answer: Under the CCAA, if the secured creditor is affected by the reorganization and a majority of their class of secured creditors' votes in favour of the proposal which is in turn approved by the court, then yes, they are subject to the court order.

Under the BIA, secured creditors have the option of being part of a proposal. In choosing to do so, the proposal may be made to secured creditors in any class. However, if a proposal is made to one or more secured creditors in a particular class, it must be made to all secured creditors in that class. In other certain circumstances, secured creditors are not affected by the proposal. For example, if, before the debtor filed the proposal, a secured creditor took possession of a secured asset, that creditor may keep the asset or sell it.

Note: CSA 2001, s.70, states that mortgages are not affected by bankruptcy of the mortgagor.

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

Answer: A debtor company is permitted to make a proposal under the BIA, so may attempt to turn the proceeding into one for reorganization or compromise. In fact, an insolvent ship operator who has been declared bankrupt may, pursuant to s.50(1)(d) of the BIA make a proposal to the creditors, and if the proposal is accepted may apply to the bankruptcy court to have the bankruptcy cancelled pursuant to s.61 of the BIA.

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?

Answer: The CSA 2001 permits a mortgagee to go into possession of a vessel if that mortgage is in default without having to take any other steps on behalf of the other creditors. A first mortgagee has absolute power to sell the vessel or the share, subject to any limitation set out in the registered mortgage. A subsequent mortgagee may not sell the vessel or share without the agreement of every prior mortgagee or under an order of the court. See CSA 2001 s. 69.

If the private creditor is a secured creditor holding a valid security interest in property, it may be able to appoint a receiver pursuant to the security agreement between the parties or by the court pursuant to the provisions of the BIA to recover amounts outstanding under a secured loan in the event the ship operator defaults on its loan payments.

The powers of the receiver derive from the authority underlying the receiver's appointment. For a privately appointed receiver, the authority is derived from the specific terms of the underlying instrument and the receiver will generally only act on behalf of the secured creditor that appointed them to realise on assets specifically covered by the loan agreement. A typical security agreement will grant the receiver the power to take possession of the company's property for the purpose of realizing the company's indebtedness to the secured creditor who appointed the receiver. Furthermore, the receiver may be authorized to sell, lease or dispose of the charged property either as a whole or in part by way of public auction, tender or private sale, and power to accept part cash or part credit for such sale. In carrying out its powers, the receiver's primary duty is to the secured creditor, although the receiver must account for the assets and hold any surplus for the debtor or other creditors.

When a debtor company is in default under its security agreement, the secured creditor can apply to court for an order appointing a receiver of the assets, property and undertaking of the company in conjunction with an action to enforce the security. For a court appointed receiver, the authority is derived from the terms of the court order appointing the receiver. The order generally provide that the receiver must seek approval of a sale process and ultimately of any sale on notice to interested parties and major creditors. If all or a large portion of the company's assets are to be sold, an application will be made by the secured creditor for court approval of the sale. To minimize interference with the receiver in exercising its powers, the court order will include a term prohibiting third parties from commencing any proceedings against the receiver or the debtor company. In support of the application the receiver will file a report with the court setting out details of the sale process, any offers received and its views of the proposed sale. If the court accepts the receiver's recommendation, the method and conditions of the sale will be set out in the order approving the sale.

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.

Answer: Both privately appointed receivers and court appointed receivers must ensure any sale is carried out in good faith, in compliance with relevant legislation and deal with the property in a commercially reasonable manner. Consequently, the receiver should give notice to interested parties and major creditors.

A registration of a registered vessel can only be changed through a bill of sale signed by the owner or registered mortgagee, or through a court order. If there is more than one registered ship mortgage, the first mortgagee has absolute power to sell the vessel or the shares, subject to any limitation set out in the registered mortgage. A subsequent mortgagee may not sell the vessel or shares without the agreement of every prior mortgagee or under an order of the court and following the procedures set out in the Federal Court Rules. See CSA 2001 s. 69.

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 is concluded)**	**Additional Comments**
Title, possession or ownership of a ship or any part interest in a ship	X				
Between co-owners of a ship including use or earnings of the ship	X				
Mortgages or hypotecs on a ship or share in a ship	X			X	See CSA 2001 s. 70
Bottomry or other contractual liens on a ship	X			X	Bottomry is a traditional maritime lien ranking above unsecured claims Contractual liens are simply secured claims

Wages, benefits or repatriation of master or crew	X				Seamen's wages are a traditional maritime lien
Loss of life or personal injury in connection with operation of a ship	X	X	X		Traditional maritime lien if caused by the ship in a Collision May be a preferred claim if it is a claim resulting from injury to an employee Statutory right in rem if caused by crew
Salvage awards	X			X	Traditional maritime lien
Unpaid suppliers of goods or services to a ship			X		Statutory right *in rem*
General average	X				A quasi-maritime lien survives the transfer of ownership, but ranks along with statutory

					rights *in rem*
Collision	X			X	Traditional maritime lien
Other types of tortious or delictual physical damage caused by ship	X			X	Traditional maritime lien
Cargo loss or damage			X		Statutory right *in rem*
Contracts of carriage, including charterparties, other than for cargo loss or damage			X		
Towage (other than salvage)			X		May have a statutory right *in rem*
Pilotage			X		A quasi-maritime lien that ranks along with statutory rights *in rem*, but may be preferred in priority

Hull insurance			X		Statutory right *in rem*
P&I insurance			X		Statutory right *in rem*
Port, canal and harbour dues	X		X		Federal Ports have a priority for amounts owing Other harbours have only a quasi-maritime lien that ranks along with statutory rights *in rem*
Wreck removal by public authorities	X				Legislative priority where the Federal Crown incurs expense to remove wrecks from navigable waters or to prevent pollution
Environmental damage	X				Legislation typically confers top priority on Governmen

					tal claims in relation to other possible claims against the vessel. Furthermore, these claims may be enforceable through traditional maritime tort lien enforceable *in rem*
Unpaid contributions for social benefits programs (workers' compensation, health, etc.)		X			
Criminal or regulatory fines or penalties				X	
Fraud or intentional wrongdoing in connection with operation of ship				X	