

COMITÉ MARITIME INTERNATIONAL

ANSWERS OF THE ASSOCIATION FRANÇAISE DU DROIT MARITIME¹

QUESTIONNAIRE

SECTION I

CROSS-BORDER MARITIME INSOLVENCY ISSUES

Part 1 General Insolvency Principles Applicable to Foreign Creditors

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

The Council Regulation (EC) No. 1346/2000 on insolvency proceedings (Hereafter “the Regulation”) is in force in the French Republic, as in other countries of the EU. One peculiarity of the French legal system is that the executive power enacted a Circular (*Circulaire de la DACS n° 2006-19 du 15 décembre 2006 relative au règlement n° 1346/2000 du 29 mai 2000 relatif aux procédures d’insolvabilité*) providing French judges with detailed guidelines and explanations on the relations of the Regulation with the traditional French rules on insolvency.

Two bodies of rules are applicable, mostly depending on the location of the centre of a debtor's main interests. When the centre of a debtor's main interests is located in a Member State of the EU and when “*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*” are at stake, the Regulation is applicable. When the centre of a debtor's main interests is located in a State outside of the EU, or when the proceedings are outside the scope of article 1.1 of the Regulation, national rules of private international law are applicable.

First, the Regulation provides rules establishing international jurisdiction of national Courts, both for main and secondary proceedings. The national courts of the Member State within the territory of which the centre of a debtor's main interests is situated, have jurisdiction to open main insolvency proceedings (Article 3.1) that encompasses all assets and all claims whenever they are related to another State : it is thus universal. Nevertheless, according to article 2, secondary proceedings can be opened in the States

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where a debtor owns assets. These secondary proceedings are merely territorial in as much “*The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State*”.

Second, Chapter 2 of the Regulation provides for a *de plano* recognition of insolvency proceedings in other Member States, which means that according to article 17 “*the judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise*”. Recognition is thus a tool of coordination between the main proceedings and secondary proceedings.

Third, the Regulation defines conflict of law rules in conformity with the principle of territoriality. According to Article 4, “the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the “State of the opening of proceedings”.

Fourth, the Regulation establishes a limited number of substantive rules that are neither related to the competence of Courts, nor related to the applicable law. These substantive rules are a limit to the application of the *lex concursus* and tend to protect the creditor’s rights according to the principle of equal treatment of all creditors. This protection results from rules governing general and specific information of creditors, condition of the right to lodge a claim and third parties rights *in rem*.

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

The principle of non-discrimination depending on nationality is well established in the treaties governing the EU and in the European Convention on human rights. Even according to Article 11 of the Civil Code in its original drafting (1804), “*An alien enjoys in France the same civil rights as those that are or will be granted to French persons by the treaties of the nation to which that alien belongs*”. The French Courts have specifically ruled that a foreign creditor has the possibility to appear in Court to object the opening of insolvency proceedings (Cass. com., 30 juin 2009, docket no 08-11902 in the *Eurotunnel* insolvency proceedings ; Cass. com., 8 mars 2011, in the *Cœur de la défense* proceedings).

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

Our understanding of the meaning of the question is that it refers to the activities of a foreign insolvency administrator outside of the country where the proceedings have been opened, but within the framework and according to the rules governing these foreign proceedings. In EU Law, *foreign insolvency administrator* refers to the quality of liquidator, which means according to article 2 b, “*any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs*”.

The Regulation gives foreign liquidators broad powers to act abroad. In particular, Article 18 states that “*The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7*”.

If the Regulation is not applicable, traditional French private international law rules give very limited powers to a foreign liquidator if the judgement appointing him has not received exequatur by the national Courts of the State where he is willing to operate. Absent the exequatur of the foreign judgement, a foreign liquidator just has quality to appear in Court in order to obtain the exequatur of the foreign judgement appointing him, to lodge claims and to ask for interim measures (Cass. 1re civ., 25 févr. 1986, *Kleber*, docket n° 84-14208).

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

First, it is important to note that foreign creditors have no special status. Secondly, the transfer of a specific claim from the estate of the debtor is not possible. During the proceedings, the duties and powers of the administrator are specified in the code. Then a committee of creditors, having specific tasks, can be appointed in order to control the action of the administrator.

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? Describe the procedure generally.*

The administrator is acting under the control of the bankruptcy judge who has jurisdiction over his acts. A creditor can also request to be appointed comptroller of the bankruptcy.

If the creditors find that the administrator is acting inefficiently or wrongly they could apply to the bankruptcy judge either to obtain his replacement or to seek his liability.

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

Yes. The liability of the administrator can be incurred as soon as it is established that he was negligent and that this negligence leads to damage. For example it can happen if the administrator goes on performing a contract after the bankruptcy proceeding while at the same time he cannot perform his part of the obligations. In practice it is not easy to show that the fact that the administrator did not pursue a specific claim caused damage to a specific creditor.

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

There are no insolvency proceedings through private receivership in France.

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.*

Both under the Regulation and the traditional private international law rules, main insolvency proceedings are deemed to produce a "universal effect" that is only limited by the opening of a local secondary insolvency proceeding. This means that all the assets of the company are subject to the main insolvency proceedings, wherever the assets are located.

Depending on the strategic choices of the insolvent ship operator, the company will only have one vessel in its assets (special acquisition vehicle) or several vessels; these vessels may be registered under the flag of the state where the debtor's center of main interests is located or in any other state. Subject to the conflict of laws rules (see *infra* under question 15) and to the laws governing execution, the divergence between the center of main interests and the flag does not entail direct difference of treatment in substantive law.

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?*

Under the French law, especially French Commercial Code within 8 days from the opening judgment, the debtor shall provide the administrator appointed by the Court with the certified list of its creditors and the amount of such debts and shall also provide the list of major contracts. The debtor shall inform the administrator of the pending proceedings.. {art. L662-6, art. R622-5 Commercial Code}.

Within 15 days of the opening judgment, the administrator appointed by the Court shall advise the known creditors to declare their claims within a determined period (article R 622-24). Creditors holding a published security ,or acting under a leasing contract are notified by registered letter with receipt.. {Art R 622-21}.

All claims must be filed even if they are not established by an enforceable title. When the amount of the claim is not definitively assessed , the claim is provisionally filed with an estimation. (art L 622-24) .

The claims must be filed within two months from the publication of the judgment opening the insolvency proceedings . This period is extended by four months for creditors domiciled outside France.

If the creditor fails to register within the period mentioned above, the creditor is barred and cannot therefore receive from the administrator any credit, if any.

It may however ask the authorisation to file out of time its claim. This action must be exercised within a period of 6 months after publication of the decision opening the insolvency proceedings, in employment matters for the AGS (i.e. the guarantor of salaries), following the expiry of the period within which claims resulting employment contract are guaranteed by it. This period is extended to one year for creditors unable to know the existence of their claims during the period of six months

The judge may authorise a creditor to register out of time its claim provided that the creditor establishes that the delay does not result from its failure or from a deliberate omission of the debtor.

The limitation does not apply to creditors holding a published security or a published contract leasing when they have not been personally notified by registered letter with receipt.

Holders of a provisional claim must establish a permanent title.

CA Orleans ch.comm. 8 oct 2009 – N°07/02272

“In case of insolvency proceedings in France, any known creditor resident in another Member State must be notified, following the procedure provided in sections 40 and 42 § 1 of the EC Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings, of its obligation to declare its claims. In application of Article 4 § 2 h) of the Regulations, the consequence of such a lack of notification will be ruled by the law of the State where the insolvency proceeding has been opened. Thereby French law provides in its law No 2005-845 of 26 July 2005 on enterprises protection, that foreign unsecured creditors might be authorized to leave to proceed out of time”.

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?*

See response to previous question.

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?*

See response to previous question.

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?*

There is no explicit provision in this respect in French Law. The judgement whereby the shipowner is declared bankrupt is officially published, the ship registrar being the supposed no to ignore this information

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?*

There is no explicit provision in this respect in French Law ; the administrator just has the general duty to inform each and every creditor by official mail.

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?*

The publication of the judgement opens a period for creditors to file their claims : two months for French creditors, four months for Foreign creditors. A creditor that has not complied with the deadline may file a late claim within six months. If the claim is accepted, the claimant is entitled to participate in the distribution to creditors. If the claim is not accepted, the creditor loses its claim. See question 9.

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?***

Under article 39 of the Regulation, “Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing”. And under Article 4 § 2 litera i), it is up to the law of the State of the opening of proceedings, the *lex concursus*, to determine the ranking of claims and the rights of creditors.

For W. Tetley, “Traditional maritime liens arise automatically when certain services are done to the ship and when certain damages are done by the ship”. Therefore, it is highly probable that the claim guaranteed by the lien has arisen in another state than the one of the opening of the insolvency proceedings. According to the French *Cour de cassation*, the execution of a lien requires to assert its existence according to the law applicable to the claim it protects and to establish that the execution is allowed according to the *lex fori*. The execution of the lien thus combines the *lex contractus* or *lex delicti* on the one hand, the *lex fori* on the other hand (Cass com., 26 mai 1997, *Navire Nobility*, DMF, 1997, p. 191 s., rapp. J.-P. REMERY; C. App. Rouen, 14 mars 2000, DMF, 2000, p. 1006, note Y. TASSEL).

As far as third parties’ rights *in rem* are concerned, Article 5 of Regulation (EC) 1346/2000 limits the scope of application of the *lex concursus* (that is the law of the forum where the proceedings have been opened). According to Article 5 § 1, “The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immovable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.” It is then stated in § 3 that “The right, recorded in a public register and enforceable against third parties, under which a right *in rem* within the meaning of paragraph 1 may be obtained, shall be considered a right *in rem*”. Therefore, mortgages and *hypothèques maritimes* are clearly assimilated to rights *in rem*. It is not so clear whether maritime liens fall under Article 5 § 1 (Cour d’appel d’Aix-Marseille, 29 juin 2011, *Navire Ital Roro I* N° 11.05895, DMF, 2012, n° 733, admitting in an orbiter dictum that a lien would fall under Article 5 § 1) because a “privilege” under civil law only offers the faculty to exert a priority among creditors (M. Virgos, E. Schmidt, *Report on the Brussels Convention* of 23rd november 1995) ; moreover, liens, although limited in time, do not benefit from any publicity.

Assuming both mortgages and liens to be included in the material scope of Article 5 of the Regulation, this means that maritime creditors are able to escape the insolvency

proceedings and to secure individually their claims : their rights are not affected by the *lex concursus* (N. Watté, “*L’opposabilité des sûretés dans le nouveau règlement européen des procédures d’insolvabilité*”, *Rev. fac. Dr. ULB*, vol. 24, 2001, p. 7 s.). Nevertheless, this exception to the application of the insolvency proceedings is subject to an accidental connecting factor, i.e., the localisation of the asset on the territory of another Member State (Article 5 § 1 and 2 litera g).

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.*

No. The only difference is that claim by foreign creditor are often subject to an another law than French law which might affect them.

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?*

EC regulation 1346/2000 contains specific provisions of reservation of title clause. They provide that the opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where, at the time of the opening of proceedings, the asset is situated within the territory of a Member State other than the State of opening of proceedings. The Regulation also provides under article 5 that the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties. Such rights cover the restitution of such assets.

For non-EC bankruptcy, the rights of the plaintiff will be determined as per the rules of conflict of laws. Several laws could be taken into consideration: the law of the contract between the claimant and the debtor, the law of the situation of the good or the law of the bankruptcy proceeding. It seems that French court favor the last option. Article L624-9 *and seq.* of the Commercial code mentions the circumstances where the owner of goods held in the hands of the bankrupt debtor can recover them. These rules might also apply to foreign creditor.

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.*

The opening of insolvency proceedings does not necessarily affect the arbitrability of the dispute. Obviously enough, the disputes related to the very insolvency proceedings shall not be subjected to arbitration because they fall under the exclusive jurisdiction of the State courts that have opened the proceedings. But as long as it respects the mandatory rules governing the insolvency proceedings, the arbitral panel may establish the existence of the amount of the claim of a creditor (ICC Award n° 7563 (1993), JDI,

1993, p. 1054, obs. Y. Derains), without having the power to order the insolvent debtor to pay.

The recognition of an arbitral award, establishing the existence and the amount of the claim, would be subject to the same tests as any arbitral award, i.e. the tests defined by the New York Convention and by the French Code of civil procedure.

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?*

The question to be determined is whether a ship operator, being a state owned enterprise, is protected by the state immunity from execution. We understand that a state-owned enterprise, especially those carrying commercial activities, are governed by the principle of autonomy of state-entities : as they should be distinguished from the powers exercising sovereign activities, they are not protected by the immunity from execution. A reasoning by analogy shall be made from the case law concerning arrest of ships, since the arrest limits the powers of the owner over the vessel and since the arrest may lead to an attachment, eventually to a sale. In the case of the Russian flag vessel "Sedov", the French Court relied on the existence of a commercial chartering contract to decide that the vessel was not protected by any immunity (TGI Brest, 24 juill. 2000, DMF 2000, p. 1026, somm. J.-P. Rémy « Pour une insaisissabilité temporaire des navires invités à une manifestation nautique, Remarques et réflexions à propos de l'affaire de la saisie du voilier école Sedov », DMF, 2001, p. 611).

Part 5 Recognition of Foreign Insolvency Proceedings

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

The administrator of a foreign insolvency, i.e. the liquidator in the meaning of the Regulation, is a private person that "*may exercise all the powers conferred on him by the law of the State of the opening of proceedings*" ; some of these powers are not tainted by sovereignty or execution. This is clearly the case of the publication of notices and of making contacts with creditors that are allowed by the Regulation and that, anyway, do not require the cooperation of local authorities.

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

Insolvency proceedings ordered in another European country are automatically recognized and enforceable in France following article 16 of the EC regulation 1346/2000. There is no need to file any request for recognition of these proceedings.

Non-EC insolvencies will only be recognized in France following a judgment for enforcement. This judgment will be given after a court procedure which will enable the French judge to check that the foreign decision satisfies three requirements:

- The jurisdiction of the foreign court
- The absence of any fraud
- That the decision is not contrary to French public policy ("*ordre public*").

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?*

The enforcement proceedings can be started by any party who has an interest (most of the time the administrator or the bankrupt debtor). They would be upheld as long as the decision complies with the three requirements mentioned under question 21.

A letter of request issued by a foreign bankruptcy court is not sufficient.

Only a writ of summons lodged before the Civil Court having jurisdiction by reason of the domicile of the Defendant or, when an enforcement measure is contemplated on an asset localised in France, of the place where such an asset is localised, may lead to the enforcement of the abroad judgment opening the insolvency proceedings.

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

Cf. replies 21 and 22

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.*

No, except in EC bankruptcy proceedings. Article 27 *and seq.* of the regulation 1346/2000 permit the opening of secondary insolvency proceedings in states where the debtor has an establishment. The effects of these proceedings shall be restricted to the assets of the debtor located in state where they are ordered.

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.*

Yes, see answer 22. There are basically two situations : when the foreign insolvency administrator contemplates a recovery action against a Defendant domiciled in France; when the foreign insolvency administrator wants to dispute an enforcement measure on a debtor's asset in France. The foreign insolvency administrator must request the recognition of the insolvency proceedings through a writ of summons before the Civil Court having jurisdiction (see answer 22 above); otherwise the foreign insolvency judgement will not produce effects as ruled by the Courts (see hereunder a summary of a recent decision of the Cour de Cassation in this respect).

Cour de cassation, 1ère Ch. Civ., March 28th , 2012, docket n° : 11-10639

Without enforcement, a decision to go into liquidation pronounced abroad can produce, in France, no effect of suspension of individual lawsuits.

Mr. X. and Ms. Y. formed in France in action against MZ reimbursement, pursuant to certificates of indebtedness incurred in 1993.

The Court of Appeal of Paris, in a ruling dated November 5, 2010, said such actions inadmissible on the grounds that MZ was placed into liquidation and received August 21, 1996, or subsequently to issue IOUs, from a U.S. court in Connecticut to forgive a debt, which would release him from any debt before that decision.

In a decision dated March 28, 2012, the Supreme Court censure the trial court, arguing that the U.S. decision had not been the subject of an enforcement order.

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?*

Even if a foreign decision on an asset owned by an insolvent owner and localised outside France is not enforced, but affects rights of parties domiciled in France the Court may consider such a decision as a material fact and thus can give effect to that decision.

See Cour de Cassation, Commercial Section, 4 October 2005 docket n° 02-18201 admitting the validity of the sale by auction of a vessel ordered in Gibraltar, pursuant to an US insolvency proceedings although the Gibraltar decision was not enforced; and has therefore confirmed the release of the vessel which was provisionally arrested upon request of a French creditor.

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

France is party to:

- EC regulation 1346/2000 on insolvency proceedings. This regulation has repealed the bilateral conventions signed with Belgium, Italy and Austria
- A bilateral convention with Monaco signed in on 13th December 1950 on bankruptcy and liquidation,
- to various bilateral conventions (in particular with former colonies or protectorates) which provided for the mutual recognition and enforcement of judgments in civil and commercial matters. Some of this convention apply to bankruptcy judgments e.g. as the Convention on judicial cooperation with Congo 1974, a 1961 agreement with Ivory Coast, or a 1974 treaty with Senegal.

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.*

Yes.

French authorities hesitate between the systems of territorialism and of universality of bankruptcy proceedings. Case law reflects that hesitation.

A foreign bankruptcy is not automatically enforceable in France. Thus, a creditor could decide to do some forum shopping and attach/arrest in France debtor's assets while he is subject to bankruptcy proceedings in another jurisdiction.

In the case *CSK RADIANCE* a shipowner attached in France funds due to his debtor in the hands of a third-party. The debtor filed bankruptcy in New-York but the attachment was nevertheless maintained. The debtor issued proceedings to obtain the enforcement of the New-York bankruptcy in France. Although this action was upheld, the civil court of Paris ruled that this enforcement did not prejudice the attachment because due to the attachment the funds were put outside of the debtor's assets.

On a contrary a decision of the court of Saint-Pierre et Miquelon released a ship from arrest because her owner was subject to bankruptcy proceedings abroad even if such proceedings have not been enforced in France.

In the case *Puglia Navigazione v. Maritima Cambiaso & Risso* the Aix-en-Provence Court of Appeal held that the arrest of an Italian vessel by a supplier should be lifted under the provisions of Regulation 1346/2000 because the owner of the arrested vessel had filed bankruptcy proceedings in Italy. The court added that under article 5 of the Regulation the arrest could be maintained only if the creditor had a maritime lien or a mortgage, but which lien or mortgage must be taken into account? A lien recognized by the law of the flag, the law of the place of the arrest or the law governing the claim?

SECTION II

GENERAL MARITIME INSOLVENCY ISSUES

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

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

Ships operators are subject to the general insolvency law except, as is the case for companies in general, whether maritime or not, where the dimension of the insolvency is great, or if they are insolvent or no

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.*

As previously stated, there are no special rules for ship operators.

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?*

We have a specific case concerning the simplified judicial liquidation (hereafter LJS).

Conditions for:

Below a first threshold, it must be opened between this and a LJS 1 threshold and a 2nd level, it can be opened an LJS.

	Turnover en € HT		Nb Employees		Real Estate
1st treshold	< or = 300.000	and	< or = 1	and	none
2 nd treshold	< or = 750.000	and	< or = 5	and	none

Turnover is the last financial year and the number of employees is reached within six months preceding the launch.

The decision to open an LJS, when you are in the threshold 2, is taken by the chairman judge on the report of the authorized representative established within a month.

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.*

No, there are only specific procedures for the banks and the insurance companies.

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?*

No

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

In France, the Commercial Court is defined by Article L.721-1 of the Commercial Code as a court of first instance made up of elected judges. Judges are elected by their peers traders. The Commercial Court is responsible for settling disputes between merchants and managing the bankruptcy proceedings in specialized chambers.

Commercial courts are governed by Book 7 of the Commercial code. They are found throughout mainland France outside Alsace and Moselle where, under local law, disputes the jurisdiction of commercial courts are heard by the High Court within the commercial division, chaired by a magistrate, two elected assessors.

In the second instance, ie on appeal, it is the court of appeal dealing with these cases.

Some insolvency proceedings are deemed to be civil insolvency proceedings when the debtor is not considered as having a commercial activity. Such type of proceedings is followed before the Civil Court.

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

The state of suspension of payments.

Art. L 631-1 paragraph 1 provides that:

"... A debtor unable to cope with the liabilities with its available assets in a state of insolvency. The debtor establishes that the reserves of credit or default from which it benefits from its creditors enable it to cope with the liabilities with its available assets is not in a state of insolvency. "

Current liabilities means certain debts due and payable, which excludes the disputed debts.

Debts to be considered to be expired

The available assets to take into account is the very short term: it includes cash on hand and in bank, and immediately realizable assets or commercial paper due or discountable and quoted securities. It does not include stocks.

The discovery of this state results from the comparative measurement of the amounts derived from two concepts mentioned above.

In private, the Tribunal shall ascertain prior to any decision to open proceedings, whether the company is in a state of insolvency. This must be assessed on the day of the hearing (and not, eg. The day of filing of the DCP)

At the Council Chamber shall be set a date of cessation of payments. This date will always, if necessary, be raised at an earlier date. To avoid a too sudden appreciation of the need to quote the head in assent, it must be careful in setting this date and in case of doubt between two dates, take the one closest to the day of the hearing

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.*

No. It remains that the foreign ship operator should have an establishment and businesses in France

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.*

Yes. A private creditor must issue a writ of summons and show that his claim remains unpaid because the debtor does not have sufficient available assets. The creditor's claim must be based on a title (e.g. a court judgment or an arbitration award).

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?*

Public authorities are subject to the same procedure than private creditors and cannot avoid going to court. Nevertheless, it is easier for them to obtain a title for their claim as they can issue "claim orders" which have the same effect as a judgment.

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.*

Yes. As in any court proceedings the debtor could argue that French courts do not have jurisdiction, that the claim of creditor is not evidenced or that the requirement for the opening of the insolvency proceedings are not met.

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.*

Yes.

Nevertheless there are several kind of insolvency proceedings available under French law.

- When a debtor as financial difficulties but not yet in default of payments it request the appointment of a *ad hoc trustee* by an ex-parte application to the president of the commercial court.
- When a debtor has been in default of payment for less than 45 days he can requests to the president of the court the appointment of a mediator who will seek an agreement with the debtor.
- When a debtor has financial difficulties (but not yet in default) he can also request the opening of a “safeguard” procedure whereby the action of its creditors will be suspended.
- Finally when the debtor his in default of payment, does not have sufficient available assets and therefore is bankrupt he could be subject to bankruptcy proceedings.

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

Yes.

Any interested party could intervene in the procedure or, once the bankruptcy judgment has been given lodge a third party opposition. The same rule applied to “safeguard” procedures.

These actions could be lodged by any party which has a proper interest to challenge the bankruptcy e.g. a creditor, the spouse of the debtor or an insurer.

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

Except for registering the claims even not definitively assessed within the period open with the publication of the judgement opening the insolvency proceedings (see p.9), the limitation applying to claims filed against the administrator is the same one than applying to maritime claims.

The letter sent to the administrator to register the claim interrupts the time limitation.

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?

Under French Law, a distinction should be made depending on the stage of the insolvency proceedings, namely the initial stage of "observation" and the final stage of winding up ("liquidation").

Even when the usual organs of the company are still vested with their usual powers during the "observation" period (notably in the situation of "sauvegarde"), the *administrateur* has the right to require from the debtor's contracting parties the performance of on-going contracts according to Article L 622-13 of the French *Code de commerce*. It is up to the *administrateur*, i.e. the insolvency administrator, to choose between good contracts, deserving to be continued, and bad contracts deserving to be terminated. The French *administrateur* has thus the power of "*cherry picking*". This would convey the possibility to complete voyage or charter party commitments.

When the winding up cannot be avoided, the "cession" of the insolvent company will imply as a consequence the assignment of on-going contracts to the transferee. It is up to the Court to determine, according to the criteria defined by Article L 642-7 of the *Code de commerce*, which on-going contracts will be transferred ("*the court will determine the finance leases, rental contracts or contracts for the supply of goods or services necessary for the maintenance of activity based on the views of the debtor's contracting parties transmitted to the liquidator or the administrator, where one is appointed*"). It has been observed that "*contracts for the supply of goods and services necessary for the maintenance of activity*" has to be understood broadly.

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?

See under question 44.

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?

During the observation period:

When such dismissals are urgent, unavoidable and necessary, the administrator may be authorized by the bankruptcy judge to achieve them.

The administrator will have prior to his request:

- consult the works council or, if the employee representatives in accordance with Article L 321-9 of the Labour Code.
 - inform the competent authority mentioned in Article L 321-8 of the Code.
- He joined in support of his application to the bankruptcy judge, the notice and collected rationale for its diligence in order to facilitate the compensation and resettlement staff.

Upon adoption of the plan

the plan may include layoffs.

- 1 - the administrator will have before the hearing, to do the same steps and attach to his report the minutes of deliberation by the Committee (or delegates) and the copy of the letter to the administration.
- 2 - the judgment shall state the number of employees to be dismissed with a statement of activities and groups of professionals. Redundancies must be given within one month from the day of judgment, simply by notification to Administrator, subject to the rights of notice.

During that period, however the administrator must offer employees not included in the plan the benefits of a personalized redeployment agreement.

Part 8 Acceleration of Remedies

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

No. An accelerated repayment clause would be contrary to various rules of bankruptcy law.

First of all, a contract is not terminated because of the opening of bankruptcy proceedings as the administrator has the power to pursue it the performance. A clause which provides for an immediate repayment of an entire debt at the discretion of the creditor would be contrary to that rule as it would be equivalent to a discharge and termination of the contract

Secondly, the bankruptcy prohibits creditors' claim against the debtor. With an accelerated repayment clause the creditor could claim immediate repayment of the entire debt with would be contrary to the stay of proceedings rule.

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

Part 9 Classes of Claims and Creditors

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

No.

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.*

No

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?*

The limitation fund is normally not affected by the bankruptcy except if was set up by fraud. (cf. article 70 of the Decree of 27th October 1967). It means that when a shipowner is authorized by court to set up a limitation fund and if he is subsequently subject to bankruptcy, the funds will not be included in the bankruptcy estate.

Setting up a limitation fund after bankruptcy proceedings appears to be more difficult as the bankruptcy prohibits any payment, and it could even be considered as a fraudulent payment to the benefit of some of the creditors..

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?*

Before the end of the observation period, the administrator forms an opinion as the long term financial viability of the company and presents a report to the court. The report will contain either a recommendation to adopt one of the rescue plans put forward by the debtor or prospective purchasers or a combination of these, or, if the administrator considers that no recovery is possible, a recommendation that the company be liquidated.

The court may decide on a continuation plan, which will allow the business to continue either in its entirety or following the sale of part of the business. The decision also include the conditions of the payment of the company's debts. The debtor will usually offer to the creditors the option of accepting either part payment over a relatively short period of time, or full payment of their claim over a longer period.

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?*

Once the administrator has submitted his report to the court, the court will invite the company's representative, the mandatory, the administrator, the employees' representative, the managing director, the secured creditors and the parties whose contracts with the company are to be assigned, to a final hearing at which it will decide the fate of the company. The court may, at its discretion, either accept or reject the recommendations of the administrator and may choose to adopt a rescue plan or order that the business is liquidated.

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?*

Not applicable.

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.*

See the response to the previous question.

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

See the response to the previous question.

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

See the response to the previous question.

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?*

Yes, but it will depend on the exact rights of the private creditor. For example a foreign creditor holding a mortgagee could take over the ship(s) cover by his mortgage and sell them to recover his debt (the French *hypothèque* does not give this kind of rights to the creditor).

Indeed, taking over the entirety of the business with the consequence that the shipowner would become insolvent may be considered as fraudulent and can then give raise to direct action of the administrator of the insolvent shipowner against the private creditor.

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.*

No (cf. question 7)