COMITE MARITIME INTERNATIONAL

IWG on Cross-Border Insolvency

Replies submitted by the

MALTA MARITIME LAW ASSOCIATION

SECTION I

CROSS-BORDER MARITIME INSOLVENCY ISSUES

Part 1 General Insolvency Principles Applicable to Foreign Creditors

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

No specific rules have been adopted.

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.

Our laws recognise the right of a creditor to commence (with the majority of creditors) or take standing in insolvency proceedings of a ship-owning company. One should note that the right of intervention is limited to a person having the interest of 'creditor' which therefore means that such person has to have a monetary claim against the ship-owning company.

A foreign creditor may also institute proceedings for the judicial verification and confirmation of a particular claim before the competent courts in Malta (or otherwise have a European judgement recognised in Malta) which can be then enforced against a vessel which being in the territory of Malta is subject to the jurisdiction of the Maltese Courts.

In both instances the rights of foreign entities are equal to those of local entities;

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

A foreign administrator/liquidator of a local ship owning company can be monitored and can be removed at the instance of the creditors of the company or otherwise by the court upon consideration of a request made by a creditor to that effect.

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?

Any actions that may be taken after the date of commencement of liquidation must not be of prejudice to other creditors.

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

Please vide response to question 3.

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

Yes this is possible.

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?

Yes.

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

Yes.

The law provides for the case when a company is being wound up by the court when in such case the liquidator or the provisional administrator, as the case may be, shall take into his custody or under his control all the property and all rights to which he has reasonable cause to believe the company to be entitled (Section 109 of the Merchant Shipping (Shipping Organizations – Private Companies) Regulations, hereinafter referred to as the "MSR Regulations").

The law reserves the position of a mortgagee in possession of a ship subject to a mortgage registered in favour of the mortgagee or the holder of a possessory lien in the sense that the applicable legal provision clearly states that the liquidator or provisional administrator is not entitled to dispossess :

(a) a mortgagee in possession of a ship subject to a registered mortgage in his favour; or
(b) the holder of a possessory lien in terms of the Act,

or to do any other act which will in any manner hinder or obstruct the exercise of rights of the holder of the registered mortgage including the right to take possession of the ship in accordance with Maltese law.

The law (Section 118 of the MSR Regulations) furthermore provides that :-

"The court may, at any time after making a winding up order, require any person who holds ***any money, property or books and papers in his hands to which the company is prima facie entitled****, to pay, deliver, convey, transfer or otherwise hand over such money, property, books or papers to the liquidator forthwith or within such time as the court directs:*

Provided that no such order may be issued in relation to any property under the control of a holder of a registered mortgage or a pledge."

The law does not distinguish between ships owned by persons domiciled in Malta and registered under the domestic flag and ships registered under another flag.

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?

Maltese law does not have a full range of insolvency options. Maltese law provides for liquidation and the appointment of a provisional administrator or a liquidator as well as an official receiver.

The law provides that where the court has made a winding up order or appointed a provisional administrator, there shall be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, or in such form as the official receiver accepts, verified by affidavit, and showing the particulars of its assets, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require."

(Section 226(1) of the Companies Act)

The liquidator is bound to hold dates of meetings of creditors and contributories and to summon the creditors and contributories to attend the meetings.

(Section 231 of the Companies Act)

The law furthermore provides that the official receiver shall also, as soon as practicable before the first meeting, send to each creditor mentioned in the company's statement of affairs, and **to each person appearing from the company's accounting records** or otherwise to be a contributory of the company, a summary of the company's statement of affairs, including the causes of its failure, and any observations thereon which the official receiver may think fit to make, but the proceedings at a meeting shall not be invalidated by reason of any summary aforesaid not having been sent or received before the meeting."

(Section 234 of the Companies Act)

Obviously, the co-operation of the directors and the availability of the company's accounting records are vital in assisting the official receiver to identify all creditors of the insolvent ship operator, whether such creditors are local or foreign.

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?

In terms of Article 40 of Council Regulation 1346/2000, as soon as insolvency proceedings are opened in a Member State, the court of that state having jurisdiction or the liquidator appointed by it must immediately inform known creditors who have their habitual residences, domiciles or registered offices in other Member States.

In practice, notification of creditors (whether local or foreign) depends on the cooperation of the company during the insolvency proceedings and how forthcoming the company is in providing details of all the company's creditors. The liquidator would also have to look into the company's accounts/records if these are available, as well as any information submitted during the proceedings.

Notice of the insolvency proceedings would be given by the publication of the appointment of the liquidator of the company concerned in local newspapers giving creditors the opportunity to communicate with the liquidator informing him of their claims against the insolvent company.

As regards requirement for notice to creditors in general, Article 153 of the MSR Regulations provides that the liquidator must give not less than fourteen (14) days notice of the time and place for meetings of creditors in the Government Gazette and in at least one local daily newspaper, *"and shall not less than fourteen days before the day appointed for the meeting, send by post to every person appearing in the company's*
books to be a creditor of the company, notice of the meeting of creditors."

11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors?

Maltese law empowers the court to fix a time or times within which creditors are to prove their debts or claims or are to be excluded from the benefit of any distribution made before those debts are proved. (Section 120 of the MSR Regulations)

The law does not distinguish between domestic or foreign creditors in this regard.

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?

No.

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?

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?

Whilst our law does not specifically regulate this scenario, justice would demand that if a foreign creditor learns of the insolvency proceedings at a late stage, he should be allowed to file late claims and

also have a right to claim against any of the assets of the insolvent ship operator which have not yet been distributed to creditors as well as to claim amounts due from any creditors who may have been paid from the assets of the insolvent ship operator in the event that the foreign creditor ranked before the creditors who actually partook from the distribution of the assets of the insolvent ship operator.

Part 4 Recognition of foreign claims

Given the scope of this questionnaire, we have excluded from the analysis in replying to this Part 4 special insolvency laws relating to the winding-up of particular institutions including (i) the Credit Institutions (Reorganisation and Winding Up) Regulations, 2004 issued under the Banking Act, 1994 and which regulations transpose the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4th April, 2001 on the reorganisation and winding-up of credit institutions and the (ii) Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004, which transpose the provisions of Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.

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 recognise the foreign maritime lien?

As may have been mentioned in response to Question 1 of this Questionnaire, as a member of the European Union ("**EU Member State**"), Malta is subject to the cross-border insolvency regime established by Council Regulation (EC) 1346/2000 on insolvency proceedings of June 2000 (the "**EIR**"). As a directly applicable EU Regulation, the EIR is the primary source of law regulating extra-territorial insolvency proceedings involving companies having their centre of main interests (the "COMI") in Malta or where a non-transitory establishment is constituted within the Maltese jurisdiction. Malta has not entered into any other international treaties or memoranda of understanding regulating cross-border insolvency proceedings.

In accordance with the provisions of the EIR, it is the courts of the member state which is the debtor's COMI that have jurisdiction to open insolvency proceedings. These are referred to as main proceedings to be distinguished from secondary proceedings which can be opened, *inter alia,* in other non-COMI member states within which the debtor has an establishment.[1] In the context of companies which have their COMI outside of the EU the EIR would not apply to any part of the proceedings. For the purposes of

[1] Article 3, EIR

establishing the process of recognition and enforcement of maritime claims in Malta one would need to distinguish between a claim which arises within a jurisdiction subject to the Regulation and one which does not.

15.1 Claims arising within a jurisdiction within the European Union[2]

Where main proceedings have been opened within the jurisdiction of an EU Member State under Article 3 of the EIR, the provisions of Articles 4, 5 and 11 of the EIR will determine the law applicable to those proceedings and consequently the law governing the recognition of the maritime claims.

Subject to the exceptions laid down in the EIR, Article 4 generally imposes upon other EU Member States the law of the EU Member State within which main proceedings have been opened, the *'lex concursus',* as the law which governs the opening, conduct and closure of the proceedings including the determination of any claims. Therefore, where the insolvent company being wound-up is a Maltese company or licenced shipping organization with its COMI in Malta and main proceedings are opened in Malta, Maltese law would be the *lex concursus*. The rules on recognition and enforcements established under the EIR are superimposed over all local rules by virtue of Articles 16 and 17 of the EIR, thus the recognition and enforcement of any claim is universal and automatic through the EU without the need of an exequatur in Member State in which the execution is being sought.

Article 5 of the EIR creates an exception to the application of the *lex concursus* in the case of third parties' rights *in rem*. In particular it states that the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties thereby reinforcing the applicability of the laws governing the particular right *in rem*. By way of clarification the definition of 'rights *in rem*' for the purposes of Article 5 includes the following:

> *"(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;*
>
> *(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;*
>
> *(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;*

[2] 'Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.' Recital 33 of Council Regulation (EC) 1346/2000 of 29th May 2000 on Insolvency Proceedings, OJ L 160/1.

(d) a right in rem to the beneficial use of assets."

Moreover, sub-article 3 of Article 5 considers the any right, recorded in a public register and enforceable against third parties, under which a right *in rem* within the meaning of Article 5 may be obtained, shall be considered a right *in rem*.

The treatment of any maritime claim during the insolvency proceedings will thus invariably be affected by whether that claim is treated as a right *in rem* or a right having similar effect under the laws under which it is established. If this is the case, the *lex concursus* will respect that classification and the effects it has as regards assets forming part of the debtor's estate which are affected by that claim. Thus, if the insolvency proceedings are opened in Malta, Maltese law will not affect those claims which fall within the EIR Article 5 definition of rights *in rem* of creditors or third parties whether such rights exist in respect of tangible or intangible, moveable or immovable assets governed by foreign law.[3]

Article 11 of the EIR relating to *'Effects on rights subject to registration'* also needs to be considered when discussing recognition of maritime claims. Article 11 supplements Article 4 in a cumulative manner and sets the exception to the application of the *lex concursus* on registered rights on immovable property, vessels and aircraft, in favour of the law applicable in the Member State under the authority of which the register is kept.[4] This however does not imply that the applicable law in respect of the claim *per se* would be that of the country in which the register is kept as the *lex concursus* remains prevalent in this respect. Rather, the result of the application of Article 11 is that the law of the state where the right is registered will determine the effects which the liquidation process will have on the rights of the debtor over the property which is subject to that registered right. Ultimately, this allows the state of registration the capacity to give effect to the results of the foreign insolvency proceedings in respect of such registered rights only insofar as this is compatible with the laws of the state of registration.

Where the company being wound up is a Maltese licensed shipping organisation with its COMI situated in Malta and Maltese law is the *lex concursus* of the insolvency proceedings, the Merchant Shipping (Shipping Organisations[5] - Private Companies) Regulations (Subsidiary Legislation 234.42, hereinafter the "**MS Regulations**") set out the applicable rules in terms of insolvency proceedings. In particular, in relation to maritime claims Article 99(6) states that "[n]*othing in this Part*[6] *shall prejudice the rights of*

[3] Ibid Article 5

[4] "The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept." Article 11 EIR.

[5] A company established under Article 84Z of the Merchant Shipping Act is deemed to be shipping organisation if its principal objects involve designated activities in relation to the operation and ownership of vessels and it obtains and maintains a licence from the Registrar-General to enable it to carry on such activities.

[6] Dissolution and Consequential Winding Up Of Companies - Part V of the MS Regulations.

any creditor under the [Merchant Shipping] Act to enforce his claim directly against a ship." thereby reinforcing the effectiveness of rights attaching to vessels in particular. Article 101(3) of the MS Regulation further provides that in the event that a shipping organisation's sole asset is a vessel, the Maltese court will await the outcome of any enforcement proceedings by the mortgagee or maritime claimants (whether in Malta or overseas) or by any maritime claimant enjoying a right of preference in terms of the Merchant Shipping Act (Chapter 234 of the laws of Malta, the "**MS Act**") before it determines the issue of the winding-up of the company. Moreover, in a winding-up by the court, any act or warrant, whether precautionary or executive, other than a warrant prohibitory injunction or any impediment of departure or warrant of seizure of a ship by a holder of a registered mortgage or a privileged creditor, issued or carried into effect against the company, after the date of its deemed dissolution will be void unless authorized by the court.[7] Also in a winding-up by the court, once a winding-up order has been made in respect of the company, no action or proceeding, other than any action instituted by a holder of a registered mortgage or a privileged creditor over a ship owned by the company being wound-up, shall be proceeded with or commenced against the company or its property except by the leave of the court and subject to such terms as the court may impose.[8] Similarly, registered mortgagees and, in some cases, holders of other maritime claims are granted special consideration under the MS Regulations dealing with the liquidation of shipping organizations which aim to ensure that holders of such maritime claims are not prejudiced by such proceedings. It is especially noteworthy that Article 49 of the MS Act provides for the recognition of foreign mortgages the status of a mortgage registered under the Act, including recognition as an enforceable executive title, once certain minimal conditions are met.

It is also possible that the Maltese Company being wound-up is in fact subject to the Companies Act rather than the MS Regulations in which case it would be the insolvency provisions in the Companies Act that would apply rather than the MS Regulations, which provisions make no specific reference to the rights of registered mortgagees or other maritime claimants. The EIR will, of course, still apply in such cases and the special consideration granted to rights *in rem* thereunder would still be available.

15.2 Claims arising within jurisdictions outside the EU

As mentioned above, Malta is not a party to any other international insolvency treaty or memoranda of understanding regulating cross-border insolvency proceedings except the EIR and has not adopted to any extent the UNCITRAL Model Law on Cross-Border Insolvency. This aspect of Maltese law is therefore not harmonized on a regional or international level and thus when claims, including maritime claims, arise in a non- EU Member State, the enforcement of any such claim or any effects arising from

[7] Article 104, MS regulations.
[8] Article 106, MS Regulations.

insolvency proceedings in respect of those claims as regards companies registered in Malta which are being wound up in Malta are subject to the Maltese domestic rules on the recognition and enforcement of foreign claims and judgements, including the applicable private international law rules.

Reference will also be made to the governing law clause of the contract regulating the Maltese debtor and foreign creditor relationship and in terms of which the claim arises. In the event that the choice of law clause within the contract regulating them refers to a foreign law, then all claims arising within the contract are determined by the foreign law which will then regulate which law is to apply to specific claims depending on the nature of that claim.

Where there is no express choice of law, within the context of immovable property, Maltese law looks towards the *lex situs* i.e. the law where the property is situated as the governing law of the claim. When considering movable property, this would depend on the type of claim being made in order to determine whether the *lex situs* applies or if alternatively, the *lex domicili* – the law of the place where the debtor is domiciled- applies.

Where the choice of law clause or the application of the relevant conflict of laws rules point to Maltese law the provisions of the MS regulations, as described above, or the Companies Act would apply.

Where the claim to the right under examination which is governed by foreign law is of a type which is alien to Maltese law, there is a risk that the court will re-characterize that right as a similar right which is contemplated under Maltese law.

16. Apart from the characterization and priority of claims, are there any other procedural difference 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.

Within the context of insolvency proceedings instituted in Malta for shipping organizations, distinction must be made with respect to those foreign creditors who are within an EU member State and those who not.

16.1 Foreign creditors within an EU Member State

The relevant law to consider is the EIR. This regulation does not create any procedural distinction between foreign creditors and local creditors when primary insolvency proceedings are initiated in Malta.

16.2 Foreign creditors within a Non – EU Member State

Within the context of a non-EU foreign creditor where the applicable law is Maltese law, reference must then be made to the various procedures as stipulated under our Code of Organization and Civil Procedure. When considering the procedure for the handling of claims, our law refers to creditors

without making a distinction between creditors that are foreign or creditors that are local. Thus our law does not discriminate between the handling of claims brought forth by foreign creditors and those claims raised by local creditors.

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?

The replies set out to Question 15 above also apply to this question such that the applicable rules under the EIR or, in the case of non- EU Member State creditors, domestic laws on the recognition of foreign claims including Maltese private international rules become applicable as set out above.

Moreover, on the hearing of a winding up application of a Maltese company, no winding up order will be made before the application is served on all persons who, in the circumstances, the court considers it appropriate to call upon to make their submissions.[9] Thus any interested persons will have the opportunity to submit their claims at this stage – this would include creditors of the Maltese company that are financial institutions or even spouses following separation or divorce. As mentioned above, creditors of the Company may at any time from the filing of the winding up application until a winding up order has been made apply to the court for a stay of judicial proceedings pending against the company and the court may stay those proceedings unless these a registered mortgagee or privilege creditor over a ship owned by the Company.[10]

Where the property rights, sale or enforcement arise from a judgement obtained awarded by a competent court outside Malta against a Maltese debtor whose only business property interests are present in Malta and the creditor seeks to enforce his claim in Malta, that judgment would be recognised as a valid judgment and enforceable in the courts of Malta without re-examination of the merits of any matters treated in that judgment, subject to the following:

i) the recognition and enforcement of foreign judgements emanating from the Court of an EU Member State would be subject to the overriding provisions of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("**European Judgements Regulation**");

ii) the recognition and enforcement of foreign judgements emanating from a Court of a State that is a party to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on the 30th October 2007 between the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Federation (the

[9] Article 101(1) of the MS Regulations and Article 219 of the Companies Act.
[10] Article 102, MS Regulations.

"**Lugano Convention**"), other than judgements which fall within the European Judgements Regulation, would be subject to the provisions contained in the Lugano Convention; and

iii) the recognition and enforcement of foreign judgements not falling within the scope of the European Judgments Regulation or the Lugano Convention, would be subject to the applicable law of Malta imposing judgement registration or confirmation in Malta, provided that the judgement (i) does not contain dispositions contrary to public policy and (ii) cannot be set aside on any of the grounds for re-trial as contemplated in the law of Malta on civil procedure.

17.1 Rights of claims to property rights, sale or enforcement given by foreign law to Spouses for their entitlement to business property interests of the other spouse on separation or divorce

Following separation or divorce, one spouse could have a claim to the business property interest held by the other spouse or co-owned by the spouses under the applicable matrimonial regime. If such a business property interest exists in respect of a Maltese company it is likely that the spouse holding such interest may have a claim to bring within the context of the insolvent winding up of the company.

The EIR rules would once again apply here where the claim arises within another EU member state and private international law rules apply where the claim arises outside the EU. Again the replies to question 15 above become relevant, however, in this context, it is also necessary to consider Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility where the claim of the spouse arises in the context of a marriage contracted and dissolved in a foreign country within the EU. Under this Regulation, judgements in relation to these matters is to be recognized without any special procedure being required.[11] A request can then be made for non recognition however this regulation provides an exhaustive list of grounds for non-recognition.[12] With respect to enforcement of a judgement under this regulation, a request must be made for the enforcement in a particular member state. This would typically be made when the claim relates to some asset that is located in another Member State. In this regard, following the application for a declaration of enforceability the court must, without delay, give a decision on the enforceability.[13] This decision is can be appealed against.[14]

Should the marriage not have been contracted and dissolved within an EU Member State or within Malta, any claim that a spouse may have by virtue of a judgement on separation or divorce given in a non-EU country would need be enforced in terms of the Maltese law rules on the recognition and

[11] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Article 21.
[12] Ibid Articles 22 and 23.
[13] Ibid Articles 28 and 30.
[14] Ibid Article 33.

enforcement of judgements generally[15] by filing an applicaaation in court.[16] Claims or judgements will not be enforced if the judgement can be set aside on the grounds for retrial provided for under our law[17], if the judgement is contrary to public policy or in the case of a judgement by law, the parties were not contumacious according to the foreign law.[18]

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 recognition and enforcement of foreign arbitral awards in Malta is regulated by the Arbitration Act (Chapter 387 of the Laws of Malta, hereinafter the "**Arbitration Act**") and the Arbitration Rules (Subsidiary Legislation 387.01, hereinafter the "**Arbitration Rules**"). The relevant provisions of the Arbitration Act and the Arbitration Rules apply indiscriminately whether recognition is required for general legal purposes or for the purposes of proof of claim in insolvency proceedings underway in Malta. Enforcement would then be affected by the applicable stays and moratoria that come into place during winding-up, if any, as applicable in terms of the relevant provisions of the Companies Act or the MS Regulations as relevant.

Any foreign arbitration award given by a competent arbitration tribunal would be recognized and enforced by the courts of Malta without re-trial or re-examination of the merits of any matters which are subject of that award. If the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "**New York Convention**") to which Malta is a party, is applicable, then the award may be registered with the Malta Arbitration Centre in Malta and will be treated as an executive title and enforceable in Malta on the same basis as a judgment. It is relevant to note in this respect, however, that Malta has opted for both reservations possible under this Convention, that is, Malta will apply the Convention only to the recognition and enforcement of awards made in the Territory of another Contracting State and only with respect to arbitration agreements concluded and awards pursuant thereto made after the date of Malta's accession to the Convention[19].

The registrar of the Centre will only register an award on the application of any interested party and against payment of the applicable fee and not prior to the lapse of at least three months from the date of the award unless the parties confirm in writing that they do not intend to take any recourse against the award in terms of applicable law. The Registrar will not register an international award if he is

[15] Laws of Malta, Cap 12, Code of Organisation and Civil Procedure, Article 825A.
[16] Ibid Article 826(1).
[17] The grounds for retrial are stipulated under Article 811 of Cap 12 of the Laws of Malta.
[18] Ibid Article 827(1)(a-c).
[19] 22nd June 2000.

notified that recourse against an award has been taken by any party to the arbitration proceedings, until such time as he is notified of the outcome of such recourse.

In the case of such foreign awards, a party has the right to object to recognition on the grounds stated in the New York Convention including:

(i) lack of capacity of the parties to the relevant arbitration agreement or invalidity of the said agreement;

(ii) lack of proper notice to the party against whom the award is invoked of the appointment of an arbitrator;

(iii) if the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

(iv) if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

(v) if the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Recognition may also be refused by the court if it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Malta or the recognition or enforcement of the award would be contrary to the public policy of Malta.

The latter ground for refusal of recognition though vague is slightly clarified by the Arbitration Act itself which states that an award is in conflict with the public policy of Malta if -
(*a*) the award was induced or affected by fraud or corruption; or
(*b*) a breach of the rules of natural justice occurred in connection with the making of the award.[20]

If the New York Convention is not applicable, then an application must be made to the Courts for recognition.

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?

[20] Article 58, Arbitration Act.

The insolvency law applicable to a Maltese state-owned enterprise will largely depend on the manner in which the enterprise has been constituted. By and large, state-owned enterprises are set-up through *ad hoc* statutes which will regulate various aspects of those enterprises including their dissolutions and winding up. One would need to refer to the said statute in order to determine whether any procedural rights which would otherwise be available to a creditor in a debtor-company's insolvent winding-up are affected in regard to that state-owned entity. The functioning of that enterprise may still remain subject to other laws generally and the statute itself may even defer specifically to the regulation of the enterprise by the Companies Act[21] or make other specific provision such as requiring an Act of Parliament for the winding-up of that enterprise[22].

With reference to laws regulating corporate insolvency, namely, the Companies Act or, in the case of shipping organizations, the Regulations, and to the Insolvency Regulation, the provisions of these instruments contain no particular provisions regulating creditors' (whether foreign or local) procedural rights in the event of insolvency of state-owned entities.

As regards Maltese law more generally, there are certain statutory provisions catering for the immunity of state-owned entities from certain actions aimed at securing claims against the Government of Malta. Foreign creditors, as is the case with local creditors, contracting with state-owned entities will need to gauge what the effects of such immunities would be on their claims in the event of that state-owned enterprise's insolvent liquidation. To take some examples:

- the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta, hereinafter referred to as the COCP provides that it shall not be lawful to issue any precautionary warrant of seizure or garnishee order in security of any right or claim against the Government of Malta;[23]

- the COCP also provides that no warrant shall be issued against any ship or vessel or aircraft wholly chartered in the service of the Government of Malta or any ship or vessel employed in any postal service either by the Government of Malta or by any other government and no warrant shall be issued against any ship or aircraft of war;[24]

[21] See, for example, Article 5(5) of the Freeports Act, Chapter 334 of the Laws of Malta in regard to the Malta Freeport Corporation Limited.
[22] See, for example, Article 19 of the Malta Development Corporation Act.

[23] Article 837(2) COCP.
[24] Article 863 and 865I, COCP.

- the COCP prohibits the issuance of warrants of prohibitory injunction against the Government of Malta or an authority established by the Constitution any person holding a public office in his official capacity unless certain conditions are met;[25]

- in terms of the COCP, the Government of Malta is also exempt, in the absence of special provisions to the contrary in regard to security, from giving any security whatsoever prescribed or required;[26]

- the Civil Code (Chapter 16 of the Laws of Malta) also provides that, with a few limited exceptions, prescription may not be set up against any right or action of the Government of Malta.[27]

Creditors of the state-owned ship operator will therefore not be able to sue out in Malta such types of precautionary measures or claim certain types of prescriptive periods against the Government of Malta. Having said this, a similar result is achieved by the the Companies Act and MS Regulations provisions regulating insolvent liquidation and winding up by the court which provide for the attainment of a stay of proceedings against the Company and also the voidability of certain precautionary warrants sued out against the company.

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 legal restrictions on direct handling of claims by foreign administrators, please provide details.

Maltese law is silent on this matter and therefore there is nothing to restrict 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. That said, however in the case of administrators of foreign insolvency proceedings before the courts of another EU member State, reference should be made to the Council Regulation (EC) No 1346/2000 on insolvency proceedings when dealing with the publication of notices in Malta by an administrator of foreign insolvency proceedings in the European Union. Article 21(1) and (2) allow the liquidator to request that notice of judgements opening insolvency proceedings and the decision appointing him be published in accordance with the publication procedure of Malta, unless such publication is mandatory. Unfortunately, since our law is silent on this matter, it is not clear how

[25] Article 873 COCP.
[26] Article 905 COCP.
[27] Article 2115 (2) Civil Code.

an administrator would proceed, or be able to convince a foreign court he or she did actually proceed "*in accordance publication procedure of Malta*". There is no legal restriction on direct handling of claims by foreign administrators. However, it would make reasonable sense for such foreign administrators to also engage a Maltese lawyer to assist them to better understand the Maltese legal system and also any legal instrument to be presented into Court which the administrator may wish to make, must be signed off by a Maltese law.

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

Yes. This applies for both EU and non-EU judgements. In the case of EU judgements, the Maltese courts would be obliged to follow the rules laid down in Articles 16 and 17 of Council Regulation (EC) No 1346/2000. Article 16 (1) imposes the obligation on the Maltese courts to recognize a request for the recognition of the opening of foreign insolvency proceedings handed down by a court in any other EU state.

In relation to the foreign insolvency proceedings opened by the courts of any other state not being an EU Member State, our courts would also recognize the request so long as all the necessary formalities listed in the relevant provisions of the Maltese Code of Organisation and Civil Procedure are satisfied.

22. **Will such a request be recognised 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 or request issued by the foreign bankruptcy tribunal?**

The enforcement of a judgement delivered by a foreign court, whether within the EU or outside the EU, may be enforced by means of an application containing a demand that the enforcement of such judgement be ordered. The law does not make a distinction between the persons capable of making such a request, and therefore a foreign trustee in bankruptcy, liquidator or administrator may make such request. Furthermore, the request need not be made by the Court. Such a request however must be made in accordance to general rules of civil procedural law found in our Code of Organization and Civil Procedure. Likewise, the request must be signed off by a Maltese advocate. Thus, essentially a foreign trustee in bankruptcy, liquidator or administrator would still need to liaise with a Maltese advocate to assist them.

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

Maltese law requires no further formalities other than those already mentioned. However, the request for the recognition of insolvency proceedings opened in a non-EU state is restricted to the assets of the debtor within Malta, as provided under Article 826 of the Code of Organisation and Civil Procedure. The same applies in the case of foreign proceedings opened in EU states as per Article 3(2) of Council Regulation (EC) No 1346/2000. Furthermore, Malta may refuse to recognise foreign insolvency proceedings, if such is manifestly 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**.

As stated under question 22, a request is made by an application to the Court requesting recognition of a foreign insolvency proceeding. Such request is generally made by an administrator.

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

The question here is a bit vague and we are not quite sure what is meant by "assistance". If "assistance" means any special procedure or special formality or organ which the courts can offer - then no it does not appear that an administrator can make any such request to the Maltese Courts for any particular assistance in order to obtain the recognition of a foreign insolvency since our law does not make any reference to this matter.

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?

Yes provided if such transfer is made compulsory pursuant to a judgment. If such a judgment is obtained from the Courts of another EU member State then so long as the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters are adhered to, then the courts would enforce it.

On the other hand, if the judgment is obtained in a non-EU member State, then in order for such a judgment to be enforceable in Malta, it must satisfy the requirements of Maltese civil procedural law found in our Code of Organization and Civil Procedure (COCP). Accordingly, the person wishing to enforce will need to file an application before our courts which should contain therein "...*a demand that the enforcement of such judgment be ordered."* Moreover, our COCP also lists those cases where a Maltese Court will not enforce a foreign (Non-EU State) judgment. These include *inter alia* where the judgment contains any disposition contrary to public policy or to the internal public law of Malta and where a judgment may be set aside on any of the grounds for a re-trail under Maltese law.

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**.

Yes, to an extent. In relation to concurrent insolvency proceedings within the European Union, this procedure is established by virtue of the provisions Council Regulation (EC) No 1346/2000. The provisions of this regulation have direct effect in Malta and therefore whereas we have no domestic legislation on this matter, the provisions of the Regulation are automatically part of our legal system. With respect to non-EU countries, we do not have any procedure to coordination any concurrent insolvency proceedings which have been opened in Malta and in other non-EU jurisdictions.

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.

Yes. Malta is party to Council Regulation (EC) No1346/2000 of 29 May 2000 on insolvency proceedings.