

# COMITÉ MARITIME INTERNATIONAL

## International Working Group on Cross-Border Insolvency

### 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)? If so, please provide a general description based on the topics discussed in this questionnaire.

Yes. The United States has adopted and implemented the substantive provisions of the Model Law on Cross-Border Insolvency (the “Model Law”), which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1997. The Bankruptcy Abuse, Prevention and Consumer Protection Act of 2005 (“BAPCA”), which was signed into law in the United States on April 20, 2005, and became effective on October 17, 2005, created a new chapter 15 of the United States Bankruptcy Code (the “Code”). Chapter 15 is based upon the Model Law and it replaced Section 304 of the Code (*Ancillary and Other Cross Border Cases*).

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.

Not explicitly. However, the Code and the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules” or “Fed. R. Bankr. P.” and, together with the Code, the “Bankruptcy Laws”) do not differentiate between foreign and domestic creditors and entities with respect to their relative standing to commence insolvency proceedings<sup>1</sup> against a local ship operator.

Please note the following definitions for purposes of this response. Under the Code, the term “**creditor**” refers generally to an “entity” that possesses a claim against the debtor.<sup>2</sup> The term “**entity**” includes within its definition a “person, estate, trust, [or] governmental

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<sup>1</sup> In the United States, local insolvency proceedings involving commercial interests typically occur under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Code. For purposes of this Questionnaire, the term “insolvency proceeding” (as it applies to proceedings in the United States) will be used to refer to a case under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Code, as the context requires.

<sup>2</sup> 11 U.S.C. § 101(10).

unit”<sup>3</sup> while the term “**person**” includes an “individual, partnership, and corporation.”<sup>4</sup> None of these definitions makes reference to residence, domicile or nationality.

The Bankruptcy Laws allow liquidation (Chapter 7) and reorganization (Chapter 11) cases to be commenced on a voluntary basis (i.e., by the debtor itself) or involuntary basis (i.e., by entities holding claims against the debtor). Subject to certain numerical and monetary thresholds, discussed in more detail below,<sup>5</sup> as well as the requirement that the debtor is generally not paying its debts as they come due, one or more entities holding claims against a person (such as a ship owner) may commence an involuntary case against such person under Chapter 7 or Chapter 11.<sup>6</sup> This right to commence an involuntary case is without regard for the nationality, domicile or residence of such entity.

An ancillary or cross-border case under Chapter 15 of the Code case may only be commenced by a “**foreign representative**”<sup>7</sup> of an estate in a “**foreign proceeding**”.<sup>8</sup>

The Code includes various procedures by which a liquidation proceeding and/or reorganization proceeding may be opposed by the debtor, a creditor and/or other party in interest. In such situations, the court is typically asked to abstain from hearing the case or to dismiss the case or to convert it from one chapter (Chapter 11) to another (Chapter 7).<sup>9</sup> The right to initiate such applications is without regard for the nationality, domicile or residence of the party in interest.

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

The Bankruptcy Laws will not reach the activities in the United States of a foreign solvency administrator unless the administrator invokes the jurisdiction of a bankruptcy court, most likely under Chapter 15 of the Code. The Bankruptcy Laws specifically apply to a foreign representative under Chapter 15 of the Code where “assistance is

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<sup>3</sup> 11 U.S.C. § 101(15). The term “**governmental unit**” includes “foreign state” and a “foreign government.” 11 U.S.C. § 101(27).

<sup>4</sup> 11 U.S.C. § 101(41).

<sup>5</sup> See response to Question 38.

<sup>6</sup> 11 U.S.C. § 303(a)-(c).

<sup>7</sup> A “foreign representative” is defined in the Code to mean “a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding.” 11 U.S.C. § 101(24).

<sup>8</sup> 11 U.S.C. § 303(b)(4) A “foreign proceeding” is defined in the Code to mean “a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” 11 U.S.C. § 101(23).

<sup>9</sup> 11 U.S.C. §§ 305, 1112.

sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding.”<sup>10</sup>

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?

The responder assumes for purposes of its answer that the term “administrator,” as used in the Question, refers to the debtor-in possession or a trustee appointed on behalf of the debtor in a insolvency proceeding in the United States.

The commencement of an insolvency case creates an estate which is comprised of all “legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>11</sup> Property of the estate includes “choses in action and claims by the debtor against others.”<sup>12</sup>

Unless the debtor abandons such a claim, which it may do under certain provisions of the Code,<sup>13</sup> an application by a creditor (whether a foreign creditor or local creditor) to the bankruptcy court for the transfer of such claim from the estate to and for the benefit of a specific creditor or group of creditors will likely be unsuccessful. However, there exists an exception where the creditor group is the official committee of unsecured creditors appointed in the debtor’s case and such committee seeks standing from the Court to bring certain claims or actions that the debtor refuses or otherwise has waived prosecution in connection with activities in the case. Under such circumstances, if the requested relief is granted, the benefit of any recovery of such claims will inure to the debtor’s estate.

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

The responder assumes for purposes of its answer that the term “administrator,” as used in the Question, refers to a trustee appointed on behalf of the debtor in a insolvency proceeding in the United States. In a liquidation case (Chapter 7), a person is typically appointed and/or elected to serve as trustee in the case, subject to certain eligibility requirements.<sup>14</sup> The trustee functions as the “representative of the estate” of the debtor.<sup>15</sup> Notwithstanding such appointment or election, the court may remove a trustee for

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<sup>10</sup> 11 U.S.C. § 1501(b)(1).

<sup>11</sup> 11 U.S.C. § 541(a)(1).

<sup>12</sup> See House Report No. 95-595, 95th Cong., 1st Sess. 367-8 (1977); Senate Report No. 95-989, 95th Cong., 1st Sess. 82-3 (1978).

<sup>13</sup> 11 U.S.C. § 554.

<sup>14</sup> 11 U.S.C. §§ 321, 701-2.

<sup>15</sup> 11 U.S.C. § 323(a).

“cause,” following notice and hearing.<sup>16</sup> The term “cause” is not defined in the Bankruptcy Code, but is “left to the Courts to determine on a case-by-case basis.”<sup>17</sup>

In a reorganization case (Chapter 11), the debtor’s management typically remains in charge during the bankruptcy case. Ouster of the “debtor-in-possession” is considered an extraordinary remedy, but can be overcome where certain factors, including “cause,” are otherwise present.<sup>18</sup> In cases where “cause”, including fraud, incompetence or gross mismanagement is proven, or where the interests of the estate and stakeholders (foreign or domestic) would be better served by appointment of an impartial fiduciary (i.e., a trustee), the Code authorizes the Court to direct the appointment of a trustee conferred with a broad array of powers and duties.<sup>19</sup>

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

A trustee appointed in a liquidation case (Chapter 7) or a reorganization case (Chapter 11) under the Code has capacity to sue and be sued.<sup>20</sup> An appointed foreign representative in a Chapter 15 case also has the capacity to sue or be sued.<sup>21</sup> The Bankruptcy Laws do not distinguish between foreign and local creditors in this regard.

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?

The responder assumes for purposes of its answer that the term “private receiver,” as used in the Question, refers to a receiver appointed on behalf of a person prior to the commencement of insolvency proceedings under non-bankruptcy laws or legal regimes.

The Code employs the term “custodian” to include a “receiver or trustee of any of the property of the debtor appointed in a [non-bankruptcy] case.”<sup>22</sup> A custodian appointed on behalf of a ship operator prior to the commencement of an insolvency proceeding may be removed (in addition for cause under certain State statutes) upon the commencement of an insolvency proceeding.<sup>23</sup> Once the proceeding is commenced, the custodian is generally required to turn over to the debtor (or bankruptcy trustee) the assets in its possession or control and to file an accounting with the court.<sup>24</sup> Under certain

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<sup>16</sup> 11 U.S.C. § 324(a).

<sup>17</sup> 3 *Collier on Bankruptcy* ¶ 324.02 at 324-4 (16th Ed. 2012).

<sup>18</sup> 11 U.S.C. § 1104.

<sup>19</sup> 11 U.S.C. § 1104.

<sup>20</sup> 11 U.S.C. § 323(b). The bases upon which suit may be maintained against a trustee is beyond the scope of this response.

<sup>21</sup> 11 U.S.C. § 1509(b)(1).

<sup>22</sup> 11 U.S.C. § 101(11).

<sup>23</sup> Please see the response to Question 2 for the prerequisites to filing an involuntary case.

<sup>24</sup> 11 U.S.C. § 543(b).

circumstances, however, the pre-bankruptcy custodian may stay in control and possession of the debtor and its estate.<sup>25</sup>

## **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. Upon commencement of an insolvency case, whether it be reorganization (Chapter 11) or liquidation (Chapter 7), the court acquires jurisdiction over all properties of the debtor, including its vessels, wherever such assets are located and by whomever held.<sup>26</sup> This jurisdiction of the court in this regard makes no distinctions based upon the vessel's flag or registry or the domicile of her owner.

## **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?

Upon commencement of an insolvency case, whether it be one under Chapter 11 or Chapter 7, the Code and, more specifically, the related Bankruptcy Rules require that a debtor submit certain lists and schedules to the court on Official Forms.<sup>27</sup> Those lists and schedules include the identification of all creditors by name and address; there is no distinction for foreign creditors.<sup>28</sup> These lists and schedules are submitted under a verification or an unsworn declaration to the veracity and completeness (to the best of the information, knowledge and belief of the signer), subject to a penalty for perjury. In a Chapter 15 proceeding (a proceeding in aid of a foreign proceeding), the foreign representative (who files the Chapter 15 petition) must file with the court lists identifying the foreign representative(s) and bodies authorized under foreign law to conduct proceedings on behalf of the debtor, and all parties in litigation in the U.S. with the debtor.<sup>29</sup>

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?

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<sup>25</sup> 11 U.S.C. § 543(d). Such relief requires notice and a hearing before the court.

<sup>26</sup> 11 U.S.C. § 541(a).

<sup>27</sup> 11 U.S.C. § 521(a).

<sup>28</sup> See Fed. R. Bankr. P. 1007(a)(1) (requiring matrix identifying all creditors (with address) to be filed along with petition commencing case); 1007(b) (requiring identification of all creditors in prescribed Official Forms (by categories of secured, priority and unsecured (Schedules D, E and F)); 1007(d) (requiring separate list of creditors holding 20 largest unsecured claims).

<sup>29</sup> Fed. R. Bankr. P. 1007(a)(9).

The Bankruptcy Rules prescribe that all creditors get notice of the commencement of the case.<sup>30</sup> All creditors are also required to receive various other notices regarding the conduct of the case, including, for instance, relating to sales of property, settlements, chapter 11 plans and claim filing deadlines.<sup>31</sup> Notice to creditors of various proceedings in the case are given at the addresses identified in the lists and schedules identified in the response to Question 9 above or at an address specifically requested by the creditor in a filing with the court or at the address listed in a proof of claim filed by the creditor.<sup>32</sup> Notice is generally provided by regular mail, although the court may prescribe different methods of service (e.g., overnight courier, facsimile, email) and add time or publication requirements.<sup>33</sup>

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?

Yes, as noted above, all creditors must get notice of the time bar (deadline) by which claims must be filed. For foreign creditors, the normal minimum of 20 days' notice is extended to a minimum of 30 days.<sup>34</sup> Typically, in practice courts require greater notice than 30 days for all creditors in any event. The method of service is as described in item 10 above. Bankruptcy Rule 3002(c)(6) provides that a foreign creditor may make a motion to the court to request an extension of the claim deadline and the court can add up to 60 days to the deadline if it determines that notice given to the foreign creditor was insufficient under the circumstances for the foreign creditor to comply with the deadline.

In Chapter 7 cases, claims are timely if filed within 90 days of the so-called "Section 341 creditors meeting" that is held early in the case (An initial meeting of creditors where they can ask limited questions of the debtor and request to be appointed to an official creditors committee. Typically, very few creditors attend such meetings.).<sup>35</sup> Often a separate, later bar date is set by the court.

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.

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<sup>30</sup> Fed. R. Bankr. P. 2002(f).

<sup>31</sup> Fed. R. Bankr. P. 2002(a), (b), (f).

<sup>32</sup> Fed. R. Bankr. P. 1007(g), (p)(3).

<sup>33</sup> Fed. R. Bankr. P. 1007(p)(1)-(3), (l).

<sup>34</sup> Fed. R. Bankr. P. 1007(p)(2).

<sup>35</sup> Fed. R. Bankr. P. 3002(c).

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?

Any creditor, foreign or domestic, is entitled to seek relief from a bar order to file a late claim in a chapter 11 case “for cause shown”.<sup>36</sup> The case law surrounding this provision looks to whether the claimant can demonstrate “excusable neglect” in not timely filing the claim. This determination is equitable in nature and is determined by weighing all the relevant circumstances surrounding the failure to timely file, and weighing the benefits and harms of allowing the late claim in the specific instance. If the claimant can ably demonstrate that it was entitled to receive notice of the deadline, was not served notice and was not otherwise in a position to reasonably know of the deadline, courts should find the existence of excusable neglect. As noted in the response to Question 11 above, foreign creditors, alone, have similar rights in a Chapter 7 case.<sup>37</sup>

#### **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?

Further research required.

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.

None (other than notice requirements previously discussed).

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?

Further research required.

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.

Further research required.

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<sup>36</sup> Fed. R. Bankr. P. 3003(c)(3).

<sup>37</sup> Fed. R. Bankr. P. 3002(c)(6).

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?

There are no specific differences under the Bankruptcy Laws. However, as a matter of non-bankruptcy law, the Foreign Sovereign Immunities Act<sup>38</sup> may prohibit or delay the enforcement of remedies against a foreign state-owned enterprise in the United States by conferring immunity from attachment and execution.

## 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.

There are no restrictions on either publication of notices of foreign insolvency proceedings or communications with local creditors concerning proofs of claims and payments of any recoveries in the insolvency proceedings. However, for ancillary proceedings under Chapter 15 of the Code, there are certain mandatory case notification requirements with respect to certain events, hearings, and requisite proofs of claims.<sup>39</sup>

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

Yes, pursuant to Chapter 15 of the Code.<sup>40</sup> The purpose of Chapter 15 is "to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency."<sup>41</sup>

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 request for recognition must come directly from the foreign representative who is appointed in the foreign proceeding.<sup>42</sup> It is the foreign representative who applies to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.<sup>43</sup>

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

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<sup>38</sup> 28 U.S.C. §§ 1602 *et seq.*

<sup>39</sup> 11 U.S.C. § 1514.

<sup>40</sup> *See* response to Question 1.

<sup>41</sup> 11 U.S.C. § 1501(a); *see also* *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007).

<sup>42</sup> *See* footnotes 7 and 8 for the definitions of "foreign representative" and "foreign proceeding."

<sup>43</sup> 11 U.S.C. § 1515(a).

Chapter 15 of the Code mandates entry of an order recognizing a foreign proceeding if, after notice and a hearing, it appears that recognition will not undermine U.S. public policy and (1) the foreign proceeding for which recognition is sought is a foreign main proceeding<sup>44</sup> or foreign nonmain proceeding;<sup>45</sup> (2) the foreign representative applying for recognition is an individual, partnership, corporation or body; and (3) the petition meets certain evidentiary and filing requirements.<sup>46</sup>

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.

Yes. Such procedures are set forth in Chapter 15 of the Code. Request for recognition is made by the foreign representative of the foreign proceeding, and not by the local insolvency court. The responder assumes for purposes of this response that the question is with reference to Chapter 15 of the Code.

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.

The responder assumes for purposes of its response that this Question relates to recognition of foreign proceedings that are not foreign "main" proceedings, but rather other foreign insolvency proceedings under the laws of countries where an insolvent entity may have done business or operated. Requests for the recognition of such proceedings may be made in accordance with the procedures governing "foreign non-main proceedings."<sup>47</sup>

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?

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<sup>44</sup> A foreign main proceeding is one if it "is pending in the country where the debtor has its center of main interests" ("COMI"). 11 U.S.C. § 1517(b)(1). Absent "evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests" or its "**COMI.**" 11 U.S.C. § 1516(c) It is well-established that in determining an insolvent entity's COMI, courts consider any relevant factors including: (i) the location of the debtor's assets; (ii) the location of the debtor's books and records; (iii) the location of the majority of the debtor's creditors; (iv) the commercial expectations and knowledge of the debtor's creditors; and (v) the location of those who actually manage the debtor. *See In re SPhinX*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

<sup>45</sup> Section 1502(5) of the Code defines a foreign non-main proceeding as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." In turn, "establishment" is defined to mean "any place of operations where the debtor carries out nontransitory economic activity." 11 U.S.C. § 1502(2).

<sup>46</sup> 11 U.S.C. § 1517(a).

<sup>47</sup> 11 U.S.C. § 1502(5).

The responder assumes for purposes of this response that the Question is referring to a compulsory transfer occasioned by order of a non-U.S. court. United States courts will enforce foreign insolvency tribunal orders that are not contrary to the public policy of the United States. If a party in this country objects to the order, or the subject vessel is within the territory of the United States, the court will additionally consider the following questions:

- Will there be just treatment of all holders of claims against or interests in the debtor's property? (Fair and equitable bankruptcy rules are sufficient).
  - Are claimholders in the United States protected against the inconvenience of processing claims in a foreign proceeding? (Knowingly doing business with a foreign party will generally be sufficient).
  - Does the action reasonably assure prevention of preferential or fraudulent dispositions of the debtor's property?
  - Does the action "substantially accord" with the manner of distribution of a debtor's property to creditors and other interested parties set forth in the United States Bankruptcy Code?
  - Foreign priority rules need not be "identical" to the United States. *See In re Combustibles S.A.*, 269 B.R. 104, Bankr. S.D.N.Y. 2001. It is only when a foreign priority rule violates a "fundamental" policy of the United States such the transaction is "inherently vicious or immoral, and shocking to the prevailing moral sense" that a foreign priority scheme will fail this test. *See In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982).
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.

Chapter 15 of the Code establishes procedures for the coordination of foreign insolvency proceedings and U.S. insolvency proceedings which are ancillary to such foreign proceedings. To the extent that U.S. courts have procedures for the coordination of concurrent insolvency proceedings involving maritime assets, it is largely in the context of Chapter 15. Although not used very often in the shipping context, it is also possible to conduct concurrent plenary insolvency proceedings in more than one jurisdiction, such as a reorganization case (Chapter 11) in the United States and a concurrent CCAA proceeding in Canada involving assets and creditors of multinational firms. U.S. bankruptcy courts have experience with the coordination of such plenary cross-border cases.

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. The United States has adopted the Model Law.<sup>48</sup>

## 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.

Since the Model Law became effective in the United States in 2005, two principal issues have created legal uncertainties and difficulties in administration and recognition of cross-border maritime insolvencies. They are outlined below.

The first set of difficulties concerns the definitions of "foreign main proceeding," and "center of main interests" (COMI) which definitions contemplate traditional "brick and mortar" establishments. These definitions do not necessarily comport with the realities of maritime commercial practice, as many shipping companies are incorporated in off-shore jurisdictions in which the company does not actually conduct business.

The second set of difficulties concerns the current reluctance of United States courts to extend the protections of the "automatic stay" to prevent attachment and arrest of the foreign debtors' vessels beyond the territorial jurisdiction of the United States. Under the current regime, the equivalent of a Chapter 15 proceeding must be filed in any jurisdiction to which a vessel sails in order for that vessel to be protected from creditor seizure.

### A. COMI Analysis in Cross-Border Maritime Insolvencies

Sometimes, as in the case of the recent Korea Lines restructuring and related chapter 15 proceeding, *In re Korea Line Corp.* 11-10789 (REG) (Bankr. S.D.N.Y. 2011), there is no question as to where the foreign debtor's center of main interests or "COMI" are located. In that case, Korea Line's center of main interest was unquestionably Korea. However, many of the maritime cross-border insolvency cases filed in the United States have concerned entities incorporated in offshore jurisdictions such as the British Virgin Islands or Singapore. Sometimes the maritime debtors will have operations in their countries of registration, sometimes not. This creates significant difficulties and uncertainty vis-à-vis recognition of those insolvency proceedings in the United States.

In the case of *In re Bear Stearns*, 374 B.R. 122 (S.D.N.Y. 2007), Chapter 15 recognition of Cayman liquidation proceedings of several Bear Stearns feeder funds was denied outright. In that case, the *Bear Stearns* Court noted that no assets of the foreign debtor were located in the Caymans, the funds' books and records were located in New York, the majority of the funds' creditors were U.S. citizens and entities and, perhaps most

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<sup>48</sup> See response to Question No. 1 above.

importantly, there was no evidence that any creditor or investor knew or had reason to know of the Funds' Cayman Islands' registration. The *Bear Stearns* case created significant uncertainty as to whether offshore-incorporated maritime companies' insolvencies could be recognized in the United States.

To counterbalance the result of *Bear Stearns*, the informal position of the some United States courts has been softened so as to consider "**post-insolvency activities**" conducted by the (offshore) liquidator or administrator within the COMI analysis. See *In re Fairfield Sentry Ltd.*, 10-13164, 2010 WL 4455879 (Bankr. S.D.N.Y. July 22, 2010) (recognizing BVI Liquidation of Madoff feeder fund as foreign main proceeding based on post-insolvency activities of liquidator); *In re Grand Prix Assocs., Inc.*, No. 09-16545 (DHS), 2009 WL 1410519 (Bankr. D.N.J. May 18, 2009) (same).

On this basis, a number of maritime offshore-incorporated companies' insolvency proceedings have been recognized. See, e.g., *In re Transfield ER Cape Ltd*, 10-106270 (MG) (Bankr. S.D.N.Y. Jan. 13, 2011); *In re Farenco Shipping Co. Ltd.*, 11-14138 (REG) (Bankr. S.D.N.Y. 2012). However no appellate court has ruled on these issues. The so called "post insolvency activity" theory by which offshore incorporated maritime entities' insolvency proceedings may be recognized in the United States is at best a workaround that not all Courts accept. See *In re Millenium Global Emerging Credit Master Fund*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011) (criticizing and rejecting "post-insolvency activity" theory). Therefore, for a maritime debtor having operations scattered throughout multiple jurisdictions, there remains significant uncertainty as to whether its Chapter 15 petition will be recognized. The solution may be for courts to place greater emphasis on the statutory "presumption"<sup>49</sup> that a foreign debtor's registered office is its COMI. As a practical matter, courts have afforded this presumption little or no weight within their COMI analyses, hence the emergence of the "post insolvency activity" line of cases.

## **B. Reach of Automatic Stay in Maritime Cross-Border Insolvencies**

Insolvency proceedings commenced under Chapter 7 (liquidation) or Chapter 11 (reorganization) are plenary cases which involve the full authority and jurisdiction reach of the court under the Code. One of the principal distinguishing features of these cases is the imposition of the automatic stay which prohibits the commencement or continuation of actions or proceedings any the debtor or its property anywhere in the world.<sup>50</sup> In maritime proceedings, this means that the court has extraterritorial jurisdiction over the debtor's vessels which are property of the debtor's estate no matter where they are located. Maritime creditors seeking to arrest, attach or detain the debtor's vessels in violation of the automatic stay can be punished by the court if the court has jurisdiction over the creditor.<sup>51</sup>

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<sup>49</sup> 11 U.S.C. § 1516(c).

<sup>50</sup> 11 U.S.C. § 362.

<sup>51</sup> See, e.g., *United States Lines, Inc. v. GAC Marine Fuels Ltd.*, 68 B.R. 690 (Bankr. S.D.N.Y. 1986); *Lykes Bros. S.S. Co. v. Hanseatic Marine Service, GMBH*, 207 B.R. 282 (Bankr. M.D. Fla. 1997).

By contrast, a proceeding commenced under Chapter 15 of the Code is not a plenary case inasmuch as it is ancillary to a foreign proceeding pending elsewhere. As such, the full panoply of powers conferred upon the courts in plenary cases is not always present in Chapter 15 cases, and this limitation can be seen in the context of the automatic stay. Under Chapter, upon recognition of a foreign proceeding as a “foreign main proceeding,” the Code provisions<sup>52</sup> applicable to the automatic stay “apply with respect to the debtor and the property of the debtor *that is within the territorial jurisdiction of the United States.*”<sup>53</sup>

With respect to actions against the debtor’s property, the quoted language makes clear that the automatic stay in Chapter 15 cases only protects property of the debtor that is within the United States. While better than nothing, it can be less than adequate for a maritime debtor having mobile assets transiting many jurisdictions throughout the world. To fully protect its properties from arrest and associated delays, it may be incumbent upon a maritime debtor to file ancillary cases in multiple jurisdictions.

With respect to actions against the debtor itself, under the plain wording of the statute, the Chapter 15 stay would appear to be worldwide. However, at least one bankruptcy judge has concluded that courts may enjoin creditors from taking actions in foreign jurisdictions in Chapter 15 cases only if the foreign action affects the debtors' property in the United States.<sup>54</sup> If this approach becomes widely accepted by the courts, it will seriously erode the utility of the stay available under Chapter 15, particularly as it affects maritime concerns with worldwide interests.

## 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?

U.S. flag vessels and domestic vessel operators are subject to insolvency laws of general application, i.e., the Bankruptcy Laws. However, there is at least one provision within Chapter 11 of the Code that has specific application to only one type of vessel, i.e., U.S. flag vessels holding either a certificate of public convenience or a permit issued by the Department of Transportation. Section 1110 of the Code allows certain mortgagees and lessors of such ships to recover such collateral if allowed to do so under the terms of their lease or mortgage and if, within 60 days of the commencement of the case, the trustee

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<sup>52</sup> 11 U.S.C. § 362

<sup>53</sup> 11 U.S.C. § 1520(a)(1) (emphasis added).

<sup>54</sup> See *In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010) (ultimately finding automatic stay was not violated because the subject action did not impact United States property).

does not agree to begin performance. By varying other provisions of the Code, Section 1110 provides “preferential treatment” for certain secured lenders and lessors with respect to such ships. Section 1110 does not afford similar relief for lessors and secured lenders of other vessel types.

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.

Not applicable.

32. Is there a monetary or asset value threshold for the application of various forms of insolvency procedure? For example, is there a form of simplified insolvency administration for ship operators with assets of limited value?

Generally speaking, no. However, the Code does permit a “small business case” to be filed by a “small business debtor” under Chapter 11 (reorganization).<sup>55</sup> Under current monetary thresholds, a small business debtor is a person “engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than \$2,343,000 (excluding debts owed to 1 or more affiliates or insiders)” in a case in which an unsecured creditors committee has not been appointed or where the court has made a determination that a previously appointed committee is unnecessary.

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.

Natural persons and entities<sup>56</sup> are both eligible to become debtors under Chapter 7 (liquidation) or Chapter 11 (reorganization ) and, for all legal and practical purposes, the procedures governing the case are the same regardless of whether the debtor is a natural person or entity.

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?

Further research required.

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

U.S. district courts are the trial courts within the federal judicial system. They are courts of limited jurisdiction, meaning that a district court must jurisdiction over the subject matter of the case or proceeding before it can accept the case or proceedings. District

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<sup>55</sup> 11 U.S.C § 101(51C).

<sup>56</sup> The Code definitions for the terms “person” and “entity” can be found in the response to Question 1.

courts do have jurisdiction have original and exclusive jurisdiction of all insolvency cases arising under the Code, and original, but not exclusive, jurisdiction of all proceedings arising under the Code, or arising in or related to cases arising under the Code.<sup>57</sup> Under federal law, the district courts may refer insolvency cases to the bankruptcy judges of their district,<sup>58</sup> and most do so through some form of standing order.

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

The status of an entity as “insolvent” is based upon traditional balance sheet tests. Under the Code, an entity is “insolvent” if its debts are greater than its assets, at a fair valuation, exclusive of property exempted or fraudulently transferred.<sup>59</sup>

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 differences.

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. Under the Code, a private creditor may file an involuntary bankruptcy case against a debtor under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Code. A case is commenced upon the filing of a petition against the debtor specifying the specific Code chapter under which the case is filed. The petition must be filed by three or more creditors, each of whom is either the holder of a claim against the debtor that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such creditor. Such noncontingent, undisputed claims must aggregate at least \$14,425.00 more than the value of any lien on the property of the debtor securing such claims. Where the debtor has fewer than 12 creditors, the petition may be filed by a single creditor so long as the same monetary threshold is met.<sup>60</sup>

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?

Yes. A public authority meeting the definition of an “entity” or “governmental unit”<sup>61</sup> may commence insolvency proceedings under Chapter 7 (liquidation) or Chapter 11 (reorganization) against a debtor in the same manner as a private creditor. The grounds

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<sup>57</sup> 28 U.S.C. § 1334.

<sup>58</sup> 28 U.S.C. § 157(a).

<sup>59</sup> 11 U.S.C. § (32).

<sup>60</sup> 11 U.S.C. § 303(b).

<sup>61</sup> The term “governmental unit” is defined in the Code. 11 U.S.C. §101(27).

upon which a public authority may commence involuntary insolvency proceedings against a ship operator are the same as those described in response to Question 38.

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. The Code includes various procedures by which a liquidation proceeding and/or reorganization proceeding may be opposed by the debtor, a creditor and/or other party in interest. In such situations, the court is typically asked to abstain from hearing the case or to dismiss the case or to convert it from one chapter (Chapter 11) to another (Chapter 7).<sup>62</sup>

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. A ship operator that is otherwise eligible to become a debtor may commence a voluntary bankruptcy case under Chapter 7 (liquidation) or Chapter 11 (reorganization) of the Code. The Code has minimum eligibility requirements in this regard. In order to become a debtor, the ship operator must reside or have a domicile, a place of business, or property in the United States at time the bankruptcy case is commenced.<sup>63</sup>

42. Do creditors or any other persons with legal standing (such as public authorities, shareholders or employees of a ship operator) have rights to oppose a ship 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 party in interest may oppose a voluntary insolvency proceeding commenced by a ship operator.

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?

The time within which a maritime claim must be asserted or filed in a U.S. court is typically governed by specific statutes of limitation or the doctrine of laches. Maritime claims which are not filed within prescribed time limits are deemed to be time-barred. The filing of an insolvency proceeding by or against the debtor will not stop the running of such deadlines, but will equitably suspend the deadlines until the later of (a) the end of such period, or (b) 30 days after notice of the termination or expiration of the automatic stay.<sup>64</sup> In the meantime, the holder of a maritime claim may present its claim in the

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<sup>62</sup> 11 U.S.C. §§ 305, 112.

<sup>63</sup> 11 U.S.C. § 109(a).

<sup>64</sup> 11 U.S.C. § 108(c).

insolvency proceeding by filing a proof of claim against the debtor in accordance with applicable Bankruptcy Laws.

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?

The responder assumes for purposes of its answer that the question refers to a liquidation of a ship operator under Chapter 7 of the Code.<sup>65</sup> The Code authorizes a Chapter 7 trustee to operate the business of the debtor for a "limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."<sup>66</sup>

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?

Yes. The Code confers broad powers on bankruptcy trustees to assume or reject executory contracts and unexpired leases,<sup>67</sup> including charter parties and contracts of affreightment to the extent that they can be categorized as such as of the commencement of the insolvency proceeding.

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?

The Code permits a bankruptcy trustee to assign an executory contract or unexpired lease, provided, that, the trustee assumes the contract or lease (curing all defaults) and provides adequate assurances of future performance.<sup>68</sup> As an exception to this right, the Code provides that a trustee may not assume and assign a contract or lease if it is "of a type that could not be assumed under applicable law."<sup>69</sup> Personal service contracts fit into this category.

## 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?

Further research required.

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.

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<sup>65</sup> A debtor-in-possession reorganizing under Chapter 11 of the Code operates its business in the ordinary course, subject to supervision and oversight by the court and stakeholder committees.

<sup>66</sup> 11 U.S.C. § 721.

<sup>67</sup> 11 U.S.C. § 365.

<sup>68</sup> 11 U.S.C. § 365(f).

<sup>69</sup> 3 *Collier on Bankruptcy* ¶ 365.07[1], at 365-61 (16th Ed. 2012).

Further research required.

## **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?

The Bankruptcy Laws do not distinguish between differing types of creditors (such as whether a mortgagee is a bank or financial institution, or a different type of entity). The priority of claims under the Bankruptcy Law depends on the type of claim, e.g., a claim arising from administrative expenses in bankruptcy, a priority claim for wages, a secured claim or an unsecured claim, etc., and not on the identity of the claimant.

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.

See the attached table.

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?

If a shipowner has commenced insolvency proceedings in the U.S., the court has jurisdiction and authority over the shipowner's estate, including over any vessels owned by the debtor in bankruptcy. There is no provision for establishing a limitation fund within bankruptcy. If a limitation fund has been established according to U.S. law, creditors who have claims against such fund may bring claims against only that fund. Although a creditor may seek to bring an involuntary bankruptcy proceeding, the creditor may not recover in bankruptcy any more than the amount to which he would be entitled outside of bankruptcy (i.e., its share of the limitation fund).

## **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?

Yes. Under Chapter 11, the presumption is that management of the debtor remains in control of the debtor and business operations, subject to complying with the requirements of the Code. However, where there is evidence of fraud or gross mismanagement, the court, upon motion of a creditor or the Office of the United States Trustee, can appoint a

trustee to operate the business and displace existing management. This is unusual and requires a high degree of proof.

During the first 120 days after the bankruptcy filing, only the debtor (that is, management) can propose a plan of reorganization (and it has until 180 days to solicit acceptances of that plan).<sup>70</sup> The debtor's exclusive period to propose a plan may be extended for up to 18 months after the filing date if the debtor shows the court it is making progress in negotiating a plan with creditors. The exclusive period is usually extended in 60, 90 or 120 day intervals. Once the debtor files a plan, it typically takes several months for it to be confirmed.

In addition to being voted on by creditors, the Court must approve the plan and it must meet numerous requirements set forth in the Code regarding the treatment of creditors and equity security holders.<sup>71</sup>

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?

The plan is the governing document for a successful Chapter 11 reorganization. All agreements reached with creditors and other parties in interest regarding the restructuring must be set forth in the plan or documents incorporated into or describing the plan.<sup>72</sup> Other than ensuring that the plan meets the requirements of the Code, the Court does not insert itself into the negotiation process. The Code sets forth the voting requirements for approval of the plan by creditors. A plan divides claims into different classes of similar claims and each class of impaired claims is entitled to vote on the plan.<sup>73</sup> A class of claims accepts the plan if, of those who cast a ballot on the plan, it is accepted by a majority of the holders and they hold 2/3rds in dollar amount of the claims in the class.<sup>74</sup> A fully consensual plan is one that has all classes accepting. However, a plan may be approved by the Court even if a class (or classes) rejects the plan, so long as one non-insider class accepts the plan and a number of tests set forth in the Code are satisfied.<sup>75</sup> To be clear, a debtor may negotiate with only those creditors it feels it needs to secure approval of the plan; however, all parties get to vote on the plan and it must meet the Code's requirements.

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?

See response to item 53 above.

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<sup>70</sup> 11 U.S.C. § 1121.

<sup>71</sup> 11 U.S.C. § 1129.

<sup>72</sup> 11 U.S.C. §§ 1129, 1122, 1125, 1123.

<sup>73</sup> 11 U.S.C. §§ 1129, 1126.

<sup>74</sup> 11 U.S.C. § 1126.

<sup>75</sup> 11 U.S.C. §§ 1129(b).

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.

Please see responses to items 52 and 53 above. Supplementing those responses, the following items relating to approval of a plan are worthy of note: (i) a plan must provide that (and a debtor must offer evidence that) any unsecured creditor that has not accepted the plan will receive value under the plan that is no less than they would receive were the debtor liquidated under Chapter 7 (11 U.S.C. §1129(a)(7)); (ii) with respect to a class of unsecured claims that has rejected the plan, the claimants in such class must be paid in full or the holder of any claim or equity interest junior to them must not receive or retain value under the plan (11 U.S.C. §1129(b)(2)(B) (known as “cram-down”)); and (iii) with respect to a class of secured claims that has rejected the plan, as a general matter, the claimants in such class must retain the liens securing their claims until the debt is paid and the present value of the payment stream must equal the value of the secured creditor’s interest in the secured assets (considering any prior liens) at the time of confirmation of the plan (11 U.S.C. §1129(b)(2)(A) (also known as “cram-down”)).(Note, there are other methods of cram-down; however, discussion of their intricacies are beyond the scope of this Questionnaire.)

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

A Chapter 11 plan must provide for the payment of a secured claim in cash up to the value of the collateral securing the claim. When a payment plan is done over a secured creditor’s objection, it is known as a “cram-down” plan, as described above.

A cram-down plan sets up, typically, an evidentiary fight between the secured creditor and the debtor over (i) collateral value (as that determines the principal amount the secured creditor is entitled to recover under the plan), (ii) the appropriate “cram-down rate” (discount rate for present value purposes), and (iii) a feasibility fight (whether the debtor’s projections are reasonable and support payment/success of the plan).

A secured creditor with an undersecured claim will have a secured claim to the extent of the value of the collateral and an unsecured claim for any deficiency. The unsecured portion of the claim will not be entitled to the more favorable treatment of a secured creditor and will generally be paid at cents on the dollar (along with other unsecured claims).

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

A debtor may convert a Chapter 7 (liquidation) case to one under Chapter 11 (reorganization)<sup>76</sup> and *vice-versa*.<sup>77</sup>

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<sup>76</sup> 11 U.S.C. § 706.

<sup>77</sup> 11 U.S.C. § 1112.

## 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. A private creditor such as a ship mortgagee may take over the business of a ship operator or sell all or part of its fleet in the exercise of rights, remedies and self-help procedures agreed to by the parties in the agreements and contracts governing their relationship. So long as the exercise of such rights, remedies and procedures do not violate public policy or otherwise cause a breach of the peace, the courts will enforce them under freedom of contract principles.<sup>78</sup> In addition, under the provisions of the Commercial Instruments and Maritime Lien Act,<sup>79</sup> private creditors such as maritime lienors and the holders of preferred ship mortgages may cause the arrest and judicial sale of vessels subject to such liens and mortgages. Such actions can be taken for the account of the private creditor to the exclusion of other creditors.

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.

Notice of the commencement of a court action to foreclose a maritime lien or mortgage lien against a vessel must be given to the master or other person in charge of the vessel and, in the case of a U.S. flag vessel, any person who has recorded a notice of claim of lien against the vessel and all mortgagees of record.<sup>80</sup> Notices will also be required if, following arrest, the vessel is not released within prescribed time limits.<sup>81</sup> Depending upon local court rules, additional notifications may be required upon the arrest and subsequent judicial sale of the vessel.

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<sup>78</sup> Self-help rights of ship mortgagees are specifically recognized under 46 U.S.C. § 31325(b)(3)

<sup>79</sup> 46 U.S.C. §§ 31301 *et seq.*

<sup>80</sup> 46 U.S.C. §§ 31325(d).

<sup>81</sup> Rule C(4), Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

**CMI QUESTIONNAIRE ANNEX**

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
title, possession or ownership of a ship or any part interest in a ship					Issues relating to title to a ship or part ownership of a ship are administered in bankruptcy; the bankruptcy court determines if the ship is property of the estate

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
between co-owners of a ship including use or earnings of the ship					Issues relating to ownership of property between two co-owners are administered in bankruptcy; the bankruptcy court determines if the ship or earnings of the ship is property of the estate
mortgages or hypothecs on a ship or share in a ship	Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
bottomry or other contractual liens on a ship	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
wages, benefits, or repatriation of master or crew		Wages are a preferred claim but only up to statutory limit of \$10,000 per person for the 180 days prior to bankruptcy filing; otherwise, the same priority applies in bankruptcy as in non-bankruptcy admiralty cases			

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
loss of life or personal injury in connection with operation of a ship	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
salvage awards	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
unpaid suppliers of goods or services to a ship	Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
general average	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
collision	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

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other types of tortious or delictual physical damage caused by ship	Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.				
cargo loss or damage			Treated as a general unsecured claim.		

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
contracts of carriage, including charterparties, other than for cargo loss or damage			Treated as a general unsecured claim.		
towage (other than salvage)			Treated as a general unsecured claim.		

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
pilotage	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

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hull insurance	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

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p&I insurance	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

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port, canal and harbour dues	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

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wreck removal by public authorities	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), the claim would be treated as a general unsecured claim.</p>				

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
environmental damage	<p>Maritime liens are given the same priority in bankruptcy as in an admiralty proceeding, provided that administrative claims take priority in bankruptcy. Enforcement may be brought or continued by claimant outside of bankruptcy only with the approval of the bankruptcy court. If a claim is not a maritime lien (under non-bankruptcy law), or due to an intentional tort or to criminal conduct, the claim would be treated as a general unsecured claim.</p>			<p>If the environmental damage is due to an intentional tort or to criminal conduct, it is not dischargeable in bankruptcy.</p>	

<b>Type of Claim Arising</b>	<b>Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)</b>	<b>Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)</b>	<b>Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)</b>	<b>Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)</b>	<b>Additional Comments</b>
unpaid contributions for social benefits programs (workers' compensation, health etc)		Claims for contributions to an employee benefit plan are preferred claims, up to \$10,000 per employee for the 180 days prior to filing the bankruptcy petition.			
criminal or regulatory fines or penalties				Criminal fines are not subject to discharge in bankruptcy.	
fraud or intentional wrongdoing in connection with operation of ship				Fraud or intentional torts are not subject to discharge in bankruptcy.	