

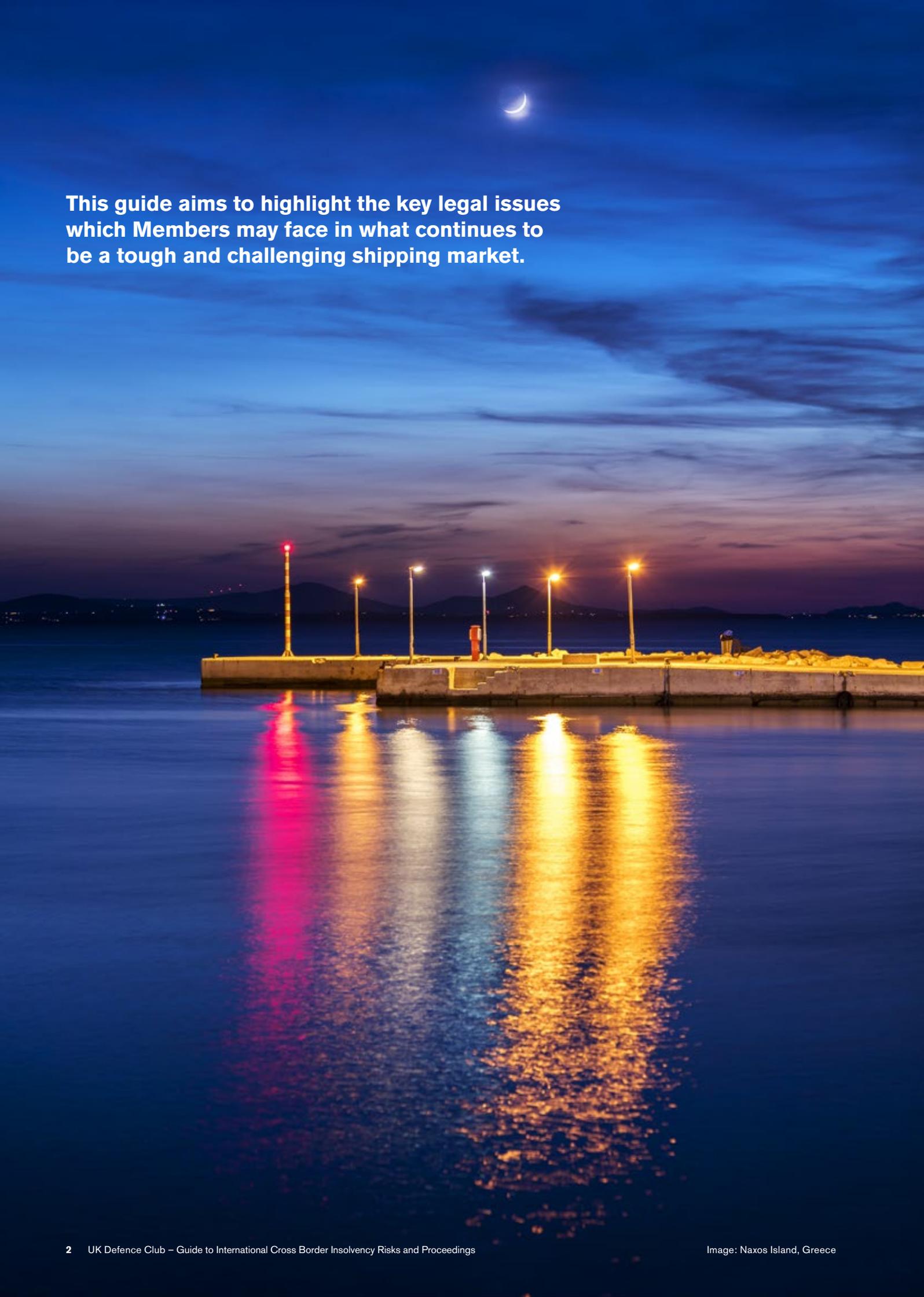
**GUIDE TO
INTERNATIONAL
CROSS BORDER
INSOLVENCY
RISKS AND
PROCEEDINGS**

Faced with a defaulting counterparty in financial difficulty, shipowners and operators will have key questions which need to be answered so that commercial decisions can be taken promptly to mitigate the risk of financial exposure.



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A night photograph of a harbor. In the foreground, the dark blue water reflects the lights from a pier. The pier is a long, low concrete structure with several tall, thin light poles. One pole on the left has a red light at the top, while the others have white lights. The lights create long, shimmering reflections on the water's surface. In the background, there are dark silhouettes of hills or mountains under a deep blue sky. A thin crescent moon is visible in the upper right portion of the sky. The overall atmosphere is calm and serene.

This guide aims to highlight the key legal issues which Members may face in what continues to be a tough and challenging shipping market.

Introduction

When financial crisis hits a company, it will inevitably seek financial protection from its creditors which may (or may not) involve a period of re-organisation, during which the company may continue to trade. Faced with a defaulting counterparty in financial difficulty, shipowners and operators will have key questions which need to be answered so that commercial decisions can be taken promptly to mitigate the risk of financial exposure. Often the issues are very complex and involve jurisdictional questions of maritime, insolvency and rehabilitation laws and local court procedures.

This guide aims to highlight the key legal issues which Members may face in what continues to be a tough and challenging shipping market. Produced in a FAQ format, the publication focuses on 10 key jurisdictions and offers an overview of the potential legal and jurisdictional issues that insolvency / rehabilitation proceedings present.

Since 2008 the UK Defence Club has been involved in many cases concerning defaulting counterparties and those which have sought bankruptcy protection. The most high profile of these was the collapse of the OW Bunker Group of companies which gave rise to the well-publicised dispute concerning the RES COGITANS, a case in which the Club supported its owner Member through various appeals to the Supreme Court. The Club's extensive experience and expertise means it is well placed to assist Members in navigating through such complex issues.

Our thanks go to the various contributors who have assisted in producing this guide which we hope our Members will find a helpful source of general reference.

England and Wales

In England and Wales, the two most common insolvency procedures are administration and liquidation.





England and Wales

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

In England and Wales, the two most common insolvency procedures are administration and liquidation. Both of these procedures involve the appointment of a licenced insolvency practitioner who effectively displaces the directors and is responsible for collecting in and realising the assets of the debtor for the benefit of the creditors as a whole.

Administration is a rescue procedure. It allows for the reorganisation of a company or the realisation of its assets under the protection of a statutory moratorium (i.e. a “breathing space”), which prevents creditors from taking action to enforce their claims against the company during the administration process and so hamper the implementation of a strategy for the company’s rescue or asset realisation. The administrator takes over the control of the company’s business and assets from the company’s directors, in order to achieve one of the statutory purposes of administration: (1) the rescue of the company (as distinct from the business carried on by the company) as a going concern; (2) the achievement of a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration) or (3) the realisation of some or all of the company’s property to make a distribution to one or more secured or preferential creditors.

Liquidation (also known as winding up) is a procedure through which the assets of a company are realised and distributed to creditors in satisfaction of the debt due and in the order of priority as set out in the Insolvency Act 1986. Once the liquidation is commenced, the company will cease trading and, following the end of liquidation, the company is dissolved. There are two types of liquidation: voluntary (initiated by the company at a shareholders’ meeting) or compulsory (usually initiated by a creditor by way of a court application). The type of liquidation will have a different impact on third parties. For example, in a compulsory liquidation, the employees are dismissed automatically and there is a stay on the commencement or continuation of proceedings against the company without the leave of the court. In a voluntary liquidation, the employees are not automatically dismissed (although given that the

company will have ceased trading, the liquidator will most likely terminate the contracts of employment shortly after his appointment) and there is no automatic stay on the commencement or continuation of proceedings (although the liquidator can make an application to court requesting a stay).

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

Yes. There are no restrictions on the renegotiation of the terms of a contract prior to insolvency. It is worth noting that the revised contracts must be completed before the insolvency procedure is commenced as the directors may not have the appropriate authority to bind the company once an insolvency practitioner is appointed. Further, the insolvency of the counterparty should not impact the parties’ obligations under a contract as, unlike in certain other jurisdictions, when a company goes into an insolvency process it is not released from its contractual obligations.

It is also worth noting that the insolvency practitioner has the statutory power to look at the transactions entered by the company in the period prior to the commencement of the insolvency procedure and, if appropriate, set aside a transaction if it was deemed to be at an undervalue or sought to prefer a particular creditor over other creditors.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

It is dependent on the circumstances. It will be necessary to review the termination rights (particularly in relation to insolvency) under the contracts. It may be preferable to maintain a contract (for example, a time charter) so that further hire accrues as a debt which is easier to prove and claim in any ensuing insolvency proceedings, rather than a damages claim for termination of the contract. If the Member does consider there is a breach but believes it is in its best interest not to terminate the contract at that stage, careful thought needs to be given to preserving the right to terminate to avoid the risk of the counterparty later arguing that the breach was waived by the conduct of the Member.

England and Wales (continued)

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

This is more likely to happen in an administration as opposed to a liquidation. If the administrator affirms the contract, then to the extent the administrator has or will incur liability under the contract it will be treated as an administration expense which gains a priority in the insolvency. It is important to ensure that the administrator confirms this in writing and also when such payments will be received as he / she may seek some flexibility as to the payment schedule. In addition, the administrator will also try to distinguish between liabilities which accrued prior to the commencement of the insolvency process (which will be treated as an unsecured claim) and those which accrued after its commencement.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

It is dependent on the circumstances and the terms of the contract. It may be easier for the Member to terminate and resolve any practical issues on termination – such as handling of cargo onboard – with the company's existing employees with whom the Member may have a working relationship, rather than with a liquidator / administrator who may be inexperienced in shipping and may be slow to react given the number of issues with which they will inevitably be dealing on commencement of any insolvency proceedings.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

A Member who has a claim against an insolvent company is required to submit a "proof of debt" to the insolvency practitioner authenticated by the creditor or a person authorised to act on their behalf. In liquidation, there is a prescribed form (form 4.25). In administration, there is no prescribed proof of debt form but, in practice, the administrators will adopt the format of the proof of debt used in liquidations. The form requires the Member to

provide details of its claim including such underlying documents as are required to substantiate their claim (e.g. signed charterparty agreement and statement of account of sums owing). The proof of debt will form the basis of the Member's claim in the insolvency for voting purposes and for the participation in any dividend available to unsecured creditors. The insolvency practitioner will adjudicate on the claim and can call for more evidence if required and will accept or reject, in whole or in part, the proof depending on the information to hand. If the claim is rejected, the insolvency practitioner is required to provide a full explanation for rejecting the proof and the creditor will have the power to challenge the decision by way of a court application. There is a time limit by which the application is required to be lodged at court.

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

Assuming that the insolvency of the counterparty (or other grounds) entitles the Member to terminate the contract, it is possible to claim damages for the loss suffered. The proof of debt submitted by a creditor may contain claims in respect of different aspects of a debt arising from the same contract, for instance a claim for accrued debts and a claim for damages for future losses within one claim. The claim for damages will be assessed under the normal legal principles and will be a matter of discussion between the Member and the insolvency practitioner. It may, for example, be necessary to commence proceedings in order to get an award and this should be done with the co-operation of the insolvency practitioner.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Yes. The rules of insolvency set-off are mandatory and may not be varied by contract. Where a creditor proves a claim in a liquidation or administration, an account must be taken of the mutual dealings between the creditor and the insolvent company. The sums due from one party must be set-off against the sums due from the other, except that sums due from the insolvent party



shall not be taken into account if the other party had notice at the time they were incurred of: (i) a resolution or petition to wind-up; or (ii) an application for an administration order or of notice of intention to appoint an administrator. All claims, including future, contingent and unliquidated sums, must be brought into account.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

If the administrator affirms the contract, then to the extent the administrator has or will incur liability under the contract it will be treated as administration expense which gains a priority in the insolvency as recognised by the administrator.

10

What is the position concerning a purchase option in a charterparty?

This will depend on whether the charterparty is terminated or continues. If the charterparty is terminated, then the purchase option cannot be exercised, but it may be possible for the Member to claim damages for loss of the option. If the charterparty survives the counterparty's insolvency, then the purchase option should also continue and be capable of being exercised.

11

What is the timescale for a repayment schedule under an insolvency / rehabilitation restructuring plan?

This will vary and can depend on how long it takes the insolvency practitioner to realise the assets of the insolvency company. The insolvency practitioners are under a general duty to perform his functions as quickly and efficiently as possible. Although there is no time limit on a liquidation, the statutory period of an administration is 12 months unless extended by court order or with the consent of the creditors. The insolvency practitioner is also required to prepare regular progress reports for the benefit of the unsecured creditors which details the conduct of the insolvency and likely return to creditors.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

If the insolvency practitioner rejects a proof in whole or in part, he / she is required to prepare a written statement of the reasons for doing so and send it as soon as reasonably practicable to the creditor. If a creditor is dissatisfied with the decision they may apply to court for the decision to be reversed or varied. The application must be made within 21 days of receipt of the written statement.

13

What happens concerning ownership of the bunkers under a time charterparty?

The usual position under a time charterparty is that, on delivery, the bunkers are purchased from the owner by the time charterer and purchased back again by the owner from the time charterer when the ship is redelivered. While the time charterparty is alive, therefore, the bunkers are usually owned by the time charterer.

If the charterparty is lawfully terminated by the owner upon a liquidation (e.g. for non-payment of hire), it will be a question of construction of the particular charterparty whether ownership of the bunkers automatically reverts to the owner upon termination (i.e. the 'redelivery' provisions are triggered early), or whether the bunkers remain the property of the charterer as there has been no 'redelivery' at the end of the charter period. Furthermore, the English Court has held that the charterer can only pass to the owner such property as he himself possessed. So, if there is a retention of title clause relating to the bunkers supplied, or property in such bunkers vests in a sub-charterer, this may prevent the passing of property in the bunkers back to the owner. This raises the risk of the owner being held liable for conversion of any bunkers consumed and consequently liable to pay the party with title to the bunkers.

England and Wales (continued)

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

Generally, the order of priority for the payment of creditors is as follows:

- (1) Fixed charge holders
- (2) Liquidators' / Administrators' fees and expenses
- (3) Preferred creditors – primarily unpaid wages and salaries (subject to statutory cap)
- (4) Floating charge holders
- (5) Unsecured creditors
- (6) Interest incurred on all unsecured debts post appointment of the relevant insolvency practitioner
- (7) Shareholders

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

It may be possible for asset attachment steps to be taken in other jurisdictions even after insolvency has commenced. This will depend on the jurisdiction in question, in particular whether the jurisdiction where the assets are to be attached automatically recognises the overseas insolvency proceedings and will impose a stay on legal proceedings.

Consideration also has to be given to whether attachment of assets will improve where the Member's claim ranks in the insolvency, or whether other creditors can attach the same asset and rank alongside the Member's claim, or ahead, if they are secured creditors.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

A Member can exercise any contractual right of lien prior to the commencement of insolvency proceedings, assuming all requirements of the exercise of lien are met. Once insolvency proceedings have commenced, whether or not it can be enforced will depend on the legal nature of the lien in the jurisdiction in which the Member is seeking to exercise it. In some jurisdictions, including England and Wales, the lien is characterised as a floating equitable charge that crystallizes once hire becomes due rather than a personal contractual right of interception. The distinction is that an equitable charge is a security interest that requires registration in some jurisdictions if it is to be binding in the event of insolvency. The English Court has held that a lien on sub-freight / sub-hire creates an assignment by way of charge. Security interests against UK companies must be registered within 21 days of their creation. Against a charterer, therefore, a lien on sub-freight / sub-hire may be void in liquidation if not registered within 21 days of the charterparty being entered into.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

If the bills of lading are owner's bills, then the owner may be entitled to demand payment of freight from the shipper / receiver under the bill of lading at any time before the freight has been paid. This is a right that arises independently of the owner's rights of lien over sub-hire / sub-freight under the charterparty. Even where a bill of lading provides for payment of



freight to a party other than the owner, that third party is regarded as the owner's agent for the purposes of collecting freight on the owner's behalf. Accordingly, if the charterer is insolvent, the owner should serve notice on the shippers / receivers under the bills of lading requiring payment of all voyage freight to the owner instead of the insolvent charterers.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

Where the charterparties are not terminated, the owner may have an express right under the time charterparty to exercise a lien over cargo, freights and sub-freights. The owner may threaten to withdraw the ship or otherwise fail to complete the intended voyage if the sub-charterer refuses to pay hire / freight directly to the owner pursuant to the exercise of the lien. The difficulty for third parties such as sub-charterers is that they may be faced with competing claims for freight, for example if the time charterers' liquidator also demands payment of the freight. If the head-charter is terminated, the sub-charter will normally fall away as the insolvent time charterer will be in repudiatory breach of the sub-charter once it no longer has the ship at its disposal.

As regards bunker suppliers, the contract for the supply of bunkers to the ship will usually be with the time charterer, not the owner. While the charterparty remains in existence, the bunkers normally remain the property of the time charterer assuming there is no retention of title clause. If the charterparty is terminated and the ship redelivered, the property in the remaining bunkers may pass to the owner on redelivery, depending on the terms of the charter. If there is a retention of title clause and the bunker supplier has not been paid, the owner may be faced with a claim for conversion of the unconsumed bunkers and required to pay for the bunkers.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

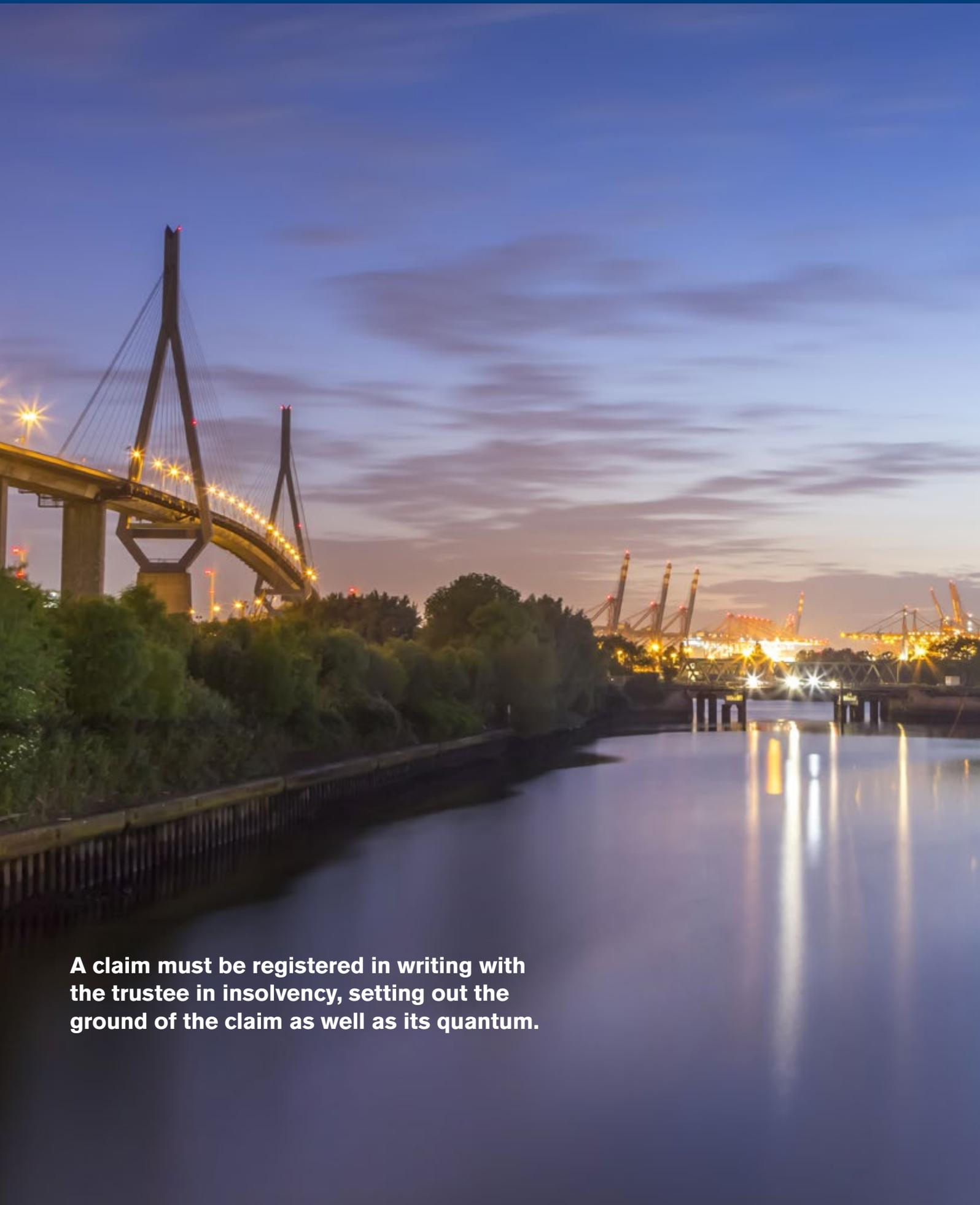
In the case of an unpaid bunker supplier, the owner runs the risk of a claim that he has converted the remaining bunkers onboard and / or threats of arrest to his ship by the unpaid bunker supplier. However, where the owner purchases the bunkers from the charterers on redelivery in good faith and without notice of the unpaid bunker suppliers' lien or other rights, then s.25(1) of the English Sale of Goods Act 1979 may operate to protect the owner from any claim in conversion.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent? Can a sub-charterer attach bunkers belonging to the disponent owner?

As noted above, it may be that the charterer's bunkers become the owner's property on redelivery. If not and they remain the charterer's property, then it may be possible to attach them or in any event set-off their value against any outstanding hire or claim for damages against the charterer.

A sub-charterer could seek to attach bunkers belonging to the time charterer, if the sub-charterer had a claim against the time charterer and if it could show that property in the bunkers remains vested in the time charterer, notwithstanding the termination of the head charter.



A claim must be registered in writing with the trustee in insolvency, setting out the ground of the claim as well as its quantum.



Germany

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

Insolvency proceedings under German law aim to ensure that the creditors of an insolvent company are treated fairly as far as possible. This is achieved by having the assets of the insolvent company sold and ensuring that the proceeds obtained are distributed appropriately. If possible, measures will be taken in order to keep the company alive rather than to have it liquidated. Control of the insolvent company is executed by a trustee in insolvency nominated by the insolvency court.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

If a Member attempts to renegotiate contracts with the insolvent party in order to improve its position if and when insolvency proceedings are commenced, any renegotiated terms may be challenged by the trustee in insolvency.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

It will depend on the circumstances and the terms of the governing contract. A Member might maintain a contract simply so that further hire accrues as a debt which can be easier to prove and claim in any ensuing insolvency proceedings, though it will be necessary to preserve the right to terminate to avoid the risk of the counterparty later arguing that any breach was waived by the conduct of the Member. From the perspective of an insolvent company, there will be a number of contracts which the trustee in insolvency will aim to maintain rather than allow to be terminated. These will be maintained for the benefit of the respective parties.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

Once insolvency proceedings have been commenced and a trustee in insolvency has been nominated by the court, it will be up to the trustee to decide whether or not existing contracts will be maintained or terminated. If the trustee in insolvency does elect to terminate a contract then any claims for damages that the counterparty may have would have to be registered in insolvency proceedings.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

A Member may not have the legal right to terminate a charterparty prior to the commencement of insolvency proceedings. In most cases the commencement of insolvency proceedings will not be sufficient to give rise to a right to terminate charterparty contract as the right to elect whether or not contracts are maintained rests solely with the trustee in insolvency.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

A claim must be registered in writing with the trustee in insolvency, setting out the grounds of the claim as well as the quantum, which must be expressed in Euros. Claims for property must also be registered with the trustee in insolvency. Property claims do not form part of the insolvency proceedings themselves as the Trustee will be obliged, in most cases, to return the property to the claimant.

Germany (continued)

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

If contracts are validly terminated or if the further fulfilment of a contract is denied by the trustee in insolvency, a claim for damages can be registered in insolvency proceedings.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

In principle a set-off is possible provided that the set-off would have been appropriate prior to commencement of insolvency proceedings.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

If the trustee in insolvency executes its right to fulfil a contract entered into by the insolvent company, then the contract will continue, and the trustee is responsible for ensuring that the contract is fulfilled. In this, in the event that the contract is not properly performed, the estate, or potentially the trustee, may be held liable for breach or non-performance.

10

What is the position concerning a purchase option in a charterparty?

If the trustee in insolvency elects to affirm the charterparty then all the terms of the charterparty remain in force including any purchase option.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

There is no pre-determined time scale for repayment schedules.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

If the trustee in insolvency rejects the registration of a claim in insolvency proceedings, then the creditor has the right to initiate Court proceedings to have the claim registered. If the creditor is successful then the claim is deemed to have been accepted by the trustee in insolvency.

13

What happens concerning ownership of the bunkers under a time charterparty?

The commencement of insolvency proceedings does not change the position of property. If the insolvent company has possession of the property or the assets of other persons (e.g. bunkers), then title to that property remains vested with its lawful proprietor, irrespective of insolvency proceedings being commenced. However if the insolvent company has a right to maintain possession then the proprietor may claim delivery of such property, the restitution of which will be fulfilled outside of the insolvency proceedings.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

There are different ranks for claims in insolvency proceedings. For example where a debt due to a bank under a loan agreement has been secured by means of a mortgage against the ship, then the bank will have a priority right.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

Under German insolvency law, the purpose of insolvency proceedings is to see a fair distribution of any remaining funds among the creditors of an insolvent company. A German court will not allow for the arrest of the assets of an insolvent company, following the commencement of insolvency proceedings, as the arrest may give an



unjust advantage to the arresting creditor. This principle applies in most European jurisdictions where the European Insolvency Code applies.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

If a lien already exists at the time of commencement of insolvency proceedings, then such lien remains existent and can lead to a preferred position of a creditor.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

If the owner is the contractual carrier under a bill of lading, then the rights and obligations towards the shipper or consignee are those as stipulated in the bill of lading. If the bill of lading is claused "freight collect", the carrier may ask for payment of the freight prior to delivery; if the bill of lading is claused "freight prepaid", then the carrier will have to deliver the cargo against proper presentation of the bill of lading without being entitled to claim potentially outstanding freight.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

The decision whether or not to affirm a contract, to which the insolvent company is a party, rests with the trustee in insolvency regardless where that contract may sit in a chain of charterparties. If the trustee in insolvency should refuse further fulfilment, then the chain may become disconnected where the insolvent party is in the middle of a chain.

Claims brought by bunker suppliers, agents or other third parties who have provided supplies or services to the ship, may be able to establish a maritime lien and / or a direct claim against the "ship", irrespective of any

contractual relationship if such a right arises under the law governing those contracts. For example, if the time charterer of a ship, having purchased bunkers, applies for insolvency then the owner, though not being a party to the purchase contract, may be faced with claims from the bunker supplier if the supplier has the benefit of a maritime lien, or a direct claim against the "ship" under the law of the purchase contract. Under German law suppliers would not have the benefit of a maritime lien and would only be entitled to claim for the return of fuel or supplies provided that the suppliers retain title to the goods themselves.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Under German law, the suppliers of bunkers or services do not have a maritime lien against the owner of a ship or a direct claim against the "ship". They are restricted to claiming for payment or damages against their contractual counterparty. Where the suppliers counterparty are the charterers of the ship the suppliers will not have a right of action against the owners in the event that the charterers become insolvent. However, where the suppliers retain title to the goods, the suppliers may bring a claim for the return of the goods themselves.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent? Can a sub-charterer attach bunkers belonging to the disponent owner?

A shipowner, in the absence of a statutory lien, may agree with a time charterer that any bunkers supplied by the time charterer shall be pledged for the benefit of the owner to secure its claims for payment of hire. However, this pledge will only be effective if the owner can show that it has reason to believe that the charterer has title to the bunkers and that, to its knowledge, the bunker suppliers have not retained title. In a chain a sub-charterer will only have contractual claims against its contractual counterparty and can only attach property belonging to that party. Bunkers or any other property not in the direct ownership of the sub-charterer's counterparty are not subject to any rights of the sub-charterer.

In general, a Member is free to contract howsoever it pleases before the provisions on bankruptcy begin to apply.

Greece

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

Under Greek law, insolvency proceedings can take two forms: pre-bankruptcy rehabilitation and bankruptcy.

Pre-bankruptcy rehabilitation means that the company continues its operation under a plan that has been agreed with its creditors and has been approved by the Court. Any measures protecting the debtor throughout the operation of the rehabilitation procedure are generally agreed upon with the creditors and are not statutorily imposed.

Bankruptcy primarily means that the bankrupt party ceases its activities. Its assets are sealed and documented by the receiver for liquidation and payment of the creditors. The sole purpose of bankruptcy proceedings is to satisfy the creditors to the largest extent possible. Enforcement against the bankrupt party is statutorily precluded (with the exception of secured claims) and the debtor enjoys statutory protection (for example, default interest ceases accruing on payable debts). Any act of management and representation of the bankrupt party is performed by the appointed receiver.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

In general, a Member is free to contract howsoever it pleases before the provisions on bankruptcy begin to apply. However when the debtor is declared bankrupt by the court and enters liquidation the appointed receiver may rescind any promise by the debtor given during the so-called “suspicious period”. This “suspicious period” is retrospectively defined as beginning on the date which the bankruptcy court holds as the beginning of the debtors permanent default on payments and ends on the date of the judicial declaration of the bankruptcy. Acts performed within the “suspicious period” that run contrary to the interests of the creditors run the risk of being rescinded.

However, renegotiations that have taken place during the pre-bankruptcy rehabilitation procedures are protected from such rescission. Therefore, if the option of the pre-bankruptcy rehabilitation is not open, extreme caution should be exercised and legal support from local lawyers should be sought prior to any steps being taken.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

In terms of pre-bankruptcy rehabilitation, a Member should consider whether it can terminate the contract without giving rise to a claim for damages; whether the likelihood of return of the other party to solvency is foreseeable; and whether the existing contract is profitable enough. Otherwise, it does not appear that any affirmation prior to the beginning of insolvency procedures puts a Member at a disadvantage for when those procedures are initiated.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

In the pre-bankruptcy rehabilitation process, if a Member has a contractual basis for terminating the contract, such affirmation should not be accepted by the Member, as termination is probably the safest option to avoid being involved in an eventual time-consuming bankruptcy. Alternatively, a Member could attempt to suggest a restructuring of the contract in order to obtain further security or down-payments, subject always to the approval of the creditors.

If bankruptcy has been declared, the decision to affirm existing contracts is made by the receiver and the Member will have to perform its contractual obligations.

Greece (continued)

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

The answer to this question depends on the commercial circumstances of each particular case (the Member's assessment of the debtor's capability of returning to solvency; the profitability and estimated duration of the charterparty; possible liability due to an unlawful termination by the Member; and whether alternative and profitable hire is available etc.). In any case, if there is a risk of the charterer being subject to bankruptcy proceedings in Greece, it would be advisable to insert in the charterparty a clause allowing the owner to withdraw the ship in case of initiation of bankruptcy proceedings.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

Within one month from the date of the judgment declaring bankruptcy, a creditor must file notice of a claim in Greek along with documentary evidence supporting its claim. The notice must describe the claim in detail and appoint a process agent in the jurisdiction over which the Court in charge of the bankruptcy proceedings has jurisdiction. Should any disputes arise regarding the registered claims, they will be resolved by the Court in charge of the insolvency procedure.

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

This depends entirely on the law governing the claim as well as the contract itself. Assuming such a claim is allowed the Member will have to "announce" a claim in the context of the bankruptcy proceedings.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Yes, but on the condition that the requirements for the set-off had been fulfilled before the bankruptcy was declared. Whether the set-off is permissible is a matter of the law applicable to the insolvent debtor's claim.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

During the pre-bankruptcy rehabilitation proceedings the contract operates normally. After bankruptcy has been declared, if the contract is affirmed by the receiver appointed by the Court, the contract operates normally and the Member's claim regarding the affirmed contract is paid before the insolvent party's assets are distributed to the creditors.

10

What is the position concerning a purchase option in a charterparty?

During the pre-bankruptcy rehabilitation proceedings nothing changes and the option may be exercised. However, the exercise of the option may be rescinded if the charterer subsequently has declared bankruptcy and the purchase took place within the "suspicious period". After bankruptcy has been declared, however, the option will not be exercised by the receiver because it runs contrary to the purposes of the bankruptcy proceedings.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

As a matter of statutory limits, pre-bankruptcy rehabilitation can last up to 12 months and bankruptcy proceedings up to 15 years. As a matter of practice, however, it all depends on the complexity of the bankruptcy proceedings, the receiver's diligence, the number of claims and the size of the debtor's remaining assets.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

During the pre-bankruptcy rehabilitation proceedings the creditor can bring legal proceedings in the normal manner, subject to any protective provision of the rehabilitation agreement or interim court protective order. After bankruptcy has been declared, however, if the receiver rejects a claim presented, the creditor can file an appeal before the court within 10 days from the date the verification of claims is concluded.

13

What happens concerning ownership of the bunkers under a time charterparty?

Subject to the applicable law and the provisions of the charterparty, if the charterer obtains property to the bunkers, the bunkers form part of the bankruptcy estate and control over them passes to the receiver.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

Greek Insolvency Law recognises three types of claims:

(1) claims armed with a general privilege

The most important sub-categories of this category are ranked as follows:

- i. Claims related to the financing of / provision of goods and services to the debtor in order to ensure that the debtor's activities and payments will continue pursuant to a reform agreement or a restructuring plan approved by the court;
- ii. Claims for wages, fees (including expenses) for lawyers on a retainer, which arose within 2 years from the date the bankruptcy was declared, claims for compensation due to termination of contracts of employment and retainers, claims for VAT and other withheld taxes due as well as surcharges and interest thereon, claims of Social Security Funds, claims for damages due to death or incapacitation of 67% and more, as long as the same arose within a year from the date the bankruptcy was declared;

- iii. Claims by the State and local authorities including surcharges and interest thereon.

(2) claims secured by a specific chattel or real property or monetary sum

The most important sub-categories of this category are ranked as follows:

- i. Claims for expenses to maintain the security for the six months preceding the declaration of the bankruptcy;
- ii. Claims for capital and interest for the 2 last years secured by a charge or mortgage or prenotation of mortgage.

(3) unsecured claims

In the event that all three types of claims have been registered, 25% of the proceeds is applied to category (a) by order of ranking, 65% to category (b) by order of ranking and the remaining 10% is distributed amongst all unsecured creditors pro rata.

The creditor's position is therefore improved if the claim is secured. Additionally, a secured creditor is excluded from the prohibition of enforcement measures against the bankruptcy estate. This means that a secured creditor may enforce its security normally after a maximum of 10 months from the date the bankruptcy is declared. However, a secured creditor is satisfied initially only by enforcement of its security. Only in the event that such enforcement proves to be insufficient, or if the secured creditor relinquishes its security rights may such creditor exercise his rights on the entire bankruptcy estate.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

During the pre-bankruptcy rehabilitation proceedings the creditor can arrest assets normally, subject to contrary provisions of the rehabilitation agreement or court order.

After bankruptcy has been declared, the effects of the application of Greek insolvency law are recognised throughout the EU pursuant to Council Regulation 1346 / 2000 therefore the bankrupt entity would be protected from any such attempts. Whether assets can be arrested in a non-EU country is a question that should be examined under the laws of that jurisdiction.

Greece (continued)

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

Before the commencement of any insolvency proceedings a lien may be exercised normally. If a pre-bankruptcy procedure has been initiated, the right is subject to the rehabilitation agreement.

Once bankruptcy has been declared, however, it will depend on the nature of the lien exercised. If the lien operates merely as a rightful refusal to surrender the object of security, then it is not covered by the preclusion of enforcement measures as it appears to be a mere right to refuse performance under a contractual provision. The charterer's claim to sub-freight, however, forms a part of the bankruptcy estate and as such is protected by any enforcement measures pursued by individual creditors.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and receiver where the owner is the contractual carrier?

This depends on the law applicable to the carriage and the charterparty as well as the terms of the bill of lading (insofar as the latter was obtained by the receiver). As a matter of Greek law, if freight has not been pre-paid and the owner has delivered the cargo to the receiver, the receiver then becomes jointly and severally liable for the freight. The owner can therefore deliver and then claim against the receiver, bypassing the insolvency procedures. However, if the bill of lading contains a "freight prepaid" clause, the receiver is not obliged to pay, even if freight has not been paid to the owner. Alternatively, if freight has not been paid, the owner-carrier may place the cargo under sequestration (it cannot itself withhold the cargo even if a lien clause has been inserted in the bill of lading).

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

Greek law distinguishes between persons using a ship they own for their own profit (shipowner) and persons using a ship owned by a third person for their own profit (disponent owner). The latter applies in the case of a bareboat charterer or a time charterer who exercises the management of the ship (e.g. appoints the Master, crew etc.). In the latter case, debts of a disponent owner arising from the utilisation of the ship can be claimed against the particular ship. Whether this rule will apply in any particular case will be determined according to the law applicable to the charterparty. Apart from the above possibility, the owner of a ship should not be liable for debts of the ship's charterers / sub-charterers who have entered into insolvency proceedings.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

If the claim gives rise to a maritime lien, then the creditors can by-pass the bankruptcy procedure and claim directly against the owner of the ship. In any case, the owner's liability is limited to the particular ship which benefited from the creditors' services.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

Once the bankruptcy has been declared, no enforcement measures can be taken against the bankrupt estate. Whether a lien can be exercised by the owner / disponent owner will depend, in the eyes of Greek insolvency law, on the content of the lien. On the other hand, as a matter of Greek law, sub-charterers may claim against the owner / disponent owner and enforce that claim. Greece has ratified the 1952 Arrest Convention and therefore the ship could be arrested insofar as the claim is a maritime claim within the terms of the Convention.



If the claim gives rise to a maritime lien, then the creditors can by-pass the bankruptcy procedure and claim directly against the owner of the ship.

China

If the reorganisation plan is not accepted by the creditors or the Court, the reorganisation can be terminated and the company declared bankrupt.





China

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

The Chinese Enterprise Bankruptcy Law provides for the “reorganisation” of a company in a procedure analogous to rehabilitation proceedings in other jurisdictions. Proceedings are launched upon an application by the company, or a creditor to the Court for reorganisation. The Court determines whether reorganisation should be granted and when it will conclude.

Upon an order for reorganisation, the debtor or an administrator appointed by the Court will formulate a reorganisation plan for approval by creditors and the Court. Normally the reorganisation plan contains the following:

- (1) The debtor’s plan for business operations during reorganisation;
- (2) The classification of the creditors’ claims;
- (3) The plans for the adjustment and payment of the claims;
- (4) The timescale for implementing and supervising the reorganisation plan.

The Court’s acceptance of the plan brings the reorganisation proceedings to an end. Thereafter the rights and obligations between the company and the creditors are governed by the reorganisation plan.

If the reorganisation plan is not accepted by the creditors or the Court, the reorganisation can be terminated and the company declared bankrupt.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

A Member is free to approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of reorganisation proceedings. However, the agreement might subsequently be nullified by the court upon the request of the administrator if the renegotiation was concluded within 12 months of the commencement of the reorganisation proceedings and involves:

- (1) Transferring the property gratis, or at an obviously unreasonable price;
- (2) Providing a property guarantee for unsecured debts;
- (3) Paying off debts not due;
- (4) Abandoning claims.

Furthermore, any agreement for payment to individual creditors within six months prior to the commencement of reorganisation proceedings may be nullified by the Court, upon the request of the administrator, unless such payment is beneficial to the debtor’s property.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

There is no real benefit in the Member affirming any or all of the existing contracts prior to reorganisation proceedings.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

The administrator is empowered, upon notification to the parties, to rescind or maintain any existing contract. Where the administrator decides to maintain a contract, the other party is entitled to request a guarantee from the administrator. Where the administrator refuses to do so, the contract shall be deemed to be rescinded.

Should the administrator fail to notify the other party of the maintenance of the contract within two months from the Court’s acceptance of the reorganisation application or reply to a request of confirmation by the other party within 30 days from the date the request is made, the contract is deemed to be rescinded.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

This would depend on the circumstances, taking into consideration the risk of non-performance as against a claim for repudiatory damages. In the absence of

China (continued)

a clear contractual right, a party is not entitled to terminate / withdraw a ship prior to the commencement of reorganisation proceedings. However, a Member may terminate / withdraw a ship after the court has accepted the reorganisation application and the administrator fails to provide a guarantee on behalf of the company for the performance of the contract.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

Upon accepting an application for reorganisation, the Court will specify a time limit for creditors to prove their claims. This period will be between 30 days and three months from the acceptance of the application. Any claims subject to a condition or time limit must also be declared. All future obligations are deemed due when the application for reorganisation is accepted. Claims which are conditional upon a future event, or are awaiting a judgment or arbitration award, may also be declared.

All declarations are made to the administrator within the time limit specified by the court.

Claims must be proven by a written statement of the amount of the claim, specifying if the claim is secured, and providing any relevant evidence. An explanation must be provided for any joint-and-several claims.

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

If a Member terminates any contracts before reorganisation proceedings, for a reason justified by the contract, the Member can claim damages, including consequential damages, in the reorganisation proceedings; however, interest will only accrue to the date when the reorganisation application is accepted. The claim should be registered and will be dealt with by the reorganisation plan.

If a Member terminates a contract after the reorganisation proceedings start, but before the enforcement of the reorganisation plan, they are entitled to claim damages, including consequential damages, in the reorganisation proceedings.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Sums due to the insolvent counterparty under one or more contracts can be set-off against amounts due from the counterparty, unless:

- (1) The set-off arises from an assignment by a third party to a Member after the commencement of the reorganisation proceedings;
- (2) The debt is incurred when the counterparty is incapable of repaying the debt, to the actual or deemed knowledge of the Member. There is a presumption of knowledge for any agreement concluded within one year prior to the commencement of rehabilitation proceedings.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

If the administrator affirms a contract, a Member is required to honour its obligations under the contract against the right to request the administrator to provide a guarantee. Where the administrator does not provide any guarantee, the contract is deemed as rescinded.

10

What is the position concerning a purchase option in a charterparty?

If the charterparty contains a purchase option, the administrator is still entitled to terminate the charterparty, and if the administrator chooses to do that, the purchase option in the charterparty will be terminated thereupon.



11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

The timescale for a re-payment under a reorganisation plan is defined by the reorganisation plan.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

The Member is required to sue the insolvent counterparty before the court which accepted the application for reorganisation, and to ask the court to affirm the claim.

13

What happens concerning ownership of the bunkers under a time charterparty?

Usually, the bunkers are supplied by and belong to the charterer. Unless the owning charterer has itself become insolvent, the bunkers do not fall into the property of the insolvency proceedings party and can be claimed back by the owning charterer.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

Generally speaking, once the costs of the bankruptcy (including reorganisation and bankruptcy liquidation) proceedings and the debts relating to joint interests are paid, claims are ranked in the following sequence:

- (1) Wages, compensation and benefits owed to the staff and crew of the insolvent company;
- (2) Other social insurance premiums and, taxes;
- (3) Other un-secured claims.

When the insolvent assets are insufficient to satisfy the requirements for liquidation, they are distributed *pari passu*.

A secured creditor will enjoy the priority to proceeds from the security, with any remaining value distributed to lower-ranking creditors.

A maritime claim has priority over other claims in the auction proceeds of a ship. The distribution of the proceeds of a ship is not subject to the bankruptcy rules but the Special Maritime Procedure Law, which sets out the following ranking of distribution (after deduction of the sale costs and court fees):

- (1) Maritime Liens;
- (2) Possessory lien;
- (3) Ship mortgage;
- (4) Maritime claims related to the auctioned ship;
- (5) Claimant that applies for arrest and auction of sister ships.

Any residual value is then distributed according to the ranking provided in bankruptcy law.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

An approved application for reorganisation stays the enforcement of claims against the asset of the company in China only. Any action to arrest assets of the insolvent counterparty in other jurisdictions is subject to the laws of that jurisdiction.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

A Member can exercise its right to lien cargo, freight, and sub-freight prior to the reorganisation proceedings. A Member can also exercise its right to lien cargo after the commencement of rehabilitation proceedings, providing that the cargo is under Member's possession before the commencement of the reorganisation proceedings.





China (continued)

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

The owner could inform the shipper that the charterer has failed to pay amounts due under the charter and the owner has the right to lien on the freight. This notification must be sent to the shipper or administrator before final payment. The owner may also be entitled to lien on the cargo onboard if the bill of lading is not a pre-paid bill of lading and the cargo owners have not paid the freight to the charterers yet.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

In a chain of charterparties, a sub-charterer is not deemed to be the agent of the owner / disponent owner, and vice versa. Thus only the party which has entered into a contract with a third party, such as the suppliers or agent, is liable to the third party.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Only the party who enters into the contract with the supplier or agent is liable to them if the supplies / services are unpaid. Notwithstanding, the supplier of goods and services to the ship may have a maritime lien over the ship.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

In a time charterparty, in case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner may have a lien on the charterer's goods, other property onboard or earnings due from the sub-charter. Thus, if the charterer becomes insolvent, the owner / disponent owner may be able to exercise a possessory lien over the charterer's bunkers on-board. A sub-charterer is not entitled under insolvency legislation to attach bunkers belonging to the owner or disponent owner.

In a chain of charterparties, a sub-charterer is not deemed to be the agent of the owner / disponent owner, and vice versa.

Hong Kong

Unlike most other jurisdictions, Hong Kong law does not provide for rehabilitation proceedings.





Hong Kong

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

Unlike most other major jurisdictions, Hong Kong law does not provide for rehabilitation proceedings, whereby a moratorium against the collection of debts is imposed to protect a company whilst it attempts to re-structure or manage its liabilities. Strictly speaking, therefore, there are no rehabilitation proceedings in Hong Kong. There are, however, statutory provisions allowing a scheme of arrangement, whereby consenting stakeholders can present a debt reduction arrangement to the court for approval. Such schemes can be attempted before, or after, a winding up order is made. Hong Kong courts may indirectly enable negotiations of this type to be carried out by way of, for example, ordering a temporary stay of proceedings in a pending winding up petition. But, it is critical to bear in mind that there is no readily available statutory regime in support of this type of negotiations, and it remains true that any one or more creditors can always resort to their statutory rights to apply for a compulsory winding up – usually following an unsatisfied Statutory Demand for payment of a debt.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

A Member is free to renegotiate contract terms with an apparently insolvent counterparty prior to the commencement of winding up proceedings. However, the liquidator may invalidate any act which gives an “unfair preference” to a creditor over the general body of creditors. A payment to / transaction with a member may therefore be caught. The liquidator can invalidate any such transactions which occurred up to six months prior to the proceedings (or 24 months in the case of transactions with an “associate” of the company).

The powers to set aside transactions are appreciably enhanced under the new Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance (the “Amendment Ordinance”), which is to take effect on a date to be announced. Under this Ordinance the Court will have power to set aside “transactions at an undervalue” entered into by the insolvent company up

to five years before the commencement of winding up proceedings. A ‘transaction at an undervalue’ includes a gift, nil-consideration transactions and transactions where the consideration received by the company is significantly less than the value of the transaction itself.

The Amendment Ordinance has extended the claw-back window for floating charges created in favour of persons who are connected with the company from 12 months to 2 years.

Under the Amendment Ordinance, an associate will include:

- (1) A director or shadow director of the company or an associate of such a director or shadow director;
- (2) An associate of the company.

A company will be an associate of another company if:

- (1) The same person has control (i.e. controls more than 30% of the voting power at general meetings of the company or of another company having control over it or where the company’s directors are accustomed to act in accordance with that person’s instructions) over both companies, or a person has control of one company and the person’s associates, or the person together with his associates, control the other; or
- (2) A group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating a member of either group as replaced by a person who is an associate.

A company will be an associate of another person if that person has control of it or if that person and associates control it together.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

Before a winding up petition is filed, all contractual obligations are to be performed as agreed. Affirming a contract (with no variation of terms) will add little to enforceability or performance.

Hong Kong (continued)

Once a petition is issued, i.e. after the commencement of winding up proceedings, a Member has to consider its position somewhat differently.

For contracts that do not require disposition of the counterparty's assets, there would be no basis for the liquidator to question ongoing performance. In other words, the liquidator will likely consider continuation of such performance not to be against the interest of the general body of creditors. On this basis, there is no need for the Member to affirm the contract, nor would any unilateral affirming add anything to the contract.

If the contract does require the counterparty to dispose of its assets (such as a payment of hire), then it will be for the directors of the insolvent company to decide whether continual performance would be in the interest of the general body of the creditors. They will have to bear the consequence of such decision. If they are in doubt, an application for a validation order can be made. Unilateral affirmation of the contract by the Member in this situation cannot bind the court or the liquidator.

In addition to a setting aside due to an unfair preference, the Member may also be exposed to a claw-back because a disposition of assets (such as a payment of hire) after a petition is issued is presumed void unless validated by the court. To play safe, the receiving party may therefore seek a validation order from the court.

It is not uncommon for a contract to contain terms allowing it to be treated as terminated or capable of being terminated upon an order of winding up of either party. Whether termination is automatic depends on the drafting of the clause.

The various standard versions of the NYPE time charter do not contain automatic termination terms. Some BIMCO forms provide that the making of a winding up order against either party can be a valid ground for early termination of a charter – for example clause 26 of SUPPLYTIME 89. Members may choose to incorporate such terms when considering a charter.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

Assuming pre-existing contracts were entered into in the course of bona fide trading activities, continual performance by the insolvent company will not be regarded as unreasonable, even if it may be facing financial difficulties. However, the liquidator may consider it as an unfair preference if performing such a contract is prejudicial to other creditors (6 months or 24 months as the case may be). If the company is wound up, it is then up to the liquidator to decide whether a contract should be continued.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

The terms of the contract or charterparty will determine whether a Member is entitled to terminate or withdraw in the event of liquidation. There is no right, in law, allowing a Member to terminate a contract in expectation of the winding up of a counterparty. However, depending on the conduct of the counterparty, a Member may be faced with an anticipatory breach. For example, if a charterer notified the owner of its inability to pay hire and / or it intends to go into liquidation, the owner should take legal advice on whether to accept such conduct as an anticipatory breach and seek an appropriate remedy.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

A creditor may join the application for a winding up of the company, or submit full factual details of its claim to the liquidator by a written Proof of Debt.



07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

The Member can file a claim if there is a lawful debt, which is a question of fact and law. All claims (whether incurred before or after the company is wound-up) are subject to assessment by the liquidator. Claims are more likely to be recognised if the debt is quantified; admitted; or supported by a judgment.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Yes. Mutual set-off is permitted.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

Disposition of the company's assets after the commencement of a winding up is void unless the court orders otherwise. A validation order is required to validate a disposition of assets after the presentation of a winding up petition against the company. Both the directors of the company and the receiving party may apply for a validation order. However, once the company is wound up, the liquidator is empowered to manage the company's affairs in consideration of the interest of all the creditors. The liquidator, rather than the Member or the company, will decide whether the continual performance of a contract would not be prejudicial to the interest of the general body of creditors.

10

What is the position concerning a purchase option in a charterparty?

If the purchase option is exercised before a winding up order, directors of the company are advised to secure a validation order from the court when they learn about the petition. From the perspective of an owner, if an owner (being the receiving party from the sale of a ship) wants to avoid any potential subsequent challenge by the liquidator, he may also apply for a validation order. Once the winding up order is made, the liquidator will assume the power to scrutinize transactions and may challenge a disposition (such as a payment of the purchase price of the ship), if it considers it prejudices the interest of creditors, unless already sanctioned by a validation order.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

The usual purpose of winding-up proceedings is quickly to realise the assets of the company and satisfy the creditors' claims. Accordingly, a long-term repayment schedule is rare.

Hong Kong law recognises a "Scheme of Arrangement" by which all creditors agree a reduction on their claims, thereby allowing the company to continue to operate. It is, however, a cumbersome procedure requiring agreement from a majority of shareholders and creditors (75% in terms of value), and the ultimate approval of the court. Secured creditors can, and often, oppose the scheme, which is more commonly invoked for very substantial companies.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

Creditors need to file a proof of debt for assessment by the liquidator who will decide whether the claims are admitted and if so, at what level. If the creditors are not satisfied with the adjudication, they may challenge the assessment in court much like any general civil disputes.

Hong Kong (continued)

13

What happens concerning ownership of the bunkers under a time charterparty?

If the bunkers belong to an insolvent charterer, the owner will not enjoy a priority over those bunkers simply because they fall within the owner's possession. Rather, the value of the bunkers will form part of a general pool of assets available for realisation and distribution amongst creditors. If the bunkers have not yet been paid for by the charterer, the supplier is likely to have retained, and will assert, title.

The insolvency of an owner will not affect a charterer's entitlement to its own bunkers, subject to satisfactory demonstration of title.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

Broadly speaking, the order and priority of payment in winding up proceedings is as follows:

- (1) The costs and expenses of the winding up, including the liquidator's remuneration;
- (2) Debts due to employees, state bodies and any preferential creditors;
- (3) Preferential charges on goods distrained (in the context of landlord and tenant);
- (4) The general body of creditors;
- (5) Interest on debts;
- (6) Debts due from the company to its members and the shareholders.

The ranking of a secured creditor, in priority over all general creditors, depends upon the nature of the security. Often, such security is in the form of a mortgage, or special charge created in the creditor's favour. It is important that for a security to be binding and effective, it must be registered so as to give constructive notice to any third party. A lien created by contract is mostly non-registrable and usually has no status as security in the context of a winding up. Any security which amounts to an "unfair preference" may be avoided.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

There is no apparent benefit in attempting to arrest the assets of the insolvent party whether locally or overseas, as any recovery will go into the general pool for distribution.

The liquidator may seek recognition of the insolvency proceedings, and a delivery of any proceeds arising from the sale of any assets, if found in foreign jurisdictions.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

Previously, a lien on sub-freight could be registered as a floating charge. However a recent change in law means such lien simply ranks alongside general creditors. The position with a lien on cargo is less clear. It may, theoretically, be possible to create a floating charge over the charterer's property, provided under the charterparty the charterer grants such a floating charge and the same is registered within the prescribed period (generally one month) and, more importantly, the cargo belongs to the charterer.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

The bill of lading evidences a contract between an owner and the merchant, independent of their respective relationship with the charterer. An owner must honour its obligations regardless of the charterer's liquidation. An owner may seek to exercise a lien over cargo shipped under the bill of lading, subject to the law of the bill and the place where the lien is intended to be exercised. However, even if a lien is exercised over assets belonging to the charterer, the ranking of the claim vis-à-vis the general body of creditors is uncertain.



18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

If a charterer goes into liquidation, an owner and sub-charterers may be tempted to enter into an independent arrangement for performance that flows through the insolvent charterer. However such agreement will not release the parties from their obligations to the insolvent company. The liquidator and the court will determine whether to maintain the contractual duties, if perceived to be in the best interest of the creditors. The position regarding payment of sub-freight is discussed in (16) and the position with bunker suppliers in (13).

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Under Hong Kong law, an owner is not generally liable for supplies or services ordered by charterers. This, however, does not prevent suppliers from attempting recovery of the charterer's debt against the owners by arresting the ship. A supplier may bring an action in rem and allege the liability of the owner to force a settlement from the owner to avoid disruption of the ship's schedule.

Hong Kong law would assess the extent to which a port agent's (or a ship management company's) claim can be regarded as an in rem claim. Case law in recent years suggests that debts incurred by an agent or a manager for traditional in rem expenses (such as bunker, crew pay, etc.) may be recognised as an in rem claim; other expenses, such as management fees, telecom charges, etc. may not have the status of an in rem claim. It is highly advisable that good records are kept by agents / managers to reflect appropriation of funds, and that notices of such appropriations should be given to their owner-customers, so as to reduce any controversy over the in rem nature of debts over in rem expenses.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

Simply seizing a charterer's assets (such as bunkers) will not create priority over a general debt claim when a charterer goes into liquidation. Unless an owner is able to demonstrate title over the bunkers, they will be realised by the liquidator for general distribution among creditors. Conversely, if the bunkers belong to an owner, a sub-charterer will be unable to advance a claim over such bunkers for sums owed by the charterer. Sub-charterers' claims will be unsecured and compete for a dividend from the general pool of realised assets.

The ranking of a secured creditor, in priority over all general creditors, depends upon the nature of the security.



In Japan there are two types of rehabilitation proceedings, one under the Corporate Organisation Act (“COA”) and the other under the Civil Rehabilitation Act (“CRA”).



Japan

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

In Japan there are two types of rehabilitation proceedings, one under the Corporate Organisation Act (COA) and the other under the Civil Rehabilitation Act (CRA). The former is usually applicable to larger companies and the latter to smaller companies or individuals. Whilst the detailed content and implications of the two Acts differ, the key provisions are similar in the sense that both are designed to ensure the continuation of the business of the company concerned.

Proceedings under the CRA are known as “Debtor in Possession” (or DIP) and permit the management of the company that is in place at the time of the commencement of the proceedings to continue to control the company, its assets and debts under the supervision of a receiver appointed by the Court.

Under the COA, proceedings are referred to as “Non-DIP” and the receiver appointed by the Court will manage and control the company, its assets and debts under the supervision or approval of the Court.

Once rehabilitation proceedings have been commenced, the company has the protection of the Court and creditors cannot enforce their claims, arrest or attach the company’s assets or ships and the company concerned cannot repay its creditors without obtaining the approvals of the receiver or the Court.

Creditors need to register their claims with the Court and the company, or receiver, will assess those claims and submit a rehabilitation plan. This usually proposes a process for the settlement of approved claims and may include the reduction of claim amounts and provision for payment in instalments. If the rehabilitation plan is approved by the creditors and the Court, each approved claim will be repaid according to the plan. The creditors who have priority, such as mortgagees, are dealt with separately. The company will continue running its business as a going concern under the approval or supervision of the receiver / the Court during the rehabilitation period.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

A Member can freely renegotiate with the company before the commencement of rehabilitation proceedings. However, if the conclusion of a settlement agreement or any payment is made shortly before the commencement of rehabilitation proceedings, and / or the outcome of the renegotiation is deemed to prejudice the rights or claims of other rehabilitation creditors, any settlement, or revised terms, could be voided by the company, the receiver or the Court.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

A Member will generally face difficulties in finding suitable alternative employment for the ship in a poor market. If the charterer can still manage to perform the charterparty at the agreed rate or at the reduced rate as agreed (which could still be higher than the prevailing market rate), a Member might be hesitant to terminate the charterparty and might well wish to monitor the situation. If the company goes into rehabilitation proceedings then the company, or the receiver will have the option to either affirm or terminate any contracts in accordance with the relevant legislation.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

The insolvent company, or the receiver has the option to either affirm or terminate the contract. The decision whether to maintain or terminate a charterparty is at the sole discretion of those responsible for managing the insolvent company’s affairs and contracts will be affirmed where performance of that contract would benefit the rehabilitation of the company.

Japan (continued)

The counterparty can request the company, or the receiver, to declare their intention within a certain period. If the company, or the receiver, does not comply within the specified period, the charterparty will be deemed “affirmed”, and will be maintained on the same terms and conditions. An owner has no right to request that either the company or the receiver terminates a contract. Those responsible for the management of the company’s affairs are obliged to act in the best interests of the company and all the creditors.

Often those responsible for the insolvent company may propose to vary some of the terms of the charterparty, such as the hire rate and the charter period in order to keep the contract alive. However the counterparty is not obliged to agree.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

If a Member terminates the contract and files a claim for damages against a charterer which subsequently goes into rehabilitation proceedings, its claims, if accepted by the insolvent company, or the receiver, would be usually subject to an approved rehabilitation plan as the rehabilitation claims.

However, if a Member does not terminate the contract prior to the commencement of the rehabilitation proceedings and the charter is subsequently affirmed; in such a case, hire, and any other sums due under the terms of the contract would be paid in full as common benefit claims. In many cases, common benefit claims are properly performed by the company / the receiver since the company is under the supervision / control of the court.

It is important to ensure that any debt that the creditor may owe to the company is “set-off” against the creditor’s claims within the stipulated time limit.

Where those responsible for the company opt to terminate the charter, any unpaid hire accrued prior to the commencement of the proceedings and claims for damages arising out of the early termination will become the rehabilitation claims subject to an approved rehabilitation plan.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

A creditor to the company is required to register its claims with the Court within the period ordered by the Court. The deadline is usually one month from the commencement of the rehabilitation proceedings. To register a claim, the following documents are required:

- (1) Power of Attorney (PoA);
- (2) Certificate of Corporate Nationality to prove the authority of the person who executes the PoA on behalf of the creditor;
- (3) A copy of the charterparty;
- (4) A final statement of account showing the outstanding hire and other sums owing.

It is important to ensure that any debt that the creditor may owe to the company is set-off against the creditor’s claims. Any set-off needs to be made within the period set down for the registration of claims. Accordingly, where a creditor has both claims and debts against the company in rehabilitation, even if the creditor would usually have the right to set-off its debts against its claim, the creditor would lose its right to do so unless it exercises the right to the set-off within the stipulated period.

If the creditor fails to do so it could only then recover its claim from the company to the extent of the reduced amount, payable in instalments, whereas it would have to pay to the company the full amount of any debts.



07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

Where a Member is legally entitled to terminate the charterparty prior to the charterer entering into rehabilitation proceedings, it can claim for damages in accordance with the governing law of the charterparty. If the governing law in the charterparty is Japanese law, the extent and degree of any claim recoverable is more or less similar to that under English law, while issues of foreseeability and remoteness might be more stringent toward the claimants, particularly relating to loss of earnings and consequential loss / damage.

Where the insolvent company, or the receiver affirms the charterparty after the commencement of the rehabilitation proceedings, the counterparty can still terminate the charter and can claim for damages in the event that it is entitled to do so under the charterparty. Such claims will be paid in full as the common benefit claims.

On the other hand, if after commencement of the rehabilitation proceedings, the insolvent company or the receiver, opt to terminate the charter the counterparty can claim for damages subject to the governing law to the charterparty.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

A Member can set-off a debt to the insolvent company against claim against the insolvent company provided such a right exists under the charterparty. If, for example, Japanese law is applicable to the charterparty, there may be broader rights of set-off, and even claims and debts arising under different contracts may be considered.

If set-off is possible, then notice has to be given to the insolvent company, or the receiver, within the time stipulated by the Japanese Court. The time limit for the reporting of claims will usually be set out in the Court Order at the commencement of the rehabilitation proceedings. If a party fails to provide notice within the time limit, its right to set-off will be lost and any claim will be subject to the approved rehabilitation plan.

Where it benefits the other general creditors of the insolvent company the insolvent company is entitled to set-off its debts to a counterparty against any claims provided permission is obtained from the Court.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

When a contract is affirmed the insolvent company must perform its obligations under that contract, including the making of payments. Under Japanese rehabilitation law, there are two types of creditors' claims:

- (1) "rehabilitation claims" and
- (2) "common benefit claims".

Rehabilitation claims that arise prior to the commencement of rehabilitation proceedings are usually paid on a reduced basis; usually less than 10% is paid to creditors. In addition, these claims are usually paid in instalments, for example, once a year for four years.

"Common benefit claims" are those that arise after the commencement of the rehabilitation proceedings and, if accepted, will be paid in full. Generally, the common benefit claims are properly performed by the company / the receiver since the company is under the supervision / control of the Court.

For example, if the insolvent company opts to affirm a time charterparty then all hire payable under that contract would be treated as a "common benefit claim".

Japan (continued)

However; if the company elects to terminate a charterparty then only the hire for the period from the commencement of the rehabilitation proceedings up to termination will be treated as a common benefit claim.

10

What is the position concerning a purchase option in a charterparty?

If a charterparty contains a purchase option and one of the parties enters into rehabilitation proceedings then the insolvent company, or the receiver, may elect to terminate the charterparty in which case any purchase option would be lost. If the charterparty is affirmed then the charterer would still be entitled to exercise the option. If the ship has an outstanding mortgage usually the mortgagee will have the priority over any purchase option under the charterparty.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

The timescale will vary in each case. Usually the rehabilitation proceedings and plan will take a few years to finalise. In many cases, the repayment ratio will be a relatively low figure, often less than 10%.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

When the company, or the receiver, rejects a rehabilitation claim, that is not a common benefit claim or claim that otherwise has priority, the creditor may raise an objection by filing a petition for assessment by the Court.

The petition needs to be filed along with supporting arguments and evidence no later than one month from the completion of the inspection of the rehabilitation claims. If the parties are unable to reach an amicable settlement the Court will make a decision. A creditor who is dissatisfied with an order of the Court may file an appeal within one month.

13

What happens concerning ownership of the bunkers under a time charterparty?

The issue over the ownership of the bunkers remaining onboard the ship will be determined by reference to the governing law of the charterparty and the bunker supply contract. Where a charterer, who has supplied bunkers, has gone into the rehabilitation proceedings and opted to terminate the charter and the bunkers remain onboard, the owner in possession may or may not be able to off-set claims for unpaid hire and / or claim for damages for the early termination of the charter. In some cases an amicable settlement is reached allowing for a deduction from the insolvent company's payment under the approved rehabilitation plan.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

There are usually 5 types of the claims under the rehabilitation proceedings and the rehabilitation law:

- (1) Rehabilitation claims; these are based on the causes which occurred prior to the commencement of the rehabilitation proceedings, such as unpaid hire and claim for damages for the early termination which occurred prior to the commencement of the proceedings. These will usually be subject to heavy discount under the approved rehabilitation plan.



- (2) General preferential claims; these give rise to preferential liens or rights (except for common benefit claims as below). Examples include taxation claims and labour claims. These claims are paid from time to time outside the rehabilitation proceedings.
- (3) Common benefit claims; claims arising after the commencement of the rehabilitation proceedings, such as unpaid hire after the commencement of the proceedings. These are paid from time to time in full.
- (4) Post commencement of rehabilitation claims: with the exception of general priority claims, and common benefit claims, these claims are treated in a special manner.
- (5) Secured claims; these are secured over the assets of the insolvent company, and include maritime liens, mortgages, pledges and some special liens. The claimant has the right of exclusion and is entitled to exercise the mortgage, lien or other right over the assets secured. This falls outside the rehabilitation proceeding and the recovery of these claims are protected. However, the position of such claims differs under the organisation proceedings and the reorganisation law.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

The protection given to the company in Japanese rehabilitation proceedings is not automatically effective outside Japanese territory. A creditor can potentially enforce its claims by attaching assets or arresting ships outside Japan unless the Japanese rehabilitation proceedings are recognised in the country in question.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

A Member's right to lien is exercisable subject to the governing law of the charterparty. A contractual lien arising under a charterparty would remain exercisable, post commencement of rehabilitation proceeds, in the event that the contract is affirmed or not affirmed outside the rehabilitation proceedings.

The issue over the ownership of the bunkers remaining onboard the ship will be determined by reference to the governing law of the charterparty and the bunker supply contract.

Japan (continued)

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and receiver where the owner is the contractual carrier?

An owner's right under the bill of lading against the shipper and receiver is subject to the governing law and the terms and conditions of the bill of lading. If the Member is entitled to exercise a lien over sub-freight, it could do so outside the rehabilitation proceedings. An owner might be able to pursue the shipper and others for the unpaid freight irrespective of the ongoing rehabilitation proceedings involving the insolvent charterer provided they are entitled to do so under the terms of the bill of lading.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

Contractual claims relating to an insolvent charterer and sub charterer(s) and suppliers will be determined in accordance with the applicable laws and provisions governing the relevant contracts. Certain claims may be pursued outside rehabilitation proceedings.

For example, if an unpaid bunker supplier, or an unpaid local agent is entitled to arrest the ship by way of maritime lien or otherwise, there would be nothing preventing the claimant from doing so and it would be difficult for the owner to seek an indemnity from another party other than the direct charterer who may or may not be insolvent. Therefore, an owner possessing the bunkers remaining onboard the ship might be potentially exposed to claims from a sub charterer or a bunker supplier who have the title / ownership to / of the bunkers.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Such claims that an owner and ship might face from an unpaid supplier of goods / services will be determined in accordance with the terms of the contract and may be pursued outside any rehabilitation proceedings. If there is a sufficient contractual nexus to an insolvent charterer, these claims could also form part of the claims considered and settled in the rehabilitation proceedings.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

An owner, or disponent owner, can exercise a possessory lien and attach the remaining bunkers onboard, subject to the governing law. However, in practice, the owner would be seeking to consume the charterer's fuel. Therefore it is likely that this would result in the charterer's claim against the owner / disponent owner for the price of the consumed bunkers. Disputes may occur on set-off, forming part of any approved rehabilitation plan and others.



The protection given to the company in Japanese rehabilitation proceedings is not automatically effective outside Japanese territory.



South Korea

Rehabilitation proceedings in South Korea effectively mean that the company has the protection of the Court until such time as an assessment has been made of its financial position.





South Korea

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

Rehabilitation proceedings in South Korea effectively mean that the company has the protection of the court until such time as an assessment has been made of its financial position. This assessment is undertaken by a receiver who is appointed on the court's behalf. Effectively the receiver reviews the financial position of the company concerned and forms a view as to whether it is a going concern and the extent to which contractual commitments can be maintained.

This process does of course take some time. Until the receiver has reached a decision the company's contractual partners are obliged to maintain the contracts, failing which they will themselves be in breach of contract, and the receiver could be entitled to claim damages against them.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

A Member is free to renegotiate or open a dialogue with the company prior to the rehabilitation proceedings, however the execution of renegotiated terms must be done with the approval of the court, otherwise there is a risk that it may be nullified at a later date by the receiver or other creditors.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

The benefit that a Member may have in affirming any existing contracts is that the existing contracts can still be performed by the company should the receiver affirm the contract. If affirmed, the company will fully pay both accrued and future debts.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

Once the receiver elects to affirm a contract (after assessing the profitability of the agreement), all obligations of the company will be performed in full, including the payment in full of any outstanding amounts due in the existing contracts.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

A Member needs to consider various elements before deciding on termination / withdrawal of a ship. Even if contractually entitled to withdraw, it may be worth waiting to see if the receiver terminates or sustains the agreement. Hire will continue to accrue until the receiver makes a decision. Hire accruing after the rehabilitation commencement is treated as a "common benefit" claim, that is, a claim which is deemed to benefit the company (and creditors) and enjoys priority of payment over other creditors' claims, including secured creditors. A Member is also entitled to secure its claim against the company's property or recover unpaid hire from third parties by exercising any available lien over the cargo and / or intercepting the sub-hire / freight, even though a rehabilitation commencement order ordinarily stays any action against the assets of a company.

Once the contract is affirmed, the company is required to perform the contract as normal. However, it should be noted that hire due before the rehabilitation commencement order is not treated as a common benefit claim, but as an unsecured rehabilitation claim and is subject to apportionment and distribution as part of the rehabilitation proceedings.

South Korea (continued)

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

A claim must be submitted to the receiver for acceptance in a "Claims List". A Member whose claim is not included or not fully accepted in the Claims List can submit details of the claim to the court (within a defined deadline). To register a claim the following authorised and notarised documents are necessary:

- (1) A copy of the charterparty;
- (2) A final statement of account showing the outstanding hire or any other documents which can substantiate the Member's claims (including, as the case maybe, an English lawyer's opinion on a right to claim for damages etc.);
- (3) A Power of Attorney (POA);
- (4) A Certificate of Corporate Nationality (CCN).

The POA and the CCN must be signed by the representative director, the president, or the managing director of the claimant Member and must also be notarised before a notary public and legalised at a South Korean consulate (or apostilled instead of legalised at a South Korean consulate).

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

It is possible to claim damages in the rehabilitation proceedings, if a charterparty is terminated. Such claim must be registered before the deadline set by the court or within one month from the crystallisation of the claim.

Where a charterparty has been formally terminated by the receiver a Member can lodge a claim for damages for the balance of the charter period.

A Member can also register any potential claim which will likely arise in the future on a conditional basis; such as an arbitration award as an anticipatory claim.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

A statutory right of set-off is enforceable by either party, subject to the following conditions:

- (1) **Mutuality** – the claim and the obligation must be mutual obligations of the parties;
- (2) **Commensurability** – the claim and the obligation must be commensurable (i.e. they must be of the same type). For example, so long as the claim and the obligation are both payment obligations, the commensurability requirement can be satisfied unless otherwise agreed;
- (3) **Maturity** – the claim and the obligation must be due and payable at the time of the set-off. The claim or the obligation will be treated as due and payable whether they arise as a result of maturity in accordance with its terms or as a result of acceleration or payment.

Importantly, a creditor's right of set-off is permanently stayed after the expiry of the claim filing period.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

If the receiver affirms a charterparty, accrued hire after the rehabilitation commencement order, up to the receiver's affirmation is payable at 100%, as is all future hire. This principle was recently affirmed by the South Korean courts.

However, if the receiver terminates a charterparty, accrued hire after the rehabilitation commencement order up to the termination is payable at 100% as a common benefit claim. Further, such claims can be enforced despite of, and outside of, the rehabilitation proceedings. Any lost future hire, and other damages claims, will rank as unsecured claims and will be apportioned amongst the general body of creditors in accordance with a rehabilitation plan.



10

What is the position concerning a purchase option in a charterparty?

If a charterparty contains a purchase option, the exercise of the option, by either party, is stayed pending an affirmation by the receiver. If the charterparty is terminated, the purchase option will be lost.

11

What is the timescale for a repayment schedule under an insolvency / rehabilitation restructuring plan?

Under normal circumstances, the repayment schedule in a rehabilitation plan allows a grace period of 2-3 years with instalment payments to be made over the following 5-7 years. The maximum payment schedule is 10 years.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

The receiver's rejection can be disputed by applying to the rehabilitation court for a decision confirming the registered claim within one month from the notification of the rejection. This is done by summary proceedings, which do not involve a full trial, although the court generally holds two or three hearings in which written evidence can be required. Summary proceedings generally last for about two to three months but can extend to five or six months depending on the complexity of a case. The courts generally encourage the parties to settle amicably, rather than proceeding to a judgement.

If the rehabilitation court denies the claim, a Member may object to the decision. Such objection is considered by the court with a judgement delay of about eight to ten months.

13

What happens concerning ownership of the bunkers under a time charterparty?

Usually bunkers onboard are supplied by the time charterer. Provided that the time charterer owes outstanding hire and / or any amount to a Member, a Member can exercise a lien over and attach the bunkers outside South Korea in jurisdictions where such a lien / attachment is permissible.

In South Korea, before the court orders rehabilitation proceedings, a comprehensive stay and preservation orders is issued. Thus, a Member is unable to take any direct "hostile" action against the time charterer's assets.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

In the rehabilitation proceedings, the claims are categorised and ranked in the following order:

- (1) Common Benefit Claims
- (2) Secured Rehabilitation Claims
- (3) Unsecured Rehabilitation Claims

The secured rehabilitation claim holders rank prior to the unsecured rehabilitation claim holders. Secured rehabilitation claims are claims which arose prior to the rehabilitation proceedings which are by means of a pledge, mortgage or lien etc.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

A rehabilitation order from the South Korean court does not have extraterritorial effect. Therefore, in principle, the claimants can take steps to arrest assets of the company in rehabilitation in other jurisdictions, unless the foreign jurisdictions recognise the South Korean rehabilitation proceedings, such as under the UNCITRAL Model Law on Cross-Border Insolvency. Once a foreign jurisdiction issues a recognition order, any hostile actions will be prevented, including the arrest of assets owned by the company in rehabilitation.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

A Member's rights of lien over the cargo, freight and sub-freight can be exercised, prior to or after the commencement of rehabilitation proceedings, subject to the law of the contract and the local laws where such

South Korea (continued)

rights are sought. Therefore, a Member's rights of lien over cargo, freight and sub-freight are not automatically extinguished upon the commencement of rehabilitation procedures in South Korea.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and receiver where the owner is the contractual carrier?

A Member is entitled to exercise all available remedies. A Member may exercise a lien over the cargo and / or over the sub-freight are against the receiver and the shipper. Subject to local laws and the terms and the governing law of the contract such rights can be exercised before or after the commencement of the rehabilitation proceedings.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

The owner / disponent owner may be able to assert its contractual rights for hire from the defaulting charterer directly against a sub-charterer. The court will recognise the owner's / disponent owner's direct action, based on the right of lien against the sub-charterer in the chain of the charterparties, subject to the contractual provisions and the governing law of the contract. If a sub-charterer pays the owner's / disponent owner's claim for hire, the sub-charterer's direct payment can be set-off against

the receiver's own claim against the sub-charterer, subject to the contractual provisions and the governing law of the contract.

However, a bunker supplier and / or third parties can only rely on their contracts with the company in rehabilitation and cannot claim in contract from owners and sub-charterers, for amounts due from a charterer in rehabilitation.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

An owner / disponent owner is not directly responsible to the bunker suppliers for any unpaid price of goods, bunkers or services supplied on to the ship by the company in rehabilitation. However, where the price of bunkers is outstanding, the bunker supplier may enjoy a maritime lien directly against the ship itself.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

When a charterer enters rehabilitation, its assets are protected against any direct action by the owner, the disponent owner and any sub-charterer.



An owner / disponent owner is not directly responsible to the bunker suppliers for any unpaid price of goods, bunkers or services supplied on to the ship by the company in rehabilitation.





There is no specific restriction on a party to renegotiate some or all of the contracts with the insolvent counterparty prior to the commencement of insolvency / rehabilitation proceedings.

Singapore

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

Rehabilitation proceedings in Singapore can mean either one of the following: (i) a scheme of arrangement, where the company seeks to vary the rights of its contractors or creditors; or (ii) judicial management, where the company is placed under the control of a judicial manager, to achieve the survival of the company or its business (and which may involve a scheme of arrangement) or a more advantageous realisation of the company's assets.

In both instances, the company is given a temporary respite from creditors, and an opportunity to rehabilitate and / or preserve the company's business as a going concern. Both types of proceedings require an order / orders from the Singapore Court to put them into effect.

Liquidation on the other hand is a process by which a company is wound up and eventually dissolved. It may take the form of voluntary liquidation (usually commenced by the company itself) or compulsory liquidation (usually commenced by a creditor).

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

There is no specific restriction on a party to renegotiate some or all of the contracts with the insolvent counterparty prior to the commencement of insolvency / rehabilitation proceedings. Care must be taken however to ensure that the renegotiated contracts are not seen to have the effect of preferential payments, which may be at risk of being subsequently clawed back from the Member by the liquidator or judicial manager.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

This very much depends on the state of affairs at the particular point in time, and the financial position of the counterparty.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

In such an instance, both parties are obliged to perform their respective obligations under the affirmed contracts, which in the case of the insolvent party includes timely payment of hire. The Member would still be entitled to claim any sums accrued and outstanding under the contracts.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

This will depend on whether it is commercially viable to continue with the contract in question, whether the counterparty is clearly in breach of its obligations to pay hire and whether or not there is a right to withdraw the ship.

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

The creditor is required to lodge a proof of debt, with the liquidator in the case of liquidation, the scheme manager in the case of a scheme of arrangement or with the judicial manager in the case of judicial management.

The supporting documents required for the proof of debt are, for example, those evidencing the debt / claim, how it was incurred and the outstanding amounts. For liquidation and judicial management, there are prescribed forms under the applicable legislation.

Singapore (continued)

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

It is assumed here that the Member brings any or all of the contracts to an end by treating the counterparty as being in repudiatory breach of the contracts and accepts the repudiation. The damages that may be claimed could include any consequential damages that are not too remote and assuming there are no contractual provisions excluding liability for consequential damages.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

In principle, a contractual right of set-off is not affected by a company going into liquidation, a judicial management order or sanctioned scheme of arrangement, and a party may be entitled to exercise a right of set-off against the insolvent counterparty. However, this may be subject to whether the sum(s) set-off amount to a preferential payment by the insolvent company, and therefore potentially subject to a clawback claim by the liquidator or judicial manager.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

If a contract is affirmed by the insolvent counterparty, performance of the obligations under the contract would continue, subject to any arrangements which the scheme manager or judicial manager may propose.

10

What is the position concerning a purchase option in a charterparty?

Assuming that the charterparty is not terminated, the purchase option will still be effective.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

This would depend on the terms of the proposals made by the scheme manager or judicial manager, as the case may be. There is no fixed or prescribed timescale.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

If a creditor is dissatisfied with the decision of the liquidator or judicial manager in respect of a claim (whether in whole or in part) submitted in a proof of debt, the court may, on the application of the creditor, reverse or vary the decision. Notice of such an application is to be given before the expiration of 21 days from the date of the service of the notice of rejection.

Insofar as a scheme of arrangement is concerned, any appeal against the rejection of a claim will be in accordance with the terms and / or procedures set out by the scheme itself.

13

What happens concerning ownership of the bunkers under a time charterparty?

Ownership of bunkers is not affected by the insolvency of either owner or time charterer. The bunkers would still belong to the party who has title to them.

Ownership of bunkers is not affected by the insolvency of either owner or time charterer.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

The general position is that unsecured creditors will rank equally. A creditor's position would be improved if it is secured in some way.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

Insolvency / rehabilitation proceedings in Singapore do not have extraterritorial effect. It therefore remains open for a party to take steps to arrest / enforce against assets of the insolvent counterparty in other jurisdictions, subject to the liquidator, scheme manager or judicial manager successfully applying for recognition of the Singapore proceedings in the foreign courts. Care must be taken to ensure that the claimant has no presence in Singapore, which may make it subject to legislative provisions / orders of the Singapore court prohibiting proceedings against the insolvent counterparty or its assets.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

A Member can exercise its right to lien against cargo, freight and sub-freight prior to the insolvent party applying to court for a meeting of creditors or for a judicial management order.

Where an insolvent company is under judicial management, once proceedings have been commenced by the insolvent company, the exercise of such a lien by a Member may be considered enforcement of security over property, which could potentially be caught under the statutory moratorium that applies once judicial management proceedings are commenced and which continues to apply until a judicial management order is granted.

The Singapore Companies Act contains a wide definition of "property" of the insolvent company which would fall within the ambit of the judicial management. This includes "money, goods, things in action and every description of property, whether real or personal, and whether in Singapore or elsewhere, and also obligations and every description of interest whether present or future or vested or contingent arising out of, or incidental to, property."

Any exercise (or continued exercise) of a lien may have to be done with the consent of the judicial manager or with leave of the court.

For a scheme of arrangement: the insolvent company, in its application to the court for a moratorium on proceedings, may apply for an order that any enforcement of security be stayed pending the approval of the scheme. Whether the order is granted is fact specific and ultimately at the court's discretion.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

Assuming that the bill of lading is an owner's bill, the owner would be entitled to direct the shipper or holder of the bill of lading to pay any unpaid freight direct to the owner. In addition, it may be possible for the owner to exercise a lien on the cargo depending on the terms of the bill of lading.

Singapore (continued)

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

In general, the doctrine of privity of contract applies and therefore an owner or disponent owner would not have any contractual obligations to sub-charterers or other third parties like bunker suppliers or agents with whom the owners have no contract.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Assuming that the contracts for supplies and / or services are not between the owner / disponent owner and the suppliers and / or agents, then the owner / disponent owner would not, under Singapore law, be liable under those contracts. The supply of bunkers and / or provision of agency services does not attract a maritime lien under Singapore law.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

An owner / disponent owner cannot exercise a possessory lien over bunkers in the event of the charterer's insolvency, as such a possessory lien does not arise and is not recognised under Singapore law. There is also no concept of an attachment under Singapore law.

Whilst it may be possible, depending on the facts, to obtain a freezing (or Mareva) injunction against charterer's bunkers, there are legal and practical difficulties with enforcing such an injunction. It may interfere with the shipowner's rights, and further, such an injunction would not in any event afford any priority to the claimant for its claim against the insolvent company.

For the same reason a sub-charterer would not be able to attach bunkers belonging to its disponent owner. If the disponent owner is insolvent and it can be shown that the bunkers belong to them, it is in principle possible for a sub-charterer to obtain a Mareva injunction against the bunkers but again, subject to the difficulties highlighted above.

The supply of bunkers and / or provision of agency services does not attract a maritime lien under Singapore law.

Any exercise (or continued exercise) of a lien may have to be done with the consent of the judicial manager or with leave of the court.

UAE law does not provide for rehabilitation proceedings as you would typically encounter in many other jurisdictions.



United Arab Emirates

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

UAE law does not provide for rehabilitation proceedings as you would typically encounter in many other jurisdictions. Instead, UAE Law provides for what is referred to as Preventative Composition.

Preventative Composition is a process pursuant to which a UAE company can apply to the UAE courts for an arrangement with creditors when its financial state has become disrupted to an extent it may lead to a suspension of payment, or within 20 days of suspending payment (and provided the company is not undergoing liquidation proceedings).

The application is made to the Bankruptcy Court and must contain proposals for a payment arrangement and sureties to secure performance. The proposed settlement must be for not less than 50% of the debt and the proposed repayment timeframe must not exceed three years. The Public Prosecutor may be part of this request and notice should be placed on the commercial record of the trader.

The Commercial Law provides that the application for composition does not automatically accelerate payment terms and convert undue debts into due debts. While not entirely clear, this provision could be used to reduce, or argue for the reduction of, the total debt on which the 50% threshold is calculated.

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

Yes, but Members should be aware of the fact that any such negotiations leading to new arrangements / contracts may be subject to “claw-back”. Indeed,

the UAE Commercial Law provides for a claw-back of certain payments made or security provided between the date of suspension of payments and the adjudication of bankruptcy (such period not to exceed two years – “the Claw Back Period”) as follows:

- (1) Donations;
- (2) Amounts paid to settle a debt before the maturity of its term;
- (3) Settlement of a debt in a manner otherwise than as agreed (i.e. by payment in kind);
- (4) Provision of a mortgage or other security over the debtors property to secure a prior debt.

together with any other disposal by the bankrupt party during the Claw Back Period which harms its general body of creditors where the person taking the asset knew that the debtor had suspended payment to its creditor(s). While the law is not clear on this point, in theory the liquidator may seek to disclaim any other contracts entered into by the debtor during the Claw Back Period which harm its general body of creditors.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

If affirming / maintaining any or all of the existing contracts essentially means confirming the existing relationship and continuing to conduct business as usual, this is unlikely to have any impact from a legal perspective. A case-by-case review however should be undertaken to determine any potential / specific benefit such an affirmation may have.

However, a Member should be wary that under UAE law there may potentially be some “claw back” if, in the court’s discretion, it prejudices the general interests of other creditors.

United Arab Emirates (continued)

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

If affirming / maintaining any or all of the existing contracts prior to the Preventative Composition in practice means entering into a new arrangement or taking new security, the Member should be aware of the claw back provisions mentioned above. Whether or not a new arrangement would potentially trigger the claw-back provisions is ultimately subject to the court's sole discretion. However, we recommend that a careful assessment of whether or not a new arrangement would potentially trigger the claw back provisions is conducted by a competent UAE legal counsel on the case-by-case basis.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

If a Member decides to terminate / withdraw the ship prior to the application for Preventative Composition, any such termination should be in line with the provisions of the contract that govern the relationship between the parties so as to avoid any adverse legal implications (such as the payment of damages by the Member).

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

If the Court agrees to hear the application for Preventative Composition it will appoint a judge and trustee for the arrangement. Creditors will be invited to meet with the trustee and all execution procedures against the debtor will be suspended. Creditors will have 10 days (30 days if outside the UAE) to make a claim for their debts. The trustee will deposit a list of debts with the court within 30 days of the receipt of the claims and will publish the list of debts within a further 3 days. Creditors and the debtor then have 10 days (30 days if outside the UAE) to object to the list of debts. The judge will finalise the list of debts within a further 30 days.

The judge will then fix a date for the meeting of the creditors to discuss the debtor's proposed arrangement. The debtor may propose to amend the proposed arrangement during the discussions. Pursuant to the Commercial Law, the arrangement will be binding on all unsecured creditors if creditors comprising the majority of those who vote at the meeting (and two thirds of the debt represented by the creditors voting at the meeting) approve the proposal. If no agreement is reached at the meeting, the deliberations may be extended by a further 10 days. Following the vote, any interested person may comment on the arrangement within a period of 5 days and the judge will either cancel or ratify the arrangement within a further 3 day period. The arrangement, if ratified, will bind all creditors whether or not they voted for it.

If the court agrees to hear the application for Preventative Composition it will appoint a judge and trustee for the arrangement.



07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

UAE Law is unclear on whether such a claim can be brought as part of the Preventative Composition proceedings, but it would be possible to claim damages in an independent claim.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Under UAE Law contractual set-off is permitted prior to the relevant party becoming insolvent. However following insolvency, set-off is not permitted unless there is a link between the insolvent party's rights and obligations.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

It would be the creditors' task to ratify and evidence any existing contract.

10

What is the position concerning a purchase option in a charterparty?

During Preventative Composition, such an option would, in theory, remain valid. However, the insolvent counterparty would be subject to the supervision of a trustee appointed by the court and would remain subject to any court decision. If on the other hand bankruptcy proceedings are initiated such an option is likely to become ineffective.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

The proposed settlement must be for not less than 50% of the debt and the proposed repayment timeframe must not exceed three years.

12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

All claims must be submitted to the trustee / court by the creditors (as opposed to the insolvent counterparty). It is up to the court to decide on the validity of such claims based on the documents and evidence presented by the creditors.

13

What happens concerning ownership of the bunkers under a time charterparty?

During Preventative Composition, such a time charterparty would, in theory, remain valid although there has been no guidance from the courts on this. However, the insolvent counterparty would be subject to the supervision of a trustee appointed by the Court and would remain subject to any court decision. If on the other hand bankruptcy proceedings are initiated such an option is likely to become ineffective.

United Arab Emirates (continued)

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

Following the formal insolvency of a debtor, each unsecured creditor would be treated equally and be entitled to and paid a pro rata amount of the debt due to it. Secured creditors however would also be entitled to the proceeds of sale of their securities in public auction.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

Yes for jurisdictions outside the UAE.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

The concept of lien does not exist under UAE Law. An attachment or an arrest order is possible through an ex-parte application submitted to the competent court.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

The owner would have the right to arrest the cargo against unpaid hire. In addition, the owner would have the right to request the court to auction the cargo against unpaid hire.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

The owner and ship will always be held responsible to suppliers and agents. Any claim against the ship will need to be settled by the owner first and it can then claim against the disponent owner / sub-charterer.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

Any claim brought against the ship will have to be settled by the owner in the first instance and then, recourse sought against the disponent owner / sub-charterer accordingly.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent. Can a sub-charterer attach bunkers belonging to the disponent owner?

The right of lien does not exist under UAE Law. Any of the aforesaid parties can apply to the court to attach bunkers. However, the applicant must prove to the court that the bunkers actually belong to the disponent owner.



Under UAE Law contractual set-off is permitted prior to the relevant party becoming insolvent. However following insolvency, set-off is not permitted unless there is a link between the insolvent party's rights and obligations.

United States

In the US, proceedings begin with a Petition for Reorganisation being filed under Chapter 11 of the US Bankruptcy Code in a US Bankruptcy Court.





United States

01

What does it mean when a company has entered into insolvency / rehabilitation proceedings?

In the US, proceedings begin with a Petition for Reorganisation being filed under Chapter 11 of the US Bankruptcy Code in a US Bankruptcy court. Reorganisation Petitions are permitted for any entity or person which transacts some business in the US, and / or has property / assets in the US. A strong connection to the US is not required. Events in such Reorganisation proceedings are divided between pre-petition and post-petition. After the Reorganisation Petition is filed (i.e. post-petition), there is the automatic-stay. This is an injunction which protects the Reorganising entity, and its property / assets (located anywhere in the world), from collection efforts. The business of the Reorganising Entity (known as the “Debtor”) is intended to continue under the supervision of the US Bankruptcy Court with the advice of professionals experienced in Reorganisation, along with oversight by a committee of creditors. Court approval will be required for most decisions. During the “breathing space” created by the automatic-stay, the Debtor is to develop a Reorganisation Plan which will produce a viable business, and / or sale of the business (complete or partial). This Plan will require creditor approval by voting. The US Bankruptcy Code also has a Chapter 15 which is designed to provide debtors and creditors involved in foreign insolvency proceedings with the protection and assistance of the US federal courts (largely consistent with the UNCITRAL Model Law on Cross-Border Insolvency).

02

Can a Member approach the insolvent counterparty to renegotiate some or all of the contracts before the commencement of insolvency / rehabilitation proceedings?

Yes. However, during Reorganisation, ongoing contracts, which in bankruptcy practice are called “executory” contracts, will become open to rejection, renegotiation, or assignment by the Debtor. Therefore, the pre-petition changes may not have a lasting effect. In addition, changes which occur shortly before the Reorganisation proceedings – which have the effect of improving the creditor’s position – can be attacked as “preferences”. The standard preference period begins 90 days pre-petition.

03

Is there any benefit in a Member affirming (i.e. maintaining) any or all of the existing contracts prior to insolvency / rehabilitation proceedings?

No. Because ongoing “executory” contracts can be “reopened” and / or rejected in the course of the Reorganisation, there is not much benefit to pre-petition affirmation of such contracts.

04

What happens if the insolvent party is interested in affirming (i.e. maintaining) any or all existing contracts?

Pre-Petition discussions with a financially-challenged entity can be valuable. However, in circumstances where a Reorganisation Petition seems unavoidable, pre-petition contract affirmations are not very helpful. Pre-Petition affirmations will be no more binding than any other ongoing “executory” contract. Therefore, the pre-petition affirmation will not effectively enhance a creditor’s rights in the Reorganisation. Post-Petition affirmations, which will require court approval, are binding and can be valuable.

05

Should a Member seek to terminate / withdraw a ship prior to commencement of insolvency / rehabilitation proceedings?

Depending on the circumstances, there can be benefits to a pre-petition termination / withdrawal. The possibility for a complete and “clean” redelivery would be an important factor to consider. Post-petition unilateral termination / withdrawal is not possible; the automatic-stay will apply and court approval would be necessary. It should also be recognized that contract terms calling for automatic terminations / defaults upon a bankruptcy filing are rendered unenforceable by US bankruptcy law. These so-called ipso facto clauses are considered void (rather like many unenforceable bill of lading terms).

United States (continued)

06

What is the procedure to register a claim against a company in the insolvency / rehabilitation proceedings?

The procedure to register a claim is relatively simple. There is a standard form which is accessible via <http://www.uscourts.gov/forms/bankruptcy-forms>. The completed and signed form (with a copy for confirmation) can be mailed / couriered to the bankruptcy court where the Reorganisation proceedings were filed. The claim process is intended to be a “notice” procedure. However, copies of the governing contracts are required. It is also good practice to provide a short explanation of the basis for the claim, a listing, and calculation of claim items, as well as basic supporting documents / invoices. A notification of the “Bar Date” and protocols for registry of claims should be sent by the debtor to every (known) creditor. Registering a claim is considered to be a binding submission to the jurisdiction of the US bankruptcy court for all claim-related matters.

07

If a Member terminates any or all of the contracts, is it possible to claim damages including consequential damages in the insolvency / rehabilitation proceedings?

Yes, such damages can be claimed. However, in US Reorganisation proceedings, the law governing contractual damages recovery is subject to standard choice-of-law principles. This means that the law selected in a contractual choice-of-law clause will presumptively apply to claim recovery questions and issues. US Maritime Law, if it were applicable (or if foreign law has not been presented / argued), does not operate to block a claim for damages, including consequential damages, in (valid) contract terminations. However, in some termination situations, proof of causation, and mitigation issues, may make such a claim difficult.

08

Can sums due to the insolvent counterparty under one or more contract be set-off against amounts due from the counterparty?

Set-off in relation to claim-related matters in US Reorganisations can be a difficult topic. Pre-Petition

set-off is freely permitted and, unlike other transfers, is not subject to a preference challenge. Post-Petition set-off is barred by the automatic-stay, but court permission can be obtained. In addition, for contractual matters involving the “same transaction,” US bankruptcy law permits a defensive set-off, which is known as recoupment. This recoupment doctrine is a limited remedy and can operate as a defence to claims by the debtor; it is not available to create affirmative claims.

09

If the insolvent counterparty affirms a contract, what happens to it in terms of the insolvency / rehabilitation proceedings?

A pre-petition affirmation has little, if any, value. A post-petition contractual affirmation requires court approval and would be binding. During a Reorganisation, when such affirmations of ongoing “executory” contracts are presented for court approval, the counter-party has the right to seek to negotiate suitable protective terms to assure past-defaults are cured and future performance will be reliable.

10

What is the position concerning a purchase option in a charterparty?

A purchase option falls within the “executory” contract rules and will be subject to court review under a rejection / affirmation evaluation. Notably, “executory” contracts that are valuable to the Reorganising Debtor are assignable (with court approval). Therefore, the creditor-party can be expected to be concerned with the court approval process, and may need to object to the court about unsuitable terms or unsuitable counterparties that are proposed by the debtor.

11

What is the timescale for a re-payment schedule under an insolvency / rehabilitation restructuring plan?

There is no fixed repayment timetable. The schedule in each case will be set by the Reorganisation Plan, which must be approved by the voting creditors. This means the payout period can be highly varied (perhaps from 1 to 10 years).



12

What happens if the insolvent counterparty rejects the claim in the insolvency / rehabilitation proceedings?

A registered claim in a Reorganisation case can be disputed by the debtor (and other parties interested in the outcome). Like most disputes, these are usually settled (with court approval). The bankruptcy court can be asked to decide the dispute in an evidentiary hearing and / or trial process (much like other litigation in the US federal courts). For many factual and / or legal issues, the forum-selection or arbitration clause may present a viable alternative forum. Such forum-selection and arbitration clauses remain effective in a Reorganisation, though they may be overridden by the court to prevent disruption to the bankruptcy processes.

13

What happens concerning ownership of the bunkers under a time charterparty?

A Reorganisation proceeding will not automatically alter ownership rights in bunkers under a time charter. However, assuming the Debtor has rights in relation to bunkers onboard a ship, the automatic-stay will bar interference with those rights. US bankruptcy law – utilising in rem principles – considers that it applies to such rights anywhere in the world. Nevertheless, the US bankruptcy court will be willing to consider choice-of-law arguments about those rights. In this regard, it is notable that, under US law, title retention clauses are not enforceable. Instead, they are treated as security devices. It is also worthwhile to remember that US maritime law permits in rem maritime liens for necessities, including the supply of bunkers.

14

How do claims rank in insolvency / rehabilitation proceedings? Is a creditor's position improved if it has some form of security?

In all US bankruptcy cases, including Chapter 11 Reorganisation, secured claims and most liens (including maritime liens) are respected and get priority. Certain wage claims and related “social” claims are also given protection. An “administrative” priority is granted to sums owing for services performed after

the commencement of Reorganisation proceedings (so-called post-petition services). In US bankruptcy law, equal treatment of similarly situated creditors is an important policy consideration. So, all unsecured creditors must be treated the same. For this and other related reasons, security obtained by means of an attachment – which does not include a legal lien priority – may not have its usual benefits. Security obtained by attachment may also be challenged as a preference (when obtained in the preference period). The approved Reorganisation Plan may, however, also address claim priority. The pre-existing shareholders or equity interest of a debtor will have the lowest rank.

15

Can steps be taken to arrest assets of the insolvent counterparty in insolvency / rehabilitation proceedings in other jurisdictions?

US Bankruptcy law, and the automatic-stay, are considered to apply to the Debtor's property and rights wherever they are located, i.e. worldwide. This means that, post-petition unilateral steps to arrest a Debtor's assets are forbidden. Further US Reorganisation doctrines are highly critical of a creditor's individual efforts to get paid ahead of the other creditors. The Reorganisation efforts are not intended to favour one party (including the Debtor). Rather, they are intended to ensure that all similar creditors get treated equally. Therefore, rigorous efforts are usually undertaken to punish creditors that deliberately and unrepentantly ignore the automatic-stay and the Reorganisation efforts. Obviously, the extent of US connections and business will be a factor in the potential enforceability of such US court orders.

16

Can a Member exercise its right to lien cargo, freight, and sub-freight prior to or post commencement of insolvency / rehabilitation proceedings?

After a Reorganisation Petition has been filed in a US Bankruptcy court, steps to enforce lien rights against cargo, freight, and sub-freights (which belong to some extent, to the Debtor), are barred. However, a Member may, with the permission of the Debtor (and the court), negotiate an agreement to nominally “perfect” its lien

United States (continued)

rights so as to protect its lien priority. Thus, while a Member cannot get immediate payment, it can put itself in a position that may preserve its lien priority.

17

When a charterer is insolvent, what are an owner's rights under the bill of lading against the shipper and administrator where the owner is the contractual carrier?

A Reorganisation proceeding does not directly alter an owner's rights against entities / persons that are not Reorganisation debtors. However, an owner needs to ensure that its exercise of its rights under a bill of lading against non-debtor shippers or receivers does not interfere with the Debtor's rights and obligations.

18

In a chain of charterparties, what is the position of an owner / disponent owner vis-à-vis the sub-charterers and other parties, such as bunker suppliers and agents?

As noted above, Reorganisation proceedings do not directly alter an owner's rights (and obligations / liabilities) in relation to entities / persons that are not Reorganisation debtors. The owner may freely negotiate and resolve its disputes with such entities / persons so long as the result does not interfere with the Debtor's rights and obligations. As previously explained, under US law, title retention clauses are not enforceable. Instead, they are treated as security devices. Please also consider that US maritime law, to the extent that it applies under choice-of-law principles, permits in rem maritime liens for necessities, including the supply of bunkers.

19

What is the position of an owner / disponent owner vis-à-vis other third parties, such as bunker suppliers and agents who have not been paid for supplies / services to the ship?

As noted above, because Reorganisation proceedings do not directly alter an owner's rights or obligations / liabilities in relation to entities / persons that are not Reorganisation Debtors, the owner should try to resolve its disputes with such persons on the best possible terms (so long as these do not interfere with the Debtor's rights). The owner may also get some protection from the Debtor because, assuming the Debtor has rights in relation to bunkers onboard a ship, the automatic-stay will bar interference with those rights in the bunkers (and / or a ship chartered to the Debtor) by unpaid suppliers.

20

What of a charterer's bunkers on-board? Can an owner / disponent owner exercise a possessory lien or attach in the event its charterer becomes insolvent? Can a sub-charterer attach bunkers belonging to the disponent owner?

After a Reorganisation Petition has been filed in a US bankruptcy court, steps to enforce lien rights against bunkers (which belong to some extent, to the Debtor), are barred. The automatic-stay would bar both possessory liens by an owner / disponent owner, and attachment or seizure efforts by a sub-charterer.



In all US bankruptcy cases, including Chapter 11 Reorganisation, secured claims and most liens (including maritime liens) are respected and get priority.



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