

EUROPEAN MARITIME LAW ORGANIZATION

SPRING CONFERENCE
in conjunction with
MALTA MARITIME LAW ASSOCIATION

VALLETTA, MALTA 7 AND 8 MAY 2014

*** * ***

GIORGIO BERLINGIERI*

Defaulting shipowners and the regulation of their insolvency status

The financial difficulties and the credit crunch are hindering the shipping market from 2008, i.e. since some six years.

The other recent crisis, the great one from 1974 to 1979 and that from 1981 to 1986, which lasted for about five years, make us to believe that the present crisis will come to an end soon.

However its impact on the shipping market seems to be higher than that of the previous economic recessions and has called the shipping operators for a review of the strategies and attitudes and imposed contract renegotiations and debt restructuring to avoid closing of business.

Unfortunately quite a number of shipping companies could continue to navigate only in the context of insolvency proceedings and such navigation, not easy within the domestic jurisdiction, has proved to be quite foggy whenever the insolvency status is to be recognized in a foreign jurisdiction. This takes place particularly in relation to an interruption or suspension of judicial proceedings or of judicial enforcements by means of a stay of steps by individual claimants against their debtor and his ships.

The assistance offered by the international instruments is not that effective, first because the conventions need to be ratified. For instance UNCITRAL Model

* Senior Partner Studio Legale Berlingieri, Genoa, President Italian Maritime Law Association, Vice President Comité Maritime International.

Law on Cross Border Insolvency adopted the 30 May 1997 has been adopted only by 20 countries¹.

A more telling instrument proved to be Regulation 1346/2000 on insolvency proceedings, enacted by the European Council and entered into force the 31 May 2002.

Its Article 4 provides that the law applicable to insolvency proceedings and their effect is that of the Member State within which the insolvency proceedings were opened.

Furthermore, under Article 16 any judgment opening insolvency proceedings handed down by a Court of a Member State is recognized in all other Member States.

And under art. 17 the judgment opening the proceedings shall, with no further formalities, produce the same effect in any other Member State as under the law of the State of the opening of the proceedings.

The Council Regulation was applied by the Court of First Instance (Tribunal) of Venice which, with judgment 21 December 2010² ruled that the opening of an insolvency proceeding in Germany precluded the arrest in Italy of a ship, the m/v “Delphin”, owned by the German insolvent company to secure payment of a supply of bunkers.

This as Section 89 of Insolvenzordnung, the German Bankruptcy law, forbids creditors to proceed with enforcement or arrests.

The Court of Venice therefore held that German law on insolvency is applicable in Italy under art. 4 of the Council Regulation and that the German judgment opening the insolvency is to be recognized and takes effect in Italy as provided by Articles 16 and 17 of the Council Regulation.

However all that glitters is not gold, as there are several intricacies and exceptions to the general rule, which make the navigation into the provisions of the Council Regulation good also for lawyers.

¹ Australia, Canada, Chile, Colombia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, Uganda, United Kingdom, U.S.A.

² *A/S Dan Bunkering Ltd. v. Dolphin Maritime Ltd. and Dolphin Kreuzfahrten GmbH*, *Il Diritto Marittimo* 2011, 607.

An example of that is contained in Article 15 which states that “*the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending*”.

The domestic law of Member States may provide for an interruption or suspension of proceedings or of enforcement.

Article 51 of Italian Bankruptcy law, similarly, for instance, to Article 89 of German Bankruptcy Law, in fact provides that “*unless the law provides otherwise, from the day of the declaration of bankruptcy no individual action or cautionary procedure, included the claims incurred during the bankruptcy, may be commenced or continued on the assets of the bankruptcy*”.

Upon the opening of insolvency proceedings, a stay may therefore operate automatically across the European Union by virtue of Articles 4 and 17 of the Council Regulation.

In the case of the insolvency of a major Italian shipowning company of Torre del Greco, Naples, an opinion was asked in London whether a stay of proceedings as provided under Italian law could also apply in England where many proceedings involving the Italian insolvent company were pending before the High Court or Arbitration Tribunals.

However the answer was that an English case³ provides that the Court may order a stay, but this is a matter entirely for the discretion of the English Court.

There is therefore no automatic stay of a foreign insolvency proceeding in England, as Section 130(2) of the Insolvency Act 1986 on providing a stay, only applies in the case of the winding up in England of a foreign company and does not apply to foreign insolvency proceedings.

In another insolvency relating to a shipping company of Genoa, the liquidator applied for the lifting of arrests in Richards Bay of the m/t “Rapallo” which, inter alia, were executed by Maltese and Danish companies to secure claims against a ship of a parent company of the insolvent one.

However the arrests were not considered wrongful or void in accordance with South African law and, with particular reference to the Danish claimants, it was

³ *Mazur Media Ltd. v. Mazur Media GmbH* [2004] EWHC 1566 (Ch).

objected that, according to Section 33 of the Preamble to Council Regulation 1346/2000, Denmark is not participating in the adoption of the Regulation, and is not bound by, nor subject to its application.

It is therefore to be acknowledged that claimants of a Member State may not be bound by the Council Regulation with regard to lawsuits, arrests or enforcements involving an insolvent of a Member State and not pending in a Member State.

But let us remain in the European Union.

The Court of Appeal of Aix-en-Provence, with judgment 29 June 2011⁴ held that a claim for bunker supply to an Italian ship, the “Ital Ro-Ro II”, does not entitle to arrest a sister ship at Toulon in France, the “Ital Ro-Ro I”, after the opening of insolvency proceeding in Italy against the debtor, an Italian shipowning company of Bari. This as a claim for bunker supplies, although being a maritime claim, does not vest the claimant with a right *in rem*.

In so ruling the French Court of Appeal made reference to Article 5 of the Council Regulation which provides that “*the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets (...) belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings*”.

Still with regard to Article 5 of the Council Regulation and in the proceeding relating to the arrest of the m/t “Valeria della Gatta”, an Italian ship owned by another Italian insolvent shipowning company of Torre del Greco, Naples, which was arrested in Toulon by an Italian bank with an hypothec on the ship, the Tribunal de Grande Instance of Aix-en-Provence, with judgment 9 July 2012⁵, held that, pursuant to art. 5 of the Council Regulation, the opening of insolvency proceedings in an EU Member State does not affect the right *in rem* such as an hypothec of a claimant on assets of the debtor.

Article 5 of the Council Regulation is an obvious example of compromise which must be reached between common law and civil law systems when drafting international instruments. However the need for such a compromise, motivated in

⁴ *Puglia di Navigazione S.p.a. v. Cambiaso & Risso Marine S.p.a.*, *Il Diritto Marittimo* 2013, 198 and *Droit Maritime Français* 2012, 131.

⁵ *Centrobanca-Banca di Credito Finanziario e Mobiliare S.p.a. v.. Deiuemar Compagnia di Navigazione S.p.a. and Ledi Shipping S.r.l.*, *Il Diritto Marittimo* 2013, 557.

Section 25 of the Preamble, infringes one of the essential principles governing bankruptcy law, i.e. that of the “*par condicio creditorum*”.

This may assist harmonization but often creates uncertainty and conflicting interpretations.

Confusion is then added by the way in which Article 5 is translated. In the earliest times the official text of a convention was only the French one. Now a convention is made in many languages, all being equally authentic, and it may happen, as in the case of the Article under reference, that words used in one language differ from those in another language.

In fact, when trying to define rights *in rem*, Article 5 of the Council Regulation states in the English text: “2. *The rights referred to in paragraph 1 (rights in rem) shall in particular mean: (...) the rights to dispose of assets (...) by virtue of a lien or a mortgage*”.

The Italian, French and Spanish texts, talking about “*diritti reali*”, “*droits reels*” and “*derechos reales*”, instead refer to “*pegno o ipoteca*”, “*gage ou hypothèques*” and “*prenda o hipoteca*”.

There is therefore a confusion between lien and pledge in the translations.

Whilst the pledge is certainly a right *in rem*, as like the hypothec allows to sell the hypothecated or pledged assets, this is not the case for the lien.

In fact, although the lien is conferred with a *droit de suite*, i.e. claims secured with a maritime lien follow a ship in whatever hands it may pass, it does not entitle to satisfy the claim by way of a sale but only to secure it with an arrest.

An interesting decision on cross border insolvency is that delivered the 9 August 2013 by the First Instance Court of La Spezia⁶ in an arrest proceeding between Dutch salvors and a German insolvent shipowning company. Such company had its m/v “Celia” arrested in La Spezia after Amtsgericht Nordenham imposed preservation measures, on the basis of section 21 of the German Bankruptcy Law, further to the company having applied for *insolvenzverfahren*. However the arrest by the Dutch salvors continued although Landgericht Oldenburg later forbidden salvors to keep the ship under arrest.

⁶ Svitzer Salvage BV v. Celia Schiffahrtsgesellschaft MNH & Co Reederei KG *Il Diritto Marittimo* 2013, 69.

In opposing the arrest the German shipowning company therefore argued that the protective measures under art. 21 of the German Bankruptcy Law are to be recognized in all EU Member States as preservation measures in the meaning of art. 25 § 1,3 of the Council Regulation.

Among various very interesting issues, discussion focused on the fact that the German shipowning company was a KG (Kommand Gesellschaft). Salvors therefore argued that the Council Regulation was not applicable as its Article 2 provides that: “*This Regulation shall not apply to insolvency proceedings concerning (...) collective investment undertakings*”.

However the Court of La Spezia rejected salvors’ argument and lifted the arrest, originally granted *ex parte*, on the ground of what provided in the Preamble, Section no. 9: “*Insolvency proceedings concerning insurance undertaking, credit institutions, investment undertakings, holding funds or securities for third parties and collective investment undertakings (such as a KG) should be excluded from the scope of the Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention*”.

In fact it did not appear that the KG company was made subject to special arrangements.

Furthermore the Court of La Spezia said that it was not proved what such special arrangements were consisting with, whilst it was quite clear that Amtsgericht Nordenham applied to the KG the general rules of German law on insolvency.

The Court of La Spezia also said that the issues relating to the type of company and the preconditions for the opening of insolvency proceedings were investigated by the German Courts and therefore the Italian judge of the arrest proceeding is to abide by the decision of the German Courts as provided in the Preamble, Section no. 22 of the Council Regulation.

Salvors additionally argued that the arrest was to be confirmed under art. 5 of the Council Regulation which provides that rights *in rem* are not affected in respect of assets situated in a Member State which is not that of the opening of the insolvency proceeding.

This given that the m/v “Celia” was under arrest in Italy and not in Germany.

The Court of La Spezia did not take the issue whether a maritime lien constitutes a right *in rem*, but objected that, under art. 2(g) of the Council Regulation, the Member State in which the assets are situated means, in the case of property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept.

As the German shipowning company proved that the m/v “Celia” was registered at the Seeschiffsregister with Amtsgericht Emden, salvors’ argument was dismissed.