Deutscher Verein für Internationales Seerecht

Deutsche Landesgruppe des Comité Maritime International

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Mr. Stuart Hetherington
President Comité Maritime International

cc: Mr. John Hare (Secretary General)
Mrs. Anne Verlinde (Administration)

CMI Questionnaire "Cross-Border Maritime Insolvency Issues"

Dear Mr. President,

I refer to your letter of 22 January 2013, addressed to the Presidents of all national Maritime Law Associations.

Please find enclosed the responses to the CMI Questionnaire on Cross-Border Maritime Insolvency Issues which have been thoroughly prepared by a working group of the German Maritime Law Association.

I would like to apologize for our very late response and furthermore inform you that also other outstanding answers to CMI questionnaires will be completed and handed in as soon as possible by the German Maritime Law Association.

Hamburg, 2 April 2015

Yours sincerely

Secretary German Maritime Law Association
(Tilo Wallrabenstein)

Encl.

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Answers of the German Maritime Law Association[1] to the

COMITÉ MARITIME INTERNATIONAL

International Working Group on Cross-Border Insolvency

QUESTIONNAIRE

SECTION I

CROSS-BORDER MARITIME INSOLVENCY ISSUES

Part 1 General Insolvency Principles Applicable to Foreign Creditors

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

   Answer: Yes, Germany has specific rules on cross-border insolvency. There are two such sources of law.

   The first of the two is the European Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (O.J. L 160/1 of 30 June 2000), in the following "**EuInsReg**". The EuInsReg is directly applicable to all collective insolvency proceedings that are cross-border, but inner-European; insofar, it overrides domestic law. It is not applicable to certain companies such as insurances and banks (art. 1 (2)).

   The EuInsReg contains 47 articles on issues such as jurisdiction, applicable law, recognition of foreign insolvency proceedings, secondary proceedings and a variety of particular instruments in more detail. The EuInsReg in principle follows the "universalist approach" (or rather "European approach") as opposed to a "territorial approach", meaning that the effects of insolvency proceedings are not meant to be limited to the State where the proceedings are opened.

[1] The answers to this CMI Questionnaire on Cross-Border Insolvency Issues have been thoroughly prepared by a Working Group of the German Maritime Law Association (Deutscher Verein für Internationales Seerecht e.V.) under the Chairmanship of Dr. Olaf Hartenstein wich was composed of Dr. Jan A. Bischoff, Mr. Gregor Harbs, Dr. Olaf Hartenstein and Mr. Thomas Nintemann.

The European institutions are working on a reform of the EuInsReg. There is a Proposal for a new regulation of 12 December 2012 (COM(2012) 744 final), but the new regulation is not yet finalized.

The Rules of the EuInsReg are, in Germany, supplemented by some domestic rules in artt. 102 and 102 a of the Introductory Law to the Insolvency Act (in the following "**EGInsO**") dealing with the implementation of the EuInsReg.

Second, there are specific domestic rules on the issue of cross-border insolvency in secc. 335 to 358 of the Insolvency Act (in the following: "**InsO**"). These are over-ruled by the above mentioned EuInsReg where such European rules are applicable, but remain applicable outside the scope of the European regulation, namely for the coordination with non-European States.

Such domestic rules on cross-border insolvency cases consist of three parts: general rules (secc. 335 to 342 InsO), recognition of foreign insolvency proceedings (secc. 343 to 353 InsO) and secondary proceedings on inland assets (secc. 354 to 358 InsO). The rules are rather comprehensive and follow a universalist approach as opposed to a territorial approach. Before 1985, Germany followed a territorial approach limiting the effects of insolvency proceedings to the State where they were opened, but this changed with a milestone decision of the Federal Supreme Court on 1985 when a universalist approach was adopted. This was then also taken over by the legislator in 1999 and eventually led to the current rules.

The German domestic rules on cross-border insolvency are clearly not an adoption of the UNCITRAL Model Law on Cross-Border Insolvency, but it seems fair to say that they are not in contradiction to it either. Like the Model Law, they follow the tendency to a universalist approach.

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

Answer: German domestic law makes no distinction between foreign creditors and domestic creditors. Under sec. 13 InsO, a creditor may apply for the opening of insolvency proceedings over the assets of the debtor. A foreign flag authority, if it wants to apply for the opening of insolvency proceedings of locally domiciled ship owner, can, therefore, only do so if it is a creditor.

On the European law level, the opening of insolvency proceedings in one Member State permits the opening of so-called secondary insolvency proceedings in another Member State with effects restricted to the assets of the debtor situated within this

territory of such other Member State (art. 27 EuInsReg); such opening of secondary proceedings may be requested by the insolvency administrator (or other persons defined as "liquidator" in Annex C of the EuInsReg) in the main proceedings as well as by any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of the secondary proceedings is requested (art. 29 EuInsReg). Therefore, if there are main proceedings in another Member State, secondary proceedings can be applied for in Germany by the insolvency administrator of such main proceedings or by any creditor. However, if there are yet no main proceedings in another Member State, although under the conditions of the State that has jurisdiction there could be main proceedings, secondary proceedings in Germany can only be applied for by a creditor which has his domicile, habitual residence or registered office in Germany, or by any creditor who has a claim against the debtor arising from an operation of the establishment in Germany (art. 3 (4) lit. b EuInsReg).

In respect of non-European cross-border cases, any creditor may request so-called particular insolvency proceedings over inland assets of the debtor. If the debtor has no branch in Germany, then the request by the creditor supposes that the creditor has a particular interest in the opening of such proceedings. That is namely the case where the creditor can show that he would obtain a much better result with such inland proceedings (sec. 354 InsO). In the non-European cross-border context, besides any creditor, also the foreign insolvency administrator may apply for the opening of such secondary insolvency proceedings (sec. 356 (2) InsO).

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

Answer: Under the European EuInsReg there is no particular supervising procedure for the activities of foreign insolvency administrators. The insolvency administrator appointed by a court in one Member State may in principle exercise all the powers conferred to him also in the other Member States, unless (1) other insolvency proceedings have been opened there or (2) a preservation measure to the contrary has been taken in that Member State following a request for the opening of insolvency proceedings there (art. 18 (1) EuInsReg).

On the non-European level, the foreign insolvency administrator in principle makes his requests through a German court; a German insolvency court is declared to have jurisdiction for such requests (sec. 348 InsO).

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

Answer: No.

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

Answer: German law does not distinguish between foreign and domestic creditors. All creditors together form the "creditors' assembly", which is directed by the court and may apply for a change of the administrator. The creditors' assembly takes decisions by simple majority of the amount of claims. The creditors' assembly may, if they wish, elect a "creditors' committee" in which different groups of creditors are represented and which takes decisions with the majority of votes.

Generally, the insolvency administrator is under the control of the insolvency court, but the court may not interfere with the administrator's office in respect to the practicability or reasonableness; the court only interferes when the administrator neglects its duty to perform its work properly and duly.

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

Answer: German law makes no difference between foreign and domestic creditors. Any creditor may commence legal proceedings against the administrator if the creditor considers that the administrator acted negligently or wrongly and if the creditor suffered a loss thereby.

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

Answer: The concept of private receivership is not known to German insolvency law.

Part 2 Subject Matter or Territorial Jurisdiction

8. **Do your laws permit assertion of insolvency jurisdiction generally over any asset of an insolvent ship operator domiciled in your country, regardless of the location of the asset within or outside your country? Please comment whether this scope of jurisdiction differs between a ship of your country's registry owned by persons domiciled in your country, or a ship of another flag owned by persons domiciled in your country.**

Answer: Under European law, i.e. art. 3 (1) EuInsReg, German courts have jurisdiction for opening main insolvency proceedings if the center of a debtor's main interests („**COMI**") is situated in Germany; it is presumed that the COMI is where the company has its registered office. Therefore, if a ship operator is

domiciled in Germany, it regularly has its COMI in Germany, so that German courts have jurisdiction for opening main insolvency proceedings – regardless of the location of assets within or outside Germany and regardless of the place of the ship's registry.

If the ship owner's COMI is not in Germany but in another EU Member State, then, under art. 3 (2) EuInsReg, German courts may have jurisdiction for so-called secondary insolvency proceedings, but only if the debtor possesses an establishment in Germany. In that case, the effects of such secondary proceedings are restricted to the assets of the debtor situated in Germany.

Where the EuInsReg is not applicable, German courts have jurisdiction for opening main insolvency proceedings if the debtor's domicile or company seat is in Germany unless the center of the debtor's independent economic activity is elsewhere. This is similar, but not identical to the COMI under European law. It must be noticed that it is widely accepted that this rule applies only in insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings. These are the cases where the EuInsReg is not applicable. In all other cases, the EuInsReg's jurisdiction rules prevail. Indeed, where the COMI is in Germany (or in another EU Member State) the EuInsReg prevails in any event, and where the COMI is outside Germany (and outside the European Union), it is rather unlikely that the "center of the independent economic activity of the debtor" is in Germany and would give jurisdiction to German courts for the main insolvency proceedings. In any event, as far as the domestic rules are applicable (e.g. on the above mentioned institutions), the opening of main proceedings would comprehend all assets within and outside Germany, regardless of the place of the ship's register.

As to secondary insolvency proceedings under the non-European rules, it can be added that where German courts do not have jurisdiction for main proceedings (and the COMI is not any EU Member State), but where the debtor has an establishment or other assets within Germany, any creditor can apply to a German court for secondary insolvency proceedings over the inland assets of the debtor (sec. 354 (1) InsO). However, if the debtor does not have an establishment in Germany, the application by the creditor is admissible only if he can prove that he has a special interest in such secondary proceedings. That is namely the case where the creditor can show that he would obtain a much better result with such inland proceedings (sec. 354 InsO).

"Inland assets" can be objects or claims. Claims are situated in Germany if the debtor is situated in Germany. Objects are situated in Germany if they are effectively in Germany. In respect of a ship, it is argued that this may be different if it is only temporarily in Germany. It is argued that in such case the relevant factor is whether the vessel is registered in Germany. There is no case law on this.

Part 3 Notice to Foreign Creditors

9. Do any legal or procedural requirements have to be followed to ensure the insolvent ship operator or the insolvency administrator identifies all known foreign creditors?

Answer: Yes. If the insolvent debtor itself applies for the opening of insolvency proceedings, its application must contain a list of all creditors (sec. 13(1) InsO). If a creditor applies for the opening of insolvency proceedings, the debtor must later give the required information to the court.

10. Do your laws require administrators of insolvency proceedings to give notice of the proceedings to foreign creditors? As a general practice, how is such notice given to foreign creditors?

Answer: Under art. 21 EuInsReg the insolvency administrator may request that notice of the court order opening insolvency proceedings be published in any other Member State in accordance with the publication procedures provided for in that State; any Member State in the territory of which the debtor has an establishment may require mandatory publication, and if so the insolvency administrator or any authority empowered to that effect in the State where the proceedings are opened shall take all necessary measures to ensure such publication.

Under German law, the publication of the opening order is mandatory and is to be served on the debtor and the known creditors. No distinction is made between foreign and domestic creditors. The publication is effected on the webpage www.insolvenzbekanntmachungen.de, which is freely accessible. The insolvency court may order further publications if so provided for by regional law. In any event the publication on the webpage is sufficient to fulfill the condition of service (!) on any person, sec. 9 (3) InsO.

As a general practice, the insolvency administrator contacts the known creditors directly.

11. Do your laws require administrators of insolvency proceedings to give notice of time bars for filing of claims to foreign creditors? As a general practice, how is such notice given to foreign creditors?

Answer: See answer to question no. 10. The time bar for filing claims is mentioned in the court's opening order. The time bar is chosen at the discretion of the court; in practice, it is chosen a bit longer in cases where foreign creditors are involved.

12. If the insolvent business is a shipowner, do your laws require notice of insolvency proceedings to be given to the ship registrar for domestically registered vessels?

Answer: Yes. There is a special rule for publication in the ship register (sec. 33

InsO): An opening order in insolvency proceedings of a ship owner is registered in the ship register. Also, if a person holds certain registered rights in a registered ship, the opening order in insolvency proceedings of such person is registered in the ship register if there is a risk that without the registration other debtors may suffer a disadvantage (secc. 32 and 33 InsO).

13. **Do your laws require notice of insolvency proceedings to be given to diplomatic or consular officials of the flag states of foreign registered vessels which are assets of a local insolvent ship operator?**

Answer: No. Sec. 33 InsO only requires the insolvency to be registered in the German ship register if the ship is registered in Germany.

14. **If a foreign creditor later learns of the existence of insolvency proceedings, is the foreign creditor permitted to file late claims or have a right to claim against any of the assets of the insolvent ship operator which have not yet been distributed to creditors?**

Answer: Yes, like any other (domestic) creditor, the foreign creditor may have his claims registered after expiry of the dead line. This may cause additional costs, which would have to be borne by that creditor. (Cf. question no. 43 below.)

Part 4 Recognition of Foreign Claims

15. **Please describe the conflict of laws rules for recognition of foreign maritime claims in insolvency proceedings. For example, if the claim is a maritime lien under the law of the place where the claim arose but not in the country where the insolvency proceeding is being conducted, will the insolvency administrator or tribunal recognize the foreign maritime lien?**

Answer: The substantive law governing maritime claims is assessed in accordance with the general conflict of law rules. Hence, the Rome I-Regulation (Regulation (EC) 593/2008 of 17 June 2008) applies to contractual obligations, the Rome II-Regulation (Regulation (EC) No 864/2007 of 11 July 2007) to non-contractual obligations and the domestic German conflict of law rules would govern for instance property rights and rights in vessels.

As a result, a German court would recognize a maritime lien that does not exist under German law, but under the laws of a third country if according to the German conflict of law rules the laws of the third country are applicable. German conflict of law rules will in principle consider that the law applicable to the secured claim also applies to the question whether it give rise to a maritime lien. It is currently disputed whether this is also true where the parties chose such law to the detriment of the ship owner who is not a party to the contract.

In addition to the above-mentioned rules governing the substantive law, secc. 335 et seqq. InsO and artt. 4 et seqq. EuInsReg contain specific conflict of law rules determining the law applicable for assessing the effects of the insolvency on

contracts and property rights. In general, these effects are governed by the laws of the Member State within the territory of which the insolvency proceedings are opened. Among the effects are for instance the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors. An important exception applies with regard to vessels: Pursuant to sec. 336 InsO, the effects of insolvency proceedings on a contract relating to a right in a vessel are subject to the law of the State in which the vessel is registered. Similar rules apply under artt. 5 and 11 EuInsReg.

16. **Apart from the characterization and priority of claims, are there any other procedural differences in the handling of claims between those by foreign creditors and those by local creditors? With reference to the types of claims listed in the table, please describe any differences in detail.**

Answer: Under German Law there are generally no procedural differences in the handling of claims between those by foreign creditors and those by local creditors. However, practical differences might result if proof of legal existence or of capacity to represent a foreign legal entity is required and if a registry of companies comparable to that in Germany does not exist.

17. **Does your law recognize rights of claims to property rights, sale or enforcement given by foreign law to particular types of creditors, such as, for example, to financial institutions or spouses for their entitlement to business property interests of the other spouse on separation or divorce?**

Answer: In general, German law will recognize such claims if the foreign substantive law applies pursuant to the principles set out above (see question no. 15). However, this is generally not the case if the right of claim to particular types of creditors is to be qualified as a procedural right (see question no. 15 above, last paragraph).

18. **Is the recognition of foreign arbitral awards for purposes of proof of claim in insolvency proceedings different from the recognition of foreign arbitral awards for general legal purposes? Please explain any differences.**

Answer: The opening of insolvency proceedings has no effect on the substantive prerequisites for the recognition of a foreign arbitration award. In practice, there may be considerable differences as concerns recognition of a foreign arbitral award for purposes of proof of claim in insolvency proceedings and the recognition of foreign arbitral awards for general legal purposes. It depends on the status of the foreign arbitral award under German law.

In Germany, the recognition and enforcement of a foreign arbitral award is generally governed by artt. III et seqq. of the 1958 New York Convention and secc. 1061 et seqq. of the German Civil Procedure Code (Zivilprozessordnung, "**ZPO**"). In general legal proceedings, a claimant will have to file a request for recognition and enforcement with the Higher Regional Court (Oberlandesgericht, "OLG").

Different principles apply during insolvency proceedings. Even if an award has been declared enforceable, it cannot be enforced anymore once the insolvency

proceedings have been opened (sec 89 (1) InsO). Rather, the provisions of the InsO govern the satisfaction of the creditors, i.e. the insolvency administrator will distribute the assets of the insolvency estate among the acknowledged claims. Pursuant to secc. 174 et seqq. InsO, the acknowledgment of a claim by the insolvency administrator requires the creditor to file the claim with the insolvency administrator. The insolvency administrator has to decide whether to acknowledge or to contest the claim. Generally, if the insolvency administrator contests a claim, a creditor will have to initiate court proceedings to have such claim acknowledged (secc. 179 (1), 180 InsO). However, sec. 179 (2) InsO provides for special procedural provisions if a claim is contested that is already based on an executable title: In this case, the party contesting the claim will have to initiate court proceedings. An arbitral award which has undergone the process of recognition pursuant to the New York convention is such an executable title.

If the claimant-creditor has already filed a request for the recognition, but the award has not yet been recognized and declared enforceable at the time of the opening of insolvency proceedings, the legal situation is not clear. In general, the opening of insolvency proceedings will interrupt proceedings before German courts until they can be resumed in accordance with the rules applying to the insolvency proceedings (cf. sec. 240 ZPO). There is no case law on whether or how this provision also applies to recognition proceedings concerning foreign awards. Following the case law on the recognition of foreign state court decisions, it can be argued that proceedings for the recognition of a foreign arbitration award will be interrupted by the opening of insolvency proceedings, but that they can be resumed if claims are contested by the insolvency administrator (then aiming at acknowledgment of the claim, not enforcement of the award).

If the claimant-creditor has not even filed a request for the recognition at the time of the opening of insolvency proceedings, the legal situation is not clear either. It can be argued that in the court proceedings aiming at the acknowledgment of the claim, the court implicitly has to decide on the recognition of the award (on the basis of the usual substantive rules).

19. If the insolvent ship operator is a state-owned enterprise, are there any differences in the rights or procedures available to a foreign creditor under your country's insolvency law?

Answer: In general, there are no procedural differences between a privately owned enterprise and a state owned enterprise.

Part 5 Recognition of Foreign Insolvency Proceedings

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

Answer: There are no restrictions on how foreign insolvency administrators may publish notices in local news media or communicate with creditors in Germany.

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

Answer: A request for the recognition of foreign insolvency proceedings will not be necessary under German law.

Pursuant to sec. 343 InsO, the opening of foreign insolvency proceedings will generally be recognized *ipso iure* unless the courts of the State of the opening of proceedings do not have jurisdiction in accordance with German law (sec. 343 (1) no. 1 InsO) or where the recognition would lead to a result which is manifestly incompatible with major principles of German Law, in particular where it is incompatible with fundamental rights (sec. 343 (1) no. 2 InsO).

Similar provisions apply under art. 16 (1) EuInsReg. The opening of insolvency proceedings by a court of an EU Member State that has jurisdiction pursuant to art. 3 EuInsReg will be recognized in all the other Member States. However, a Member State may refuse recognition where the effects of such recognition would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual (art. 26 EuInsReg).

22. Will such a request be recognized if it comes directly from a foreign trustee in bankruptcy, insolvency administrator or administrator, or does the request have to be in the form of a letter of request issued by the foreign bankruptcy tribunal?

Answer: Foreign insolvency proceedings will be recognized *ipso iure*, which means that no formal request for recognition is required (see question no. 21).

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

Answer: See question no. 21.

24. Do your laws have a procedure for a request for the recognition by a foreign insolvency administrator or insolvency court of a local insolvency proceeding? Are such requests generally made by the administrator or the insolvency court? Generally describe the procedure.

Answer: No, there is no such procedure. The local insolvency administrator is only held to keep the foreign administrator informed about the circumstances which may play a role for the foreign proceedings (sec. 357 InsO).

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

Answer: No such procedure exists.

26. **Will your courts enforce any compulsory transfer of a contractual obligation involving a vessel formerly owned by an insolvent ship operator, if this contractual obligation affects parties located in your country?**

Answer: We have difficulties in understanding this question.

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

Answer: There is no special procedure for such coordination. As to jurisdiction and recognition of foreign proceedings as well as secondary proceedings see question no. 8 above. Under German domestic law, sec. 348 (2) InsO merely provides that German insolvency courts are allowed to cooperate with foreign courts and in particular to provide information on German insolvency proceedings. Under European law, art. 31 EuInsReg stipulates a duty of cooperation for the insolvency administrators in primary and secondary insolvency proceedings.

28. **Is your country a party to any bilateral or multilateral agreements for the coordination of multi country insolvency proceedings or the recognition of foreign insolvency proceedings? Please list such agreements.**

Answer: Germany is an EU Member State and thus the EuInsReg applies (see question no. 1 above). Other than that, Germany is not bound by any bilateral or multilateral agreements.

Part 6 Need for Reform

29. **Have any provisions of your insolvency law created legal uncertainty or difficulties in the administration of cross-border maritime insolvencies? Please refer to any legal commentary or case law.**

Answer: Yes, there are issues which cause uncertainty.

One example is the question of arrest of vessel during the preliminary phase (after application, but before opening). It is in dispute whether the insolvency court can enjoin any arrest or not.

Another example (though not a privy to insolvency proceedings) is the unsatisfying situation of maritime liens where the charterer is in insolvency. Under German law bunker claims and other supply claims do not lead to maritime liens. The owner may thus discover himself in a situation where he faces an arrest of the ship by the supplier for claims against the insolvent charterer in a jurisdiction with a more extensive concept of maritime liens.

Furthermore, as has been set out above (question 18), the coordination of arbitral proceedings (recognition proceedings) and insolvency proceedings should be clarified.

German insolvency law has been substantially reformed in three steps during the last years; however, none of the reforms explicitly concern maritime or cross-border insolvencies. On the European level, there is a Proposal for an amendment to the a.m. EuInsReg, but this is not connected to the peculiarities of maritime insolvencies either.

SECTION II

GENERAL MARITIME INSOLVENCY ISSUES

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

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

Answer: German law does not provide for specific rules relating to the administration of the businesses of insolvent ship operators.

31. If your laws provide for specific rules relating to the administration of the businesses of insolvent ship operators or ships under your registry as distinct from assets of commercial enterprises generally, please provide details of how these rules applying to ships or ship operators differ from general insolvency administration.

Answer: Not applicable.

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

Answer: Generally, there is no monetary or asset value threshold for the application of various forms of insolvency procedure under German law. However, under very narrow prerequisites a debtor ship operator who is a natural person may apply for "consumer" insolvency proceedings according to Part 9 of the InsO, if at the time of the application for the commencement of insolvency proceedings his self-employed business activities have completely ceased, his assets are manageable ("*überschaubar*") and no claims exist against him from employment. The assets are not considered manageable if 20 or more creditors exist at the time the request is made to open the insolvency proceedings.

33. Do rights to commence insolvency proceedings or insolvency procedures differ if the debtor ship operator is a natural person as distinct from a legal entity? Describe any differences generally.

Answer: Generally, German law provides the same insolvency proceedings for natural and legal persons. However, if the debtor is a natural person, some distinctions apply. Apart from the possibility to apply for "consumer" insolvency proceedings under the narrow prerequisites described under question no. 32, a natural person may also apply for a discharge of residual debt, i.e. all obligations due to insolvency creditors which at the end of the insolvency proceedings have not yet been fulfilled.

The "consumer" insolvency proceedings are designed to do away with unfulfillable obligations by way of a simplified plan for the settlement of debts, which the debtor must hand in together with the application for commencement of insolvency proceedings. If no creditor has objected to the plan for the settlement of debts or if more than half of the named creditors with more than half of the accumulated claims have adopted the plan, the court will establish, by issuing a corresponding order, that a settlement concluded in accordance with the submitted plan has been reached. If the plan is not adopted, regular insolvency proceedings will follow.

A natural person may also apply for the discharge of residual debts pursuant to Part 8 of the InsO (sec. 286-303a InsO), irrespective of its status as consumer or entrepreneur. In such a case, together with his application, the debtor has to assign all his garnishable claims for salary and other emoluments to a trustee for a period of six years following the commencement of the insolvency proceedings. Within this six year period, the debtor will have to meet certain obligations, such as engagement in adequate gainful employment or to seek and accept a reasonable activity, transfer to the trustee of certain property acquired by him by way of succession, information of the insolvency court and the trustee of his whereabouts and the making of payments to satisfy the insolvency creditors only to the trustee. The discharge of residual debts is denied, if within certain time limits the debtor committed certain criminal offences or acted against the interests of his creditors according to sec. 290 InsO or if he did not adhere to the prerequisites of the proceedings.

34. If creditors are asserting claims against all or substantially all the assets of an insolvent ship operator, does this result in distinct or additional procedural or legal requirements?

Answer: No.

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

Answer: Insolvency procedures are governed by specialized insolvency courts within the local courts. The insolvency court appoints the insolvency administrator.

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

Answer: The general reason under German law to open insolvency proceedings is illiquidity. A debtor shall be deemed illiquid if he is unable to meet his payment obligations when due. Illiquidity shall be presumed as a rule if the debtor has stopped payments. If the debtor himself requests the opening of insolvency proceedings, imminent illiquidity shall also be a reason to commence proceedings. The debtor shall be deemed to be faced with imminent illiquidity, if he is likely to be unable to meet his existing payment obligations on their due date. Furthermore, if the debtor is a legal person or a company in which no personally liable shareholder is an individual, overindebtedness is also a reason for opening insolvency proceedings. Overindebtedness exists, if the debtor's assets no longer

cover his existing payment obligations, unless it is highly likely, considering the circumstances, that the enterprise will continue to exist.

37. **If the threshold tests for insolvency proceedings in your country differ for a foreign ship operator with assets in your country which wishes to begin insolvency proceedings in your country, describe these differences in detail.**

Answer: Once German courts have jurisdiction to open insolvency proceedings (cf. question 8 above), the proceedings do not differ depending on the nationality of the debtor.

38. **Do your laws permit a private creditor to obtain a court order to begin insolvency proceedings against a ship operator? If so, describe generally what facts or legal grounds the creditor must show to obtain such an order.**

Answer: German law permits a private creditor to apply for the commencement of insolvency proceedings against his debtor (sec. 14 InsO). The creditor must on a prima facie basis show, to the satisfaction of the court, that he has a legal interest in the opening of the insolvency proceedings, the facts supporting his claim and the reason why insolvency proceedings should be opened, i.e. the debtor's illiquidity or, if it is a legal person or a company in which no personally liable shareholder is an individual, his overindebtedness.

39. **Do your laws permit a public authority to obtain a court order or to exercise its own jurisdiction to begin insolvency proceedings against a ship operator other than procedures available to private creditors? If so, describe generally what are the factual or legal grounds for such public authority to begin such insolvency process?**

Answer: There are no separate proceedings available for public authorities. Generally, even public authorities are bound by the prerequisites set up in sec. 14 InsO. However, since public authorities are considered bound by law and order, the degree of establishing prima facie evidence for their claim is reduced. As regards the establishing of prima facie evidence for the existence of illiquidity or overindebtedness, the same standard applies as for private creditors.

40. **Does a ship operator have rights to defend or oppose an insolvency proceeding begun by private creditors or public authorities? If so, describe generally what defences are available.**

Answer: Yes. In case of a creditor's application for the commencement of insolvency proceedings, the debtor has a right to be heard (sec. 14 (2) InsO). If he conclusively contests the existence of the alleged claim or the alleged insolvency and if his denial together with prima facie evidence in the opinion of the court countervails against the facts and prima facie evidence submitted by the creditor, the creditor's application will be rejected as inadmissible.

41. **Do your laws permit a ship operator to voluntarily begin an insolvency proceeding? If so, describe generally what facts or legal grounds a ship operator must demonstrate to begin voluntary insolvency proceedings.**

Answer: Yes, German law permits a ship operator to voluntarily apply for an insolvency proceeding. In doing so, a ship operator – as any other debtor – must show on a prima facie basis that he is either illiquid in terms of sec. 17 InsO, facing immanent illiquidity in terms of sec. 18 InsO or – In case of the debtor being a legal person or a company in which no personally liable shareholder is an individual – that it is overindebted in terms of sec. 19 InsO.

It is to be noted that if the debtor is a legal person or a company in which no personally liable shareholder is an individual, the application for commencement of insolvency proceedings is not only a right the debtor may exercise voluntarily, but according to sec. 15 a InsO the debtor is obliged to apply for the commencement of insolvency proceedings if such legal entity is illiquid or overindebted. Legal representatives of such debtors may be facing criminal charges, if they delay the application for more than three weeks. The same applies to associations and partnerships in which no personally liable shareholder is a natural person.

Furthermore, in cases in which the debtor is a legal person or a company in which no personally liable shareholder is an individual, any member of the representative body or any general partner and any liquidator shall be entitled to request the opening of insolvency proceedings over the assets owned by such entity. In the absence of management of a legal person, each shareholder shall be entitled to file a respective application.

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

Answer: There is no particular procedure for third parties to oppose a debtor's voluntary insolvency proceedings under German law. Upon receipt of the application to commence insolvency proceedings, the insolvency court has the official duty to investigate any facts required to reach a decision on whether or not to commence insolvency proceedings. It may thereby request information from the debtor or third parties, hear witnesses, instruct experts and obtain an expert's report on the financial situation of the debtor. Within this investigation phase, any third party may contribute information, which – depending on the level of evidence – the court may or may not consider.

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

Answer: German law does provide for a time bar for filing of claims in insolvency proceedings, which is not set out in legislation, but decided by the insolvency court on a case-by-case basis. However, the time bar is not strict, claims may also be filed at a later time until the termination of the insolvency proceedings. In that case a separate verification of the claim will be necessary, for which the belated creditor will bear the additional costs.

44. Do your laws permit an insolvency administrator to carry on the ship operator's business for a temporary period in order, for example, to complete voyage or charter party commitments?

Answer: Yes, German law does permit an insolvency administrator to carry on the ship operator's business for a temporary period. The court may, for example, order already in the preliminary insolvency proceedings until the order for commencement of proceedings, that the preliminary insolvency administrator appointed by the court may take over the debtor's business. Once insolvency proceedings are officially commenced, by virtue of sec. 80 (1) InsO the debtor's right to manage and transfer the insolvency estate shall be vested in the insolvency administrator anyway.

45. Do your laws permit an insolvency administrator to disclaim or otherwise set aside future contractual obligations such as charter parties or contracts of affreightment?

Answer: German insolvency law permits such a remedy: According to sec. 103 InsO the administrator may choose either to fulfil the (future) contractual obligation and request the creditor to fulfil its obligations as well, or not to fulfil the obligations with the effect that the creditor's claim must be filed as an insolvency claim. For performances which are dividable there is a particularity: In case the creditor already fulfilled part of its obligations before the opening of the insolvency proceedings and the debtor did not, the creditor's claim for remuneration for / compensation of the past performance may only be filed as an insolvency claim even if the insolvency administrator choses fulfilment of the other part.

46. Do your laws permit or require an insolvency administrator to compulsorily transfer contractual obligations such as contracts of affreightment or employment agreements with crew from the insolvent ship operator to the purchaser of the vessel from the estate of the insolvent owner?

Answer: The answer is not the same for contracts of affreightment and employment contracts.

Contracts of affreightment may be transferred by the insolvency administrator to the buyer of the ship (if all three parties agree), but that is not compulsory.

Employment contracts are transferred by operation of the law if certain prerequisites are met. Under German law, when a business is transferred, the transferor's rights and obligations arising from a contract of employment existing on the date of a transfer shall, by reason of such transfer, generally be transferred to the transferee. (This is comparable to Art. 3 of the European Council Directive

2001/23/EC of 12 March 2001 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses – which, unlike German law, is not applicable to seagoing vessels.)

Furthermore, even where a contract is not transferred, claims for hire under contracts of employment may give rise to a maritime lien.

Part 8 Acceleration of Remedies

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

Answer: Under sec. 119 InsO any agreements setting aside the effects of secc. 103 to 118 InsO are null and void; this includes the insolvency administrator's right to opt for or against the continuation of a contract (see question no. 45 above). On the basis of this sec. 119 InsO, there is recent case law by the Federal Court of Justice that a clause in a contract for continuous supply of goods or energy which permits the cancellation of the contract in case of insolvency of the purchaser is void. The effects of this decision are disputed. It is arguable that a clause accelerating remedies in case of insolvency is void as well. There is no case law on this, yet.

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

Answer: There are no differences.

Part 9 Classes of Claims and Creditors

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

Answer: German law distinguishes between different types of claims, which have a different priority. Apart from ordinary insolvency claims ("*Insolvenzforderungen*"), there are two kinds of claims that have priority. Certain assets/claims are subject to separation ("*Aussonderung*") which means that the satisfaction of such claims is governed by the legal provisions applying outside insolvency proceedings (sec. 47 InsO). Other assets/claims are subject to separate satisfaction ("*Absonderung*"). These claims are subject to insolvency proceedings but enjoy priority over ordinary insolvency claims (sec. 49 seqq. InsO). In contrast, sec. 39 InsO provides a list of claims that have an even lower ranking than ordinary insolvency claims.

As to the specific kind of claims we refer to the schedule where we refer to "*Aus-*

sonderung" as Secured claims (although "*Aussonderung*" is not limited to secured claims), to "*Absonderung*" as Preferred claims and to ordinary insolvency claims as Unsecured claims. We do not make use of the term "Exempt claims".

50. Does the existence of an insolvency proceeding under your country's law alter the priority of creditors' claims against a ship owned or operated by an insolvent person? Please respond to this question with reference to the types of claims listed in the attached table.

Answer: Not applicable, as there are no claims against the vessel as such under German law. Rather, claims against the ship owner can be enforced against the vessel. The insolvency has no effect on the priority.

51. If a shipowner commences proceedings to establish a limitation fund under the LLMC Convention or to establish a limitation fund under domestic law, describe the relationship between such fund and any insolvency proceedings involving that shipowner. For example, can creditors begin insolvency proceedings if a limitation fund has been established? Can an insolvent shipowner establish a limitation fund?

Answer: German law expressly states that where limitation fund proceedings are already opened subsequently opened insolvency proceedings have no influence on the limitation proceedings. The limitation amount constitutes separate assets.

Inversely, there is no express rule (and no case law) on the question whether after the opening of insolvency proceedings, a ship owner (or rather: its insolvency administrator) may still apply for limitation proceedings. In legal literature the opinion prevails that the administrator may not apply for the opening of a limitation fund where the quota of such proceedings would be above the quota of the insolvency proceeding, because this would be to the detriment of the other creditors.

Last, it is discussed in legal literature whether and under which conditions the opening of fund proceedings (more precisely: the payment to the fund) just before the application for insolvency may retroactively be contested in case of mala fide of the limitation proceeding creditors.

Type of Claim Arising	**Secured Claim (enforcement may be continued by claimant outside bankruptcy administration)**	**Preferred Claim (administered as part of bankruptcy process but in higher priority to general creditors)**	**Unsecured Claim (administered as part of bankruptcy process with same ranking as other claims)**	**Exempt Claim (claim is not subject to bankruptcy or continues to be an obligation of ship operator after bankruptcy administration concluded)**	**Additional Comments**
title, possession or ownership of a ship or any part interest in a ship	title and ownership		Possession as such is not a claim. A claim to possession would be an unsecured claim.		
between co-owners of a ship including use or earnings of the ship	use / ownership		earnings		
mortgages or hypotecs on a ship or share in a ship		+			
bottomry or other contractual liens on a ship		contractual liens			Bottomry no longer exists under German law.
wages, benefits, or repatriation of master or crew		+ (maritime lien)			
loss of life or personal injury in connection with operation of a ship		+ (maritime lien)			

salvage awards	+ (maritime lien)		
unpaid suppliers of goods or services to a ship		+	
general average	+ (maritime lien)		
collision	+ (maritime lien)		
other types of tortious or delictual physical damage caused by ship	+ (maritime lien)	(+)	If the claim can also be considered a contractual claim, it is not preferred. This particularly excludes cargo claims from the category of Preferred claims.
cargo loss or damage		+	
contracts of carriage, including charterparties, other than for cargo loss or damage		+	
towage (other than salvage)		+	
pilotage	+ (maritime lien)		Pilotage fees may be unsecured if the pilots were ordered by the charterer and not by the owner.
hull insurance		+	
p&I insurance		+	
port, canal and harbour dues	+ (maritime lien)		

wreck removal by public authorities	+ (maritime lien)		
environmental damage	+ (where tort claims for damage to objects)		
unpaid contributions for social benefits programs (workers' compensation, health etc)	+ (maritime lien)		
criminal or regulatory fines or penalties		+	Not only unsecured, but even lower priority.
fraud or intentional wrongdoing in connection with operation of ship		+	

Part 10 Proposals for Reorganization or Compromise

52. Do your laws permit an insolvent ship operator to make a proposal for the reorganization of its business or compromise of claims in which the ship operator would continue to operate into the future if the proposal is approved?

Answer: Yes. The so-called insolvency plan proceedings (secc. 217 et seqq. InsO) permit an insolvent ship operator – just like any other insolvent debtor – to submit an insolvency plan to the insolvency court in which he proposes to regulate the proceedings and the settlement of claims in a way different from the stipulations in the code. He may also propose that the business should be continued and claims settled from the proceeds. The setup of the plan has to follow certain requirements.

53. Do your laws permit such proposals to be conducted through private contractual arrangements between an insolvent ship operator and some of its creditors, or do such proposals need to be conducted under supervision of a court or with approval of all identifiable creditors?

Answer: A private contractual arrangement is not admissible. The insolvency plan proceedings remain under control of the insolvency court. The plan is submitted to the court, the court either rejects it (mainly for formal reasons) or calls for a meeting of the creditors' assembly in order to decide if the plan is accepted. Not all creditors need to consent, but there is a complex mechanism in order to determine the necessary majority, e.g. the creditors are divided into groups depending on their respective legal position and each group of creditors votes separately. Creditors, whose legal position is not impaired by the plan, do not have a right to vote. If the plan is adopted by the necessary majority, it is to be confirmed by the court (which may take into account minority rights).

54. If it is lawful to conduct a proposal through private contractual arrangements, are such private contractual arrangements affecting a ship legally binding on other claimants against that ship who have not participated in such private contractual arrangements?

Answer: Not applicable.

55. If a proposal is required to be conducted under supervision of a court or approval of all known creditors, please provide a general description of the reorganization procedure.

Answer: See answer to question no. 53. If the insolveny plan is accepted by the creditors and confirmed by the court, it becomes effective for everyone. The debtor (not the administrator) will then proceed to realizing the plan. The court order confirming the plan may, however, provide for the insolvency administrator to supervise the debtor.

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

Answer: Yes, see answers to questions no. 53 and 55 above. The insolvency plan must deal with different groups of creditors, one of such groups being for example the secured creditors.

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

Answer: German insolvency law is in practice traditionally quite focused on liquidation rather than restructuring, although the law provides for the possibility of restructuring on an equal level as liquidation. The court examines the restructuring possibilities already in the preliminary proceedings; once proceedings are opened, the administrator will check the possibility of restructuring. The insolvency debtor cannot decide it on its own. But he can naturally make suggestions and file an insolvency plan (see questions 52 to 56).

Part 11 Receiverships

58. Does your law permit a private creditor such as a ship mortgagee to take over the business of a ship operator or to sell part or all of its fleet or generally act to recover a debt without needing to commence insolvency proceedings for the benefit of all creditors?

Answer: No, a private creditor is neither entitled to take over the business of a ship operator nor to sell part of the fleet free hand (save thus the cases of forced public sale based on a mortgage, maritime lien or enforceable title).

59. Does your law set out minimum requirements which a private receiver of an insolvent shipowner must follow such as giving notice to other registered ship mortgagees, the procedure for sale, etc.

Answer: Not applicable.