



Keep out: a Yukos affiliate was declared bankrupt in Russia, but a Dutch court ruled that its Dutch assets were not included in the receivership procedure.

Bloomberg

# Dutch ruling on Yukos sees assets protected

## Russian bankruptcy does not allow for inclusion of Dutch assets in receivership procedure

### Haco van der Houven van Oordt

THE fallout from the global economic recession is continuing to have an adverse effect on the international shipping industry.

Already, a number of owners and operators have been declared bankrupt, and most observers agree that more are likely to follow in both the short and longer term.

When a shipowner is declared bankrupt, it may no longer be possible to arrest or attach its vessels as assets. But shipping is an international industry, and the approach adopted to bankruptcy may vary from country to country. A universal approach is adopted in many countries, whereby it is not possible to arrest and/or attach the assets of a company once it has been declared bankrupt, irrespective of where the declaration is issued. A similar result is achieved by the 1997 UNCITRAL Model Law on Insolvency, which is designed to help states to address instances of cross-border insolvencies and which recognises foreign bankruptcy proceedings.

Signatories to this Model Law include, among others, the UK and Poland.

There are countries, however, which adopt a territorial approach to bankruptcy. One such is the Netherlands, which is not a signatory to the Model Law and which limits the prohibition of attachment of assets only to the country where the bankruptcy is declared.

Confirmation of this territorial approach was provided by a recent decision of the Supreme Court in the Netherlands in a dispute between an affiliate of

Russian oil giant Yukos, which had been declared bankrupt in Russia, and Russian state oil company Rosneft. The court ruled that, in the absence of an international agreement between Russia and the Netherlands,

Dutch assets were not included in the receivership procedure, thereby confirming that foreign bankruptcies do not preclude or limit the possibility to attach assets in the Netherlands.

In the Netherlands, the only exception to this rule exists in relation to insolvencies declared in another European Union member state on the basis of EU insolvency regulations.

## Debt collection claims double over past year

CASHFLOW problems, bankruptcies and defaults have resulted in a doubling of debt collection claims for International Transport Intermediaries Management, the Thomas Miller-managed leader in insurance for shipbrokers and ship agents, writes *Rainbow Nelson*.

"We have been inundated by debt collection in Itic in the last 12 months," Itic underwriter Kevin Sandom told delegates at the Pandibra McLintock Maritime Conference in Santos.

"It has got so bad that we started our own committee of three people that are specialised in collecting debt for our members," he said.

Some 31% of all claims against ship agents is linked to default by principals.

"Sometimes the debts are not paid because the shipowner does not have the cash in his pocket and he is waiting for his freight payment, but we

have seen claims for debt collections double over the last year," he said.

The debt collection arm of Itic's business has helped secure claims of \$80m for its customers in the past 10 years. Figures for this year have yet to be calculated but the use of Rule B attachments has proved effective in securing assets for agents and brokers covered by debt-collection cover.

"We used to receive a lot of rulings under Rule B attachments but these are not going to be covered under Rule B any more," he said.

Where it can be proved that the funds are those of the defendant and there is clear ruling in another jurisdiction, he said, Rule B was still an option but there were still more traditional methods open to recover unpaid debts.

"We take action against those covered by arresting their ships to seize and recover existing debt," said Mr Sandom.

Furthermore, by attaching assets in the Netherlands, a creditor can create a factual priority over specific assets which would not be awarded in the bankruptcy proceedings. Given that the assets of globally operating shipping companies are often spread worldwide, this is an attractive option for creditors who have no realistic expectation of recovery under bankruptcy proceedings.

The Netherlands is widely recognised as a haven for those looking to arrest ships and/or to arrange for their swift judicial auction. Leave for arrest is commonly granted without delay on production of a simple written application containing a summary of the claim only. No formal power of attorney and no proof of the claim is required. The arrestor is not liable for any port dues or related expenses. In addition, counter-security is seldom required. There are also very few legal hurdles to pass to obtain leave for arrest and, in addition, there is no obligation for the claimant to pursue its claim in the courts of the Netherlands following a ship arrest.

The approach adopted by the Dutch courts to the recognition of foreign insolvencies and to the arrest and judicial sale of ships makes the Netherlands a very attractive jurisdiction for creditors in the maritime industry. Indeed, a number of mortgagees are known to have taken active steps in the past to direct vessels to ports in the Amsterdam-Rotterdam-Antwerp range for the specific purpose of bringing themselves within the jurisdiction of the Dutch courts. Given the current parlous, albeit slowly improving, state of world financial markets, this trend is only likely to become more pronounced in the immediate future.

*Haco van der Houven van Oordt is a partner with the shipping team at Dutch law firm AKD Prinsen van Wijmen.*

# Brokers get their heads around the globe

BROKERS from more than 20 countries were in London last week as Lloyd's, its syndicates, a leading broker and the world's largest non-life insurer provided a masterclass on the placement of multinational business, writes *Jon Guy*.

The delegates were all part of the Brokers' Link global network and split their time between a Greenwich hotel and Lloyd's for the two-day visit, during which they were given a detailed insight into how they can place multinational programmes.

Chartis, formerly the non-life operations of US giant AIG, played a significant role in the event, as did the likes of Amlin and QBE, all of which have significant marine and energy operations.

## Guy Ropes



The event was hosted by broker Cooper Gay, which is part of the Brokers' Link network, and the accent was heavily on the marine and energy risks and how these brokers, while major players in their domestic markets, could combine to compete against the global giants for the big placements.

The event is indicative of a growing feeling among underwriters that there is a

move by clients away from the global broking firms towards their local markets.

Underwriters recognise that if they are to access the business that is now being placed locally, they need to get closer to brokers and networks that have the local expertise and a desire to grow their horizons.

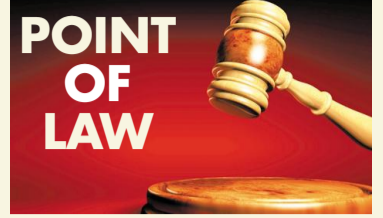
All too often it has been the lack of global reach and size that has hampered those efforts, but the markets are now paying more attention to the mid-sized specialist brokers that have a significant share of the markets within which they operate.

The underwriters' shift in focus may have something to do with Lloyd's plans to open its doors to a wider spectrum of brokers; it may also have something to do

with the rising percentage of the business coming into London and Lime Street from binding authorities and MGAs.

But what the shift towards the increasing placement of risks with local broking operations will do for the marine and energy firms is to provide more choice as those firms build their books of business and with it their influence with underwriters. While the underwriters may not like to admit it this, will also drive greater competition.

Invariably in the insurance market competition acts as a brake on premium increases and the word is that there will be some significant moves in the coming months that will see greater access to London's marine and energy capacity across the globe.



## After the storm

### William Cecil

WHEN the US Court in *Shipping Corporation of India vs Jaldhi Overseas Pte Ltd* recently appeared to put an end to all use of Rule B applications to attach electronic fund transfers cleared through New York, an article in this paper pointed out that arbitrations — in London and elsewhere — had lost a potent edge and that some may cease to be taken seriously at all.

While this is no doubt true, we are probably seeing the end of a short-lived aberration, rather than the end of an era.

It is an age-old maxim that a claim, whatever its merits, is only as good as the claimant's ability to enforce it. A claimant will also normally have to incur the costs of obtaining an award or judgment before it can be enforced. This runs the risk of throwing good money after bad.

This has always had particular relevance in the maritime world, where the main assets — ships, cargos and bunkers — move from jurisdiction to jurisdiction.

That is why obtaining security for a claim before judgment or award is such a useful weapon for a claimant. The 2002 judgment in *Winter Storm Shipping vs TPL* allowing Rule B attachments of electronic fund transfers made this weapon considerably easier to use.

But claimants pursued their maritime claims through the courts and arbitration tribunals long before the *Winter Storm* case. The traditional routes to obtaining security still remain.

The most well-known is ship arrest or, in some jurisdictions, arresting bunkers.

If that is not available, then, as a matter of English law, a claimant may be able to obtain a freezing order from the English Courts, which have the power in certain circumstances to freeze almost any type of asset before a judgment or award has been obtained.

However, even if the claimant is able to locate assets to freeze, such an application is by no means straightforward. The claimant has a strict obligation to provide full and frank disclosure to the court and must persuade the court that he has a good arguable case, that there is a real risk that the assets will be dissipated and that it is in the interests of justice that the court should exercise its discretionary power to make such an order.

The claimant will also have to provide a cross-undertaking — often supported by security — to pay the defendant's losses if it subsequently turns out that the order should not have been made.

The court can also make a freezing order over assets outside the English jurisdiction. However, additional considerations will apply. The court will have to consider the practical effect of making such an order in the jurisdiction in which the assets are located before it decides whether it is still in the interests of justice to make the order.

If the defendant's assets are located outside the English jurisdiction, the claimant should also investigate whether it would be better to apply direct to the local courts for a freezing type order. This will avoid the risk of the local courts refusing to enforce the English Court order.

If the defendant's assets are located in a number of jurisdictions, then a co-ordinated, simultaneous strike in each jurisdiction may be the best tactic.

So while *Shipping Corp of India* will not herald the end of litigation and arbitration, it does represent a significant shift in the balance of power back towards defendants of maritime claims.

Whether you think that it is back to the good old days, or the bad old days, probably depends on whether you are a claimant or a defendant. *William Cecil is a partner at Curtis Davis Garrard LLP.*



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