

Shipping & Transport - Netherlands

Yukos Confirms Dutch Territorial Approach to Bankruptcy

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The fallout from the global economic recession continues to have an adverse effect on the international shipping industry. 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 long term.

When a shipowner is declared bankrupt, it may no longer be possible to arrest or attach its vessels. However, shipping is an international industry and approaches adopted with regard to bankruptcy vary from country to country. A universal approach is adopted in many countries whereby it is not possible to arrest or attach the assets of a company once it has been declared bankrupt, irrespective of where the declaration was issued. A similar result is achieved by the United Nations Commission on International Trade Law Model Law on Insolvency 1997, which applies to cross-border insolvency situations and recognizes foreign bankruptcy proceedings. Signatories include the United Kingdom and Poland.

However, certain countries adopt a territorial approach to bankruptcy. One such country is the Netherlands, which is not a signatory to the model law and which limits the prohibition of attachment of assets to the country in which the bankruptcy is declared. Confirmation of this territorial approach was provided by a recent Dutch Supreme Court decision 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.

The only exception to this rule exists in relation to insolvencies declared in another EU member state on the basis of the EU Insolvency Regulation.

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 that have no realistic expectation of recovery under bankruptcy proceedings.

The Netherlands is widely recognized as a haven for those looking to arrest ships 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. No formal power of attorney and no proof of the claim is required, and the arresting party is not liable for port dues or related expenses. In addition, counter-security is seldom required. There are very few legal hurdles to overcome in order to obtain leave for arrest and there is no obligation for the claimant to pursue its claim in Dutch courts 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 an attractive jurisdiction for creditors in the maritime industry. Several mortgagees are known to have directed vessels to ports in the Amsterdam-Rotterdam-Antwerp range to bring them within the jurisdiction of the Dutch courts. Given the parlous state of the global financial markets, this trend is likely to continue.

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