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Shipping & Transport - Netherlands

Attaching maritime assets in insolvency

Contributed by **AKD**

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In most jurisdictions, under the universal approach to cross-border insolvencies a mortgagee cannot enforce a mortgage without the consent of the administrator. However, the Netherlands is an exception in this regard, and allows a mortgagee to enforce mortgages even if the debtor is insolvent.

Currently, this is of particular significance for the maritime industry given the large number of reported bankruptcies and voluntary liquidations involving shipping companies and the banks. Moreover, the incidence of such proceedings is expected to escalate over the coming months as the economic downturn continues to bite and the banks and other investors look with an increasingly critical eye at the prospect of receiving a return on their investment, albeit a reduced one compared to original expectations.

The attachment of assets can be a complex business in the shipping industry. One possible way forward for financially distressed shipowners was signposted by a 2009 ruling of the US Bankruptcy Court for the District of Nevada in a non-marine case in which Betcorp, a company registered in Australia, was sued for patent infringement by a US-based technology provider. Betcorp applied for voluntary liquidation in Australia and the court granted a stay of all litigation against it in the United States.

There has been a vast increase in the use of bankruptcy protection filings by owners in the absence of agreement by lenders to restructure debt. However, in this respect, US Chapter 11 or similar bankruptcy protection does not enjoy worldwide recognition – certainly not in the Netherlands. Chapter 11 works in many countries where a universal approach to cross-border insolvencies is adopted, including the United States and the United Kingdom. In contrast, the Netherlands adopts a territorial approach to bankruptcy, as typified by the 2009 decision of the Dutch Supreme Court in a dispute involving Russian oil giant Yukos. Yukos had been declared bankrupt in Russia, but the Dutch court ruled that in the absence of an international treaty or other international agreement, foreign bankruptcy did not preclude or limit the possibility to attach and auction assets in the Netherlands (for further details please see "[Yukos confirms Dutch territorial approach to bankruptcy](#)").

This means that banks can still take action against the assets of a debtor in the Netherlands, even if the debtor is in liquidation or subject to similar proceedings. The only exception applies to insolvencies or liquidation in other EU states, but that exception does not prejudice the position of secured creditors. In other words, the liquidation of a debtor does not prevent a bank from enforcing a ship mortgage in the Netherlands, even in the case of an EU insolvency.

Under Dutch law, it is possible to act for banks and to auction vessels in the Netherlands even if insolvency or liquidation proceedings are ongoing in other countries.

In addition to its territorial approach to the law of bankruptcy, the Netherlands is also a jurisdiction in which very few claims enjoy priority over mortgage claims. Moreover, the Netherlands is widely recognised as a haven for those looking to attach ships or to arrange for their swift judicial auction.

While most mortgages are enforced in Rotterdam, a significant number are dealt with in Amsterdam. All ships proceeding to Antwerp have to transit the River Scheldt, where they are also subject to Netherlands jurisdiction. Therefore, a number of mortgagees are known to have taken

active steps in the past to direct vessels to the ports of Amsterdam, Rotterdam or Antwerp in order to bring themselves within the jurisdiction of the Dutch courts.

Although it is expected that increasing numbers of shipowners will turn to Chapter 11 protection in the coming months, in the Netherlands at least, creditors can still pursue the attachment of assets.

For further information on this topic please contact [Haco van der Houven van Oordt](#) at AKD by telephone (+31 88 253 53 92), fax (+31 88 253 54 30) or email (hvanoordt@akd.nl).

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