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Effects of Recent Insolvencies in the Offshore Oil and Gas Industry on the Efficacy of Knock-for-Knock Provisions

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The offshore environment is fraught with risk — dangerous operating conditions, high financial stakes and the potential for catastrophic consequences. Knock-for-Knock indemnity provisions (KK provisions) were formulated on the realization that contractors' balance sheets could not cope with potential liability for catastrophic damage to property or consequential long-term disruption to oil production. Further, such clauses simplify risk allocation and determine and attribute liability. It is not uncommon for different contractors (whether within a working consortium or not) to split tasks, and for responsibilities in the scope of work to overlap. The advantages of KK provisions have led to their development and widespread use, providing a web of indemnities and exclusions to allocate, manage and underwrite risk and liability within a project. However, in recent times, the efficacy of KK provisions in managing, allocating and underwriting risks has been unravelled by a wave of insolvencies and corporate rehabilitations in the oil and gas sector due to persistent low oil prices. This paper examines how these developments could undermine KK provisions with catastrophic consequences for the participants in a project, and explores the need for reform to meet these challenges.

Keywords: Knock-for-Knock; insolvency; SUPPLYTIME; offshore; oil and gas

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1 Introduction

The exploration and development of offshore oil and gas fields is fraught with risk — dangerous operating conditions, high financial stakes and the potential for catastrophic consequences. In July 1988, an explosion and resulting fires destroyed Piper Alpha, an oil production platform in the North Sea, killing 167 people and with a total insured loss of GBP 1.7 billion. This was one of the costliest human catastrophes ever, and remains the worst offshore oil disaster in terms of lives lost and industry impact.[1] Another incident was the April 2010 explosion and fire on the Deepwater Horizon offshore drilling unit owned and operated by Transocean, which was drilling for BP in the Macondo Prospect oil field off the Louisiana coast.[2] BP subsequently agreed to settle all federal and state claims from the disaster for USD 18.7 billion.[3]

A common thread in the ensuing litigation was the focus on the indemnity and exclusion clauses to determine the various participants' liability. These clauses had become commonplace in many contracts for on-field development,[4] from drilling contracts for exploratory wells, to the engineering, procurement, installation and commissioning (EPIC) contracts for the facility, subsea completion, flow lines, umbilical and risers, and vessel charters.[5]

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1 Steven Duff, 'Remembering Piper Alpha disaster' *BBC News* (London, 6 June 2008).

2 Tom Zeller Jr, 'Estimates Suggest Spill Is Biggest in US History' *The New York Times* (New York, 28 May 2010).

3 BP was ordered to settle federal, state and local Deepwater Horizon claims for up to USD 18.7 billion with payments to be spread over 18 years: <https://www.bp.com/en/global/corporate/media/press-releases/bp-to-settle-federal-state-local-deepwater-horizon-claims.html> (accessed 6 January 2018).

4 The KK provisions were described by Lord Bingham in *Caledonia North Sea Ltd v British Telecommunications plc (Piper Alpha)* [2002] SC (HL) 117 [7] as a 'market practice that has developed to take account of the peculiar features of offshore operations'.

5 Found in BIMCO's suite of standard charterparties for offshore work. See eg cl 14 of SUPPLYTIME 2017, cl 23 of TOWHIRE 2008, and cl 25 of TOWCON 2008.

1.1 Features of KK provisions

KK provisions are a series of hybrid indemnity and exclusion clauses.[6] As succinctly described by Williams, KK provisions operate 'both as a shield (exclusion of liability) and as a sword (the right to enforce an indemnity) … channelling claims to a single party [within the group] who is required to take out adequate insurance in place to protect the members' [interests].'[7] Whilst the terms of these clauses in offshore contracts are individually negotiated, most KK provisions contain the following common features:[8]

1. The primary parties, contractors, sub-contractors and their employees constitute a 'group' for risk-allocation purposes;[9]
2. The damage and loss suffered by a member of the primary party's group are borne by that primary party regardless of fault.[10] Group members (including employees, agents and subcontractors)[11] have the same protection as the primary party by virtue of a Himalaya clause;[12]
3. This risk allocation is accompanied by an indemnity provided to the other primary parties and their group members (each indemnitee a 'Indemnity Claimant') against any liability for claims resulting from damage to the first-named primary party's property or personal injury, irrespective of fault (the right to enforce such an indemnity by way of an 'Indemnity Claim'). If, notwithstanding this agreed risk allocation, claims are brought against the other primary party or against another member in the primary

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6 *Farstad Supply A/S v Enviroco Ltd* [2010] UKSC 18 [24]-[29] per Clarke LJ.

7 Richard W Williams, 'Knock for Knock Clauses in Offshore Contracts: the Fundamental Principles' in Baris Soyer and Andrew Tettenborn (eds), *Offshore Contracts and Liabilities* (Routledge 2015) 58.

8 Pat Saraceni and Nicholas Summers, 'Reviewing Knock for Knock Indemnities: Risk Allocation in Maritime and Offshore Oil And Gas Contracts' (2016) 30 ANZ Mar LJ 28, 28-29. Williams (n 7) 53, 56-57.

9 See Fig 1 below and the demarcation between the charterers' and owners' groups.

10 So eg in the scenario in Fig 1 below, damage to Vessel 3 (a member of the Main Contractor's/Charterers' group) will be borne by the Main Contractor regardless of cause.

11 Such as the ship manager and offshore diver in Fig 1 below.

12 For example, see cl 14(d) of SUPPLYTIME 2017, which provides that 'all exceptions, defences, … limitations … , indemnities granted … by the Charterparty or any applicable statute for the benefit of the Owners, shall also apply to and be for the benefit of the Owner's Group, their respective underwriters and the Crew.' This extension also applies to the Charterers' Group and their respective underwriters. See also HEAVYCON 2007, cl 27 (Himalaya Cargo Clause), which is designed to protect 'servants or agents of the Owners', including any independent contractor who will be able to rely on the clause under the Contract Rights of Third Parties Act 1999 (UK).

group in respect of loss, damage or injury, the primary party that has agreed to bear that loss, damage or injury must indemnify the other primary group and any member of its group against any liability incurred as a result of those claims, even if the loss, damage or injury has been caused by the negligence of the primary party or its member;[13]

4. KK provisions traditionally exclude liability arising out of consequential or indirect losses,[14] gross negligence[15] or wilful misconduct;[16] and
5. Primary parties are required to take out insurance coverage[17] to protect against losses and to underwrite their obligation to indemnify other primary parties and their groups.[18]

An example of how this scheme operates in the context of a charter for offshore supply vessel or offshore operating asset is found below.

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13 So eg in the scenario at Fig 1 below, if Contractor 2 commences a claim against for damage done to its vessel (Vessel 3), against Contractor 1, Contractor 1 is entitled to seek an indemnity under the SUPPLYTIME 2017 charterparty against the Main Contractor for an indemnity.

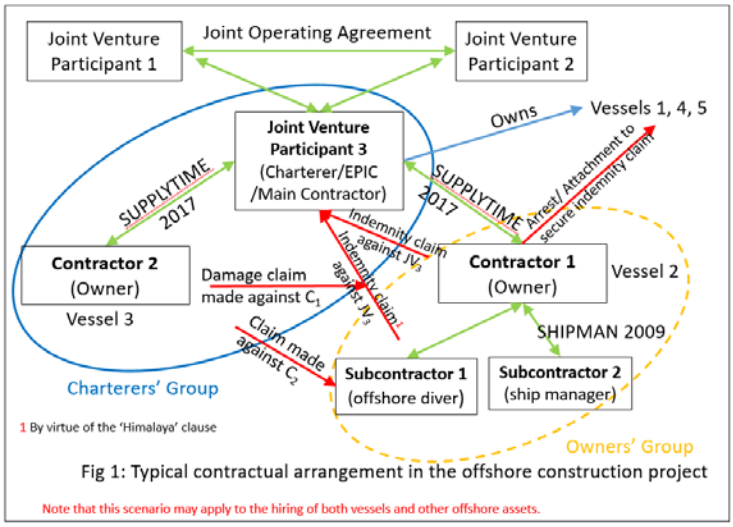
14 Found in TOWCON 2008, cl 25(c) and TOWHIRE 2008, cl 23(c).

15 This is a qualification to the general principle that the KK provisions are intended to apply irrespective of negligence. Unless the contract draws an express distinction between negligence simpliciter and gross negligence (see eg the AIPN Model Well Services Contract 2002), there is an increased risk of dispute, at least under English law, as to whether the conduct giving rise to the damage constitutes gross negligence: see *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* [2007] EWCA Civ 154 [23]; *Armitage v Nurse* [1998] Ch 241, 254 per Millet LJ. For Singapore law, see *Sie Choon Poh (trading as Image Galaxy) v Amara Hotel Properties Pte Ltd (No 2)* [2005] SGHC 127 [6]-[7] per Lai J. For an in-depth discussion on the exclusion of gross negligence inform the scope of KK provisions, see Stuart Beadnall and Simon Moore, *Offshore Construction: Law and Practice* (Informa Law 2016) [11.48]-[11.60].

16 For wilful misconduct, the touchstone is that of the knowledge of the perpetrator. To determine whether the liability is regulated by the KK provisions would require a consideration of the facts available to, and the intention of, the controlling minds of the company, which, unlike the test of negligence, is subjective rather than objective: *Forder v Great Western Railway Company* [1905] 2 KB 532, 535-536. For an in-depth discussion on the exclusion of liability wilful misconduct from the scope of KK provisions, see Beadnall (n 15) [11.43]-[11.47].

17 Such as Construction All Risks (CAR) insurance to underwrite risks of damage to the facility under construction. For an in-depth discussion, see Paul Reed, *Construction All Risks Insurance* (2nd edn, Sweet & Maxwell 2016).

18 These insurers are generally required to waive their rights of subrogation against the other primary parties, their group members and their respective insurers, with a further requirement that each party be named as additional insured in the other party's insurance policy.



1.2 Rationale behind KK provisions

KK provisions were developed in response to the demanding and risky offshore environment. Owing to significant exposures, risk allocation in an offshore project is critical. Poorly-defined risk allocation can rapidly result in inappropriately-managed risk, unprofitable contracts, insolvent companies and injured parties left uncompensated.[19] KK provisions allocate risk, attribute and determine fault in the event of an accident by clearly defining all participants' liability in an offshore construction project.

The burden and incidence of damage and loss (losses lie where they fall) reduces the need for excessive or overlapping insurance,[20] resulting in reduced aggregate insurance premiums for a particular project by channeling claims to one responsible party who is obliged to ensure that adequate insurance is in place to protect the interests of the various parties. The 'channeling' structure of claims 'enables the insurers to provide higher levels of cover'.[21]

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19 Beadnall (n 15) 210.

20 In the absence of KK provisions, each contractor would need to take out (i) insurance coverage over its property and personnel, (ii) insurance against the risk of destruction or damage to the entire facility and the personnel, property working in it, (iii) liability insurance (public liability, industrial all risks) for loss of production or use due to damage to adjacent and existing facilities (such as CAR and Commercial General Liability insurance), and (iv) damage to the facility under construction. Under KK provisions, each contractor would only need to take out insurance for its property and that of its employees.

21 Williams (n 7) 58.

Under KK provisions, lengthy and complex litigation to establish liability on general principles of negligence are no longer necessary, reducing legal costs and the number of claims taken out by the injured party.[22]

Lastly, there is judicial support for, and well-developed jurisprudence interpreting, KK provisions. The ensuing litigation from the Piper Alpha incident continued for some 14 years, until the House of Lords finally upheld their efficacy.[23]

2 Series of insolvencies and corporate rehabilitations compromising the integrity and efficacy of KK provisions

In recent times, however, the integrity of KK provisions and their efficacy in managing and allocating risks have been compromised by the wave of insolvencies and corporate rehabilitations in the offshore oil and gas sector. The intrusion of the applicable insolvency regime has undermined the enforceability of the mutual indemnities in KK provisions. This has been complicated by the following factors:

1. Participation in a project by contractors and clients incorporated in different jurisdictions;
2. Congestion in major offshore fields resulting in contractors, sometimes working on different facilities, operating simultaneously in close proximity; and

[22] Under general tort law principles that would otherwise apply, where an employee of company A is injured as a result of actions by companies A and B, he or she would have to commence negligence proceedings against both A and B to determine their respective liability. Under the KK provisions, he or she would only need to claim against company A.

[23] *Caledonia North Sea Limited v British Telecommunications Plc (The Piper Alpha)* [2002] SC (HL) 117. The House of Lords upheld the contractual indemnities in favour of the operator and gave explicit recognition to the industry practice of mutual offshore indemnities. Their Lordships quoted from various texts (including Terence Daintith and Geoffrey Willoughby, *Manual of United Kingdom Oil and Gas Law* (2nd edn, Sweet & Maxwell 1984) and David Sharpe, *Offshore Oil and Gas Insurance* (Witherby & Co 1994)) and came to the conclusion that there were good reasons for having a regime of mutual indemnity in place and that the parties' intentions on the allocation of liability were clear ([7]-[8] per Lord Bingham and [81]-[82] per Lord Hoffmann).

3. Consolidation and mergers in the offshore marine sector[24] resulting in multinational groups operating across the globe.

Whilst much media scrutiny and academic ink has been spilt on the financial market effects of the industry slow-down, less attention has been paid to the legal and operational effects on KK provisions.

Persistent low oil prices have resulted in the precarious financial health of Offshore Support Vessel (OSV) owners, EPIC contractors and other oil and gas companies, with a consequent series of insolvencies and corporate rehabilitations.[25] The oil majors' reduction in capital and operating expenditures resulting from Organization of the Petroleum Exporting Countries (OPEC) output cuts on contractor's revenue.[26] Further, these oil and gas companies are highly leveraged.[27] The market is unlikely to see any improvement soon.[28]

Whilst poor market conditions have affected all entities across the contracting chain, EPIC contractors (for example the Main Contractor (JV_3 in Fig 1 above)) are particularly affected. The acute frequency of insolvency proceedings involving Main Contractors is primarily due to the payment schedules employed in EPIC contracts. Disbursements of payments by the employer are made upon completion of project milestones[29] whilst the Main Contractor is

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24 For example the purchase by Transocean Ltd of Songa Offshore SE, and Ensco Plc's pending purchase of Atwood Oceanics Inc. See Liz Hampton, 'Offshore drilling mergers raise hopes for sector recovery' (*Reuters*, 16 August 2017) <https://www.reuters.com/article/us-oil-m-a-offshore/offshore-drilling-mergers-raise-hopes-for-sector-recovery-idUSKCN1AW07P> (accessed 28 January 2018).

25 In Singapore, eg, Swissco Holdings Limited and Swiber Holdings Limited are undergoing JM whilst Ezra Holdings has filed for bankruptcy protection under Ch 11 of the United States Bankruptcy Code.

26 OPEC cuts are expected to continue into 2018. See Sam Meredith, 'OPEC and non-OPEC members agree to extend production cuts for nine months; oil prices slump 4%' (*CNBC*, 25 May 2017) <https://www.cnbc.com/2017/05/25/opec-agrees-to-extend-oil-production-cuts-for-nine-months-delegate-tells-reuters.html> (accessed 14 January 2018).

27 There has been a series of bond defaults in 2016 and 2017, with USD 800 million redeemable through 2018. Tan Hwee Hwee, 'Cash up or ship out: it's the big O&M squeeze post-Swiber' *Business Times* (Singapore, 29 August 2016).

28 Tan Hwee Hwee, 'Debt restructuring can be hurdle to O & M recovery 29 December 2016' *Business Times* (Singapore, 29 December 2016).

29 The operator would often withhold disbursements of milestone payments on the basis of delays to the project schedule and defects in construction, and scrutinize or contest requests for disbursements and change orders. Where the operator is a state-owned company or public sector undertaking, the disbursement process, approval of change orders, and resolution of disputes, are often bureaucratic and drawn-out. For example, Swiber-Sime JV has commenced arbitration against Oil and Natural Gas Corp Ltd, a public sector undertaking of the government of India, administered by its Ministry of Petroleum and

required to continue payment of hire and instalments to subcontractors. These cash flow issues have been exacerbated by the recent economic climate.

The financial impecuniosity and ultimate insolvency of the Main Contractor has serious repercussions because it affects the enforceability of the Main Contractor's obligation to indemnify. The mutual obligation to indemnify by the Main Contractor is a vital component as it reinforces the agreed risk allocation (losses lie where they fall). If the obligation is rendered unenforceable or its efficacy compromised, the members within the Main Contractor's group[30] will be exposed to claims by third parties,[31] but left without recourse to the Main Contractor. Under the KK provisions, abridged insurance coverage[32] and waivers of subrogation against other primary parties and their insurers are centred around allocation of responsibility for damage and the Main Contractor's obligation to indemnify its members.[33] These members, which are exposed to claims from members within and without the group, are likely to be under-insured as they would have only taken out insurance on their own property and personnel and relied on the exclusions and mutual indemnities contained in the KK provisions in respect of liability claims.

Natural Gas, over the B-193 project: see Swiber-Sime JV commences arbitration in India over ONGC's B193 project (*Rigzone*, 9 June 2016) <http://www.rigzone.com/news/oil_gas/a/144988/swibersime_jv_commences_arbitration_in_india_over_ongcs_b193_project/> (accessed 14 January 2018).

30 Who previously enjoyed the benefit of its indemnity through a Himalaya clause (cl 14(d), SUPPLYTIME 2017).

31 Including members of the other primary party's group.

32 Taking out insurance only for its property and dispensing with liability insurance.

33 The fact that the primary parties are named as additional insureds and loss payees, and a cross-liability clause (which allows the additional named insured to claim directly under the policy without claiming against the insured and to obtain insurance pay-outs directly from the insurers) has been inserted in the respective insurance policies taken out by the Main Contractor will not assist where KK provisions are rendered unenforceable by the lex fori, or by the lex concursus if the Main Contractor is insolvent. In the former case, insurance will only respond to the liability of the primary insured. In the latter case, insurance coverage would have been withdrawn.

3 Insolvency and security underwriting the contractors' obligation to indemnify

3.1 Insurers and clubs 'withdrawing' cover

The effect of the Main Contractor's insolvency on the integrity of KK provisions is exacerbated by the 'withdrawal' of insurance coverage, leading to an absence of insurance underwriting the mutual indemnities. P&I cover and liability insurance generally respond to the liabilities of the insured or member arising out of KK provisions[34] and up to a very high limit.[35]

Financial impecuniosity of the insured may lead to the withdrawal of cover offered by the Protection and Indemnity (P&I) Clubs. Incorporation of the 'Pay to be Paid' or 'Pay First' clauses into the P&I Club rules[36] means calls would have to be paid before the member can make any claims. The position under liability insurance and hull and machinery insurance

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[34] For example, see s 11 R 2 of the Shipowners Club Rules 2017, which provides that liabilities assumed under KK provisions are subject to club cover. The 2017 versions of the Standard Club Rules and Shipowners Club Rules can be found at <http://www.standard-club.com/news-and-knowledge/publications/club-rules.aspx> and <https://www.shipownersclub.com/publications/club-rules-2017/> respectively.

[35] Each of the International Group clubs (13 clubs including Skuld, Shipowners and Standard) can provide P&I cover to a very high limit, approximately USD 5.5 billion. This high limit is achieved by a claims-sharing mechanism operated by the International Group clubs through the mechanism of the Pooling Agreement 2013 (IGPA). The IGPA provides for mutual reinsurance by the clubs of all claims in excess of USD 10 million per claim between themselves in agreed proportions. As highlighted above, claims of such magnitude are common in offshore work. Under the IGPA, liability under KK provisions is poolable to the extent that the contractual allocation of risk is reciprocal. However, certain offshore specialist operations are excluded from normal cover, and re-instatement of such cover is subject to prior approval of the club (see Standards' Offshore extension clauses 2017 and rule 4 of the Shipowners Club Rules). Offshore specialist operations excluded from normal cover are defined in rule 28.3 of the Shipowners Club Rules (set out below) and r 5.11 of the Standard Club:

> Rule 28 Liabilities Excluded In Respect Of Salvage Vessels, Drilling Vessels, Dredgers And Other Specialist Operations
>
> …
>
> 3. The performance of specialist operations including … dredging, blasting, pile driving, well-stimulation, cable or pipe laying, construction, installation or maintenance work, core sampling, depositing of spoil, professional oil spill response or professional oil spill response training … .

[36] See rule 5, UK P&I Club Rules:

> A Payment first by the Owner
> … [I]t is a condition precedent of an Owner's right to recover from the funds of the Association in respect of any liabilities that he shall first have discharged or paid the same ... .

policies is similar: payment of premiums is a pre-condition to claims under the relevant policies.[37] This will preclude claims by the injured third party under the insurance policy. Under English law, this position is only modified in cases of death or personal injury.[38]

Further, the Club rules typically provide that commencement of insolvency proceedings in respect of the member, even rehabilitation proceedings, automatically terminate the shipowner's cover.[39] Insurance policies also contain clauses that allow one party to terminate or modify the operation of the contract upon the occurrence of an insolvency event (ipso facto clauses). The position on the enforceability of these ipso facto clauses varies across jurisdictions.[40] Such clauses are likely to be enforceable in the UK.[41] Further, the member or the assured would not be able to circumvent choice of law or exclusive jurisdiction clauses in the insurance contracts and have the claim heard in jurisdictions where there are direct action

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37 *Firma C-Trade SA v Newcastle Protection and Indemnity Association (London) Ltd (The Fanti) and Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (The Padre Island)* [1991] 1 AC 1.

38 See Part 5.2.1 below.

39 See, for example, rule 29, UK P&I Club Rules:

> (A) An Owner shall forthwith cease to be insured by the Association in respect of any and all ships entered by him or on his behalf upon the happening of any of the following events:
>
> …
>
> ii. Where a) upon the passing of any resolution for its voluntary winding up …, b) upon an order being made for its compulsory winding up ...

40 Among Common Law jurisdictions, ipso facto clauses are nullified in Barbados, Canada and New Zealand (in limited cases). Among Civil Law jurisdictions, ipso facto clauses are nullified (at least in some cases) in Belgium, Finland, France, Norway, Poland, Portugal, Sweden, and Spain. See *Philip Wood, Principles of International Insolvency* (2nd edn, Sweet & Maxwell 2007) [16-030].

41 Davies has argued (in Martin Davies, 'Cross-border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' CMI <http://www.comitemaritime.org/Uploads/Work In Progress/Cross-Border Insolvency/Cross-border insolvency and admiralty – a middle path (002).pdf> (accessed 23 March 2018) that such clauses are enforceable in the UK, notwithstanding the 'anti-depravation rule', arguing that 'the insurer has the ability to stipulate the terms upon which it will provide cover'. The 'anti-depravation rule' is a common law rule whereby it is contrary to public policy for parties to contract out of the mandatory provisions of the Insolvency Act by removing from the insolvent entity's estate assets otherwise available for distribution pari passu to its creditors. In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 the majority of the UK Supreme Court held that the rule does not automatically invalidate provisions in executory contracts that take effect upon insolvency (see Lord Collins at [102]-[106] and Lord Mance at [177]). In *Re Pan Ocean Co Ltd; Fibria Celulose S/A v Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch), parties accepted that the a clause entitling either party to terminate a long-term contract of affreightment upon the event of the other party's insolvency did not fall foul of the 'anti-deprivation rule'. Morgan J agreed that such clauses were enforceable under English Law (at [11]-[17]).

statutes[42] or where 'Pay to be Paid' clauses are unenforceable.[43] In the US, such clauses are rendered invalid by the Bankruptcy Code, with the result that the insurance cover of insolvent shipowners continues after their petition for bankruptcy, notwithstanding the Club Rules.[44]

3.2 Entitlement to Arrest as security for Indemnity Claim

With the withdrawal of insurance coverage, the Main Contractor's vessels and offshore assets are effectively the only security for the Indemnity Claim. The Indemnity Claimant may be able to obtain security and, in the case of a maritime lienholder, improve on its position hitherto as an unsecured creditor if it is able to frame its Indemnity Claim as an in rem claim and bring it within the subject matter jurisdiction of the admiralty court.[45] However, even so, arrest proceedings to secure Indemnity Claims are only superficially attractive, and any expectation of recovery from judicial sale proceeds is illusory:

1. The range of offshore operating assets against which the Indemnity Claimant may proceed in is limited to assets within the admiralty definition of 'ships';
2. In most jurisdictions, save for some notable exceptions,[46] the Indemnity Claim can only be secured by a statutory right of action in rem rather than a maritime lien, and leave

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42 Legislation granting the injured party the right to sue a defendant's insurer directly and without first suing the insured. For example, art 1478 of the Turkish Insurance Contract Law of 2012 provides that 'the victim may claim its loss up to the insured sum directly from the insurer provided that the claim is brought within the prescription period applicable to the insurance contract'.

43 The English Commercial Court in *Ship-owners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS* [2015] EWHC 258 granted an anti-suit injunction against the charterers who had sued a P&I Club in Turkey. This decision was affirmed by the English Court of Appeal in *Ship-owners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat Ve Ticaret AS* [2016] EWCA Civ 386. The charterers had tried to avoid the 'Pay to be Paid' rule by relying on a right of direct action against insurers under Turkish insurance law.

44 *In re Probulk, Inc* (2009) 407 BR 56, the insolvent vessel owners, who had vessels entered in North of England P&I Association Limited and Steamship P&I Clubs, commenced Ch 7 bankruptcy proceedings. The trustee attempted to make claims against the P&I Club, whose rules contained cesser clauses. The Bankruptcy Court for the Southern District of New York held that the Bankruptcy Code applied to invalidate such clauses despite the fact that the arrangement between club and members was governed by English law: 'Section 541(c) [of the Bankruptcy Code] applies "notwithstanding any provision in ... applicable non-bankruptcy law." Thus, the fact that the provisions of the Clubs' contracts are authorized under UK law or that the contracts are governed by English law is not determinative. s 541 'contains no limitation on "applicable non-bankruptcy law" relating to the source of the law.'

45 With reference to the scenario set out in Fig 1, this would mean an arrest or attachment of a vessel owned by the Main Contractor (ie Vessel 1).

46 See Part 4.1.1 below.

to proceed may not be granted in event of a stay of proceedings being ordered under insolvency law;

3. The priority of the Indemnity Claim over the proceeds of judicial sale of the vessel will (with some notable exceptions) be subordinated to other secured claimants such as mortgagee banks.

Further, it must be noted that a review of case law from Anglo-Common Law jurisdictions does not produce any reported arrests or attachments of offshore vessels for indemnity claims. This is largely due to the widespread adoption of one-ship company structures and special purpose ownership structures in the offshore industry (in part) to prevent attachment or arrest of their assets.[47]

3.2.1 Assets against which in rem proceedings may be sought

The scope of the in rem jurisdiction depends on the state in which proceedings are commenced. The in rem jurisdiction generally extends to vessels as well as certain semi-submersibles and offshore drilling units. The type of assets against which the plaintiff is entitled to proceed is usually defined in the relevant admiralty or merchant shipping legislation.[48] Where oil rigs or offshore units are involved, much may well depend on 'their

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[47] See Fig 3 at Part 4.4 below, which illustrates the typical corporate structure adopted by EPIC contractors. The operating assets are owned by a special purpose vehicle, which is a separate entity from the entity liable in personam (the EPIC Contractor).

[48] In the UK, this is limited to the 'ships … used in navigation': Merchant Shipping Act 1995 (UK), s 313 and Senior Courts Act 1981 (UK), s 24. English courts have adopted an expensive interpretation of the term 'ship', which has been extended in *Addison* v *Denholm Ship Management* [1997] ICR 770 to include certain semi-submersibles floating platforms used in the offshore industry, such as a 'flotel'. A 'flotel' is a complex semi-submersible barge to accommodate workers for the oil and gas installations, which may be capable of proceeding under its own power or towed and is staffed with a maritime crew for navigational purposes. In *Perks v Clark (Inspector of Taxes)* [2001] EWCA Civ 1228, the English Court of Appeal observed that oil rigs would be considered 'ships' but not jack-up rigs. Longmore LJ said at [59]: '… Drilling ships and drilling barges must be ships. Semi-submersible oil rigs in which drilling operations are carried out while the rig is in a floating condition, submersible oil rigs in which drilling is carried out when the rig is resting on the sea bed, and jack-up drilling rigs which, when drilling, have legs resting on the sea bed (and are thus not subject to the heaving motion of the sea, in the same way as semi-submersible oil rigs and drilling ships) are all different forms of structure; it could be said that since the jack-up rigs cannot perform their main function without their legs being on the sea bed, they should be singled out and should not be regarded as ships. It would, however, be unsatisfactory if some forms of oil rigs were ships and others were not.'
In Singapore, the list of assets is arguably broader. The High Court (Admiralty Jurisdiction) Act (Sing), s2 defines a ship to include 'any description of vessel used in navigation'. It can be argued the Merchant

intended function, the degree of attachment to the sea-bed and the ability, extent and frequency of any movement.'[49]

3.2.2 Subject matter jurisdiction: Any claim arising out of any agreement relating to the use or hire of a ship

The Indemnity Claimant may obtain security for its claims by arguing that they fall within the head of admiralty jurisdiction – 'any claim arising out of any agreement relating to the use or hire of a vessel.'[50]

Under English and Singapore law, these claims only give rise to the claimant's right to invoke admiralty jurisdiction by means of a statutory action in rem and do not attract a maritime lien. In contrast, claims for breach of a charterparty are recognized as giving rise to a maritime lien

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Shipping Act (Sing), s 2(1) expands this definition – 'ship' includes 'any kind of vessel used in navigation by water, however propelled or moved and includes … (c) an off-shore industry mobile unit': see Toh Kian Sing, *Admiralty Law and Practice* (3rd edn, LexisNexis 2017) 39. Attention should be paid to the definition of the type of offshore industry mobile units as spelt out in the Merchant Shipping (Amendment) Act 2004, s 2, as follows:

> (a) a vessel that is used … in exploring or exploiting the natural resources of the subsoil of any seabed, or in any operation or activity associated with or incidental thereto, by drilling the seabed or its subsoil, or by obtaining substantial quantities of material from the seabed or its subsoil … ; and
> (b) a barge … fitted with living quarters … and used … in connection with the construction, maintenance or repair of any fixed structure used or intended for use in exploring or exploiting the natural resources of the subsoil of any seabed...

In Australia, the definition of ships similarly includes oil rigs: s 3(1), Admiralty Act 1988 (Aus). In the US, 'the terms 'ships' and 'vessels' are used in a very broad sense to include all navigable structures intended for transportation' (*Cope v Vallete Dry Dock Company* (1887) 119 US 625 (US Supreme Court); *Stewart v Dutra Construction Co* 543 US 481 (US Supreme Court 2005)).

[49] Toh (n 48) 39. For an in-depth discussion of the subject-matter jurisdiction of the admiralty court, see Nigel Meeson and John A Kimbell, *Admiralty Jurisdiction and Practice* (5th edn, Informa Law 2017) ch 2.

[50] High Court (Admiralty Jurisdiction) Act (Sing), s3(1)(h); Senior Courts Act 1981 (UK), s20(2)(d); Arrest Convention 1952, art 1(1)(d). Another head of subject matter jurisdiction which the Indemnity Claimant may proceed under is 'damage received by a vessel': High Court (Admiralty Jurisdiction) Act (Sing), s3(1)(e). An indemnity claim by Contractor 1 against the Main Contractor may be secured by an arrest of Vessel 1, since the jurisdictional facts would fall within the aforesaid limb. Any claims arising in respect of this limb relates to the case where the damage is received by a chartered vessel (Vessel 3) and an action in rem is commenced against that ship (Vessel 3) or another ship (Vessel 1) which at the time the action is commenced, is beneficially owned by the person who was the charterer of the damaged ship at the time the action arose and would be the party liable in action in personam. However, it is unlikely such an action may be proceeded with under the equivalent limb in the UK and Malaysian statutes: see the Senior Courts Act 1981 (UK), s20(2)(d)). Section 20(2)(d) is omitted from the list in sections 21(2)-(4) which prescribes the modes by which the in rem jurisdiction may be invoked.

under US maritime law.[51] Such claims may be secured by an arrest of the defendant's vessel or property under Rule B and C attachment procedures.[52]

The claim in which security is sought is one arising out of the breach of the charterers' obligation under KK provisions[53] to indemnify the claimant. An arrest could be effected under article 1(1)(d) of the Arrest Convention 1952 or its functional equivalent in the enacting domestic statute.

A claim to enforce the obligation to indemnify under KK provisions is construed as an action to enforce an obligation to compensate and thus recovery of a debt[54] rather than a claim for damages for breach of contract.[55] This makes it no different from a claim for outstanding hire or expense under the charterparty or contract of hire, the archetypal claim falling within this head of jurisdiction.

4 Insolvency proceedings and corporate rehabilitations an impediment to obtaining security

Insolvency proceedings pose an impediment against arrest proceedings, where:

1. there are concurrent insolvency proceedings in the jurisdiction where arrest proceedings against the vessel are commenced; and

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51 *The Director* 27 F 708 (1886); *The Bird of Paradise,* 76 US 454 (1866); *Kopac International Company, M/V Bold Venture,* 638 F Supp 87, 1987 AMC 182 (WD Wa 1986). In *Bank One Louisiana NA v M/V Mr. Dean,* 293 F 3d 830, 2002 AMC 1617 (5th Cir 2002), the court ruled that the charter lien attaches once the vessel was delivered to the charterer: 'A maritime lien for breach of a charter thus attaches when the owner places the vessel at the charterer's disposal and remains inchoate until perfected by a breach or discharged by the undisturbed end of the charter.' (293 F 3d 838).

52 Rule B and Rule C of the Federal Rules of Civil Procedure's Supplemental Rules for Certain Admiralty and Maritime Claims.

53 For example under cl 14(a)(ii) of SUPPLYTIME.

54 *The Piper Alpha* (n 23) [95]-[97] per Lord Hoffmann.

55 This is in contrast to the indemnity under English insurance contract law. The insurer's obligation is not to compensate the insured for its loss but to prevent the loss from occurring: see *The Fanti and The Padre Island* (n 37) 35-36. Once the loss is suffered, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss. The remedy under the indemnity will be a claim in damages for breach of contract. The advantages of a claim for a recovery of debt as against damages for breach of a contract are two-fold:
   (i) In the former, the plaintiff only needs to establish that the event triggering the obligation to pay the sum sought has occurred. In the latter, the plaintiff needs to establish that both a breach of contract has occurred and that the damages being claimed have been suffered;
   (ii) The latter is subject to the rules of mitigation and remoteness but not the former.

2. an application is taken out in the jurisdiction of arrest by the liquidator or company representative to recognize foreign insolvency proceedings.

This tension between maritime claimants and the general body of creditors arises because the action in rem allows an hitherto unsecured creditor (in the case of a claim secured by a statutory right of action in rem) to make use of a procedure outside the liquidation process after the latter is commenced. This is contrary to the statutory object of the insolvency regime, which is to ensure that all unsecured creditors share pari passu in the company's unencumbered assets. The issue here is under which circumstances the action in rem should be allowed to commence or, if commenced already, to continue, notwithstanding the supervening winding-up process.

4.1 Arrest proceedings and insolvency proceedings in the same forum

Whether an arrest can proceed in the light of supervening insolvency depends on the nature of the claim for which security is being sought and when the statutory right of action in rem arises (ie the issuance of the writ). An arrest of a ship after commencement of winding-up would be 'sequestration … put in force'[56] after the latter event and void.[57] Further proceedings in an action in rem may be stayed or restrained on application by a creditor,[58] unless leave of court is obtained.

[56] *The Constellation* [1966] 1 WLR 272; *In re Australian Direct Steam Navigation Company* (1875) LR 20 Eq 325.

[57] Companies Act (Sing), s 260.

[58] Ibid, s 258.

4.1.1 Maritime and statutory lienholders as secured creditors entitled to proceed against the Main Contractor's assets

In Singapore[59] and the UK, leave to proceed would usually be granted to a secured creditor since it could enforce its security against the unencumbered property independent of the liquidation process.[60]

When the writ in rem is issued before winding-up commencement, a statutory right of action in rem accrues in the Indemnity Claimant's favour, by which it becomes entitled to arrest the ship and subsequently to a judicial sale and satisfaction of claim from the proceeds if the court adjudicates in its favour. The Indemnity Claimant's right bears some similarities with that of secured creditors and it is considered a secured creditor under the applicable insolvency regime entitled to a favourable exercise of judicial discretion.[61] Where the writ is issued after winding up, the Indemnity Claimant could not be said to be a secured creditor immediately before winding-up commences and is therefore not be entitled to leave to proceed with its action.[62]

Under US law, the maritime lien attaches simultaneously with the cause of action and adheres to the maritime property until it has either been enforced through an in rem proceeding in admiralty or discharged or extinguished. Where the maritime lien accrues before commencement of winding-up, the lienholder is a secured creditor even if the writ in rem has not been issued.[63] Leave would automatically be granted to the maritime lienholder to enforce its security notwithstanding the winding-up order.

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59 Ibid, under s 262(3).

60 In Australia, there is no need to apply to the court for leave to enforce the secured claim arising under its maritime lien. In *Yu v STX Pan Ocean Company Ltd* [2013] FCA 680 [41] Buchanan J observed that, because a maritime lienholder is a secured creditor, an action in rem to enforce a maritime lien would fall within and be protected by s 471C of the Australian Corporations Act (which provides that '[n]othing in sections 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security interest'), and there was therefore no need to apply to the court for leave under s 471B.

61 *Lim Bock Lai v Selco (Singapore) Pte Ltd* [1987] SLR (R) 466; *In re Aro Co Ltd* [1980] Ch 196.

62 *The Hull 308* [1991] 2 SLR(R) 643. The Singapore Court of Appeal, relying on *In re Aro* (ibid), reiterated at [10] that the proper test for determining whether the plaintiffs in any given case are secured creditors is to ask whether, immediately before the presentation of the winding-up petition, they could assert against all the world that the vessel was security for their claim.

63 *In re Aro* (n 61) 205.

4.1.2 Insolvency an impediment to arrest

The Indemnity Claimant must establish that beneficial ownership of the target vessel is vested in the person liable in personam at the time when the proceedings are commenced to secure claims that only give rise to a statutory right of action in rem.[64] However, there is case authority in certain jurisdictions to the effect that the winding-up order divests the company of 'beneficial ownership' in its assets[65] (the insolvency divestment rule). This poses a significant impediment to arrest by the Indemnity Claimant in these jurisdictions when the owner is insolvent.

In the UK, the insolvency divestment rule remains entrenched.[66] Under Australian case law, there is uncertainty whether the rule still applies in the admiralty context. There are two conflicting case authorities in Australia.[67] The Hong Kong and Singapore Courts have firmly rejected the application of the insolvency divestment rule.[68]

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64 Section 4(4) of the High Court Admiralty Jurisdiction Act (Sing) and s 21(4) of the Senior Courts Act 1981 (UK).

65 *Ayerst v C & K (Construction) Ltd* [1976] AC 167.

66 In *Ayerst* (ibid), Lord Diplock referred to *In re Oriental Inland Steam Co* (1874) 9 Ch App 557 which established the rule: 'The authority of this case for the proposition that the property of the company ceases upon the winding up to belong beneficially to the company has now stood unchallenged for a hundred years.'

67 *In re Lineas Navieras Bolivianas SAM* [1995] BCC 666, the Australian Admiralty Court applied this proposition in the admiralty context. The Admiralty Court held that leave was not required by creditors (whose claims were secured by a statutory lien) to continue with their *in rem* proceedings against a vessel under arrest after the presentation of the winding up petition against the vessel owners and order for appraisement and sale of the vessel was granted. Arden J held that 'the effect of the order for sale … on the assets of the company must have been to convert the company's interest in the ship into a right to receive the balance of the proceeds of sale remaining after satisfaction of the prior claimants. As a result of conversion [sic], the present applicants do not in fact require leave … because they are not proceeding against either the company or the company's property' (at 676D). However, the majority of the High Court of Australia in *Commissioner of Taxation v Linter Textiles Australia Ltd (in liquidation)* [2005] HCA 20, interpreting the Income Tax Assessment Act 1936 (Aus), declined to apply the insolvency divestment rule.

68 See *International Transportation Service Inc v The Convenience Container* [2006] 902 HKCU 1. In that case, the owners of the vessel arrested to secure outstanding stevedoring fees sought to have the arrests set aside on grounds that the 'ownership' nexus required by s 12B(4)(i) of the High Court Ordinance (HK) was not satisfied. When the writs in rem were issued, the owner was already wound up in Singapore, and thus (applying *Ayerst*) the beneficial owner of the vessels a different person to their owner at the time when the causes of action arose. This submission was rejected by the Waung J who held that there was no trust that a court of equity could recognize and that power or control of assets has no direct bearing on their ownership. The Singapore High Court in *Low Gim Har v Low Gim Siah* [1992] 2 SLR 593 affirmed 'the general rule that in a winding-up of a company, the company retains the legal ownership (and no differentiation needs to be made with respect to its equitable ownership) of all its assets … '.

The Indemnity Claimant is effectively precluded from proceeding against the assets of the Main Contractor in certain jurisdictions such as the UK. Further, Derrington has argued that the unbridled application of the insolvency divestment rule may lead to an abuse of process.[69]

4.1.3 Corporate rehabilitation

Apart from outright insolvency, supervening corporate rehabilitation undermines the agreed risk allocation under KK provisions by imposing a stay on enforcement proceedings for the duration of the corporate rehabilitation or until its stated aims have been achieved. Corporate rehabilitative schemes such as Chapter 11 bankruptcy[70] and judicial management (JM)[71] are increasingly popular with impecunious offshore marine contractors. The Indemnity Claimant will not be able to proceed against the Main Contractor to enforce the contractual indemnities or seek security for its claims (at least during the duration of the mandatory stays unless leave is granted). Further, there is a significant chance that the company may not succeed in its rehabilitation,[72] leading to an outcome for the claimant no different from that in liquidation.

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69 Sarah C Derrington, 'The Interaction between Admiralty and Insolvency Law' (2009) 23(1) ANZ Mar LJ 30. A claimant whose claim is secured by a maritime lien (such as a mortgagee) may proceed to wind up the owner of the vessel, with the disingenuous purpose of ensuring, in effect, that its claim would be accorded a higher priority than other potential statutory claimants in rem. Further, the threshold for commencing insolvency proceedings is relatively low in the UK. A company is deemed 'unable to pay its debts' where the company 'has not paid … a claim for a sum due to a creditor exceeding £750 within three weeks of having been served with a written demand in the statutory form': s 123, Insolvency Act 1986 (UK).

70 11 USC §§ 1101-1174. Chapter 11 provides for corporate reorganization in which the debtor proposes a plan of reorganization to continue with its business and pay creditors over time. Chapter 11 protection is also available to foreign companies. The Bankruptcy Code permits a Ch 11 filing by a corporation 'that … has … property in the United States … '. (11 USC § 109(b)). The US Courts have considered this requirement satisfied by a minimal amount of property located in the United States owned by the foreign corporations. For example, *In re Global Ocean Carriers Ltd* 251 BR 31 (2000), a shipping company domiciled in Greece filed Ch 11 petitions before the Bankruptcy Court of the District of Delaware. In that case, the court held that the presence of sums in a US bank account and the unearned portions of retainers provided to local US counsel constituted sufficient property to meet the statutory requirements. In the offshore oil and gas sector, troubled operators, such as Paragon Offshore Ltd, GulfMark Offshore Inc, and Ezra Holdings, have sought Ch 11 protection although based in Singapore.

71 Swissco Holdings Ltd and Swiber Holdings Limited.

72 According to the 2013 Report of the Insolvency Law Review Committee (Sing), a review of 135 JM cases between 1996 and 2010 revealed that only 52 cases (or 38.5%) were 'successful' (at 82-83). A 'successful' JM was defined broadly by the Committee ie one when 'all the debts of the company were paid and management was returned to the board of directors, and/or those which fulfilled the purposes of the JM order (the survival of the company or the whole or part of its undertaking as a going concern and to carry out a more advantageous realisation of the company's assets than on a winding up)'. This broad definition includes companies, which ultimately underwent liquidation after what was likely a more advantageous

4.1.3.1 Statutory moratoriums and protection afforded to companies

A key feature of corporate rehabilitation regimes internationally is the existence of a moratorium against any claims and enforcement action. This is designed to give the company breathing space to restructure.

4.1.3.2 Scheme of Arrangements, JM (Singapore) or Administration (UK)[73]

During the duration of the corporate rehabilitation, there are two moratoriums that come into effect. On the making of an application, an interim moratorium comes into effect automatically.[74] Its purpose is to preserve the company's assets in this critical period, until the application is finally disposed of. The moratorium stays, amongst other things, the following proceedings, and leave of court is required to commence or continue with them:[75]

1. Enforcement of any security over the company's property; and
2. Proceedings and execution or other legal process levied against the company's property.

The scope of the moratorium granted after the successful application is similar to that of the interim moratorium, albeit with a longer period.[76] These moratoriums do not affect the substantive rights of the security holder to enforce its security; they simply stay the enforcement of its rights. The Indemnity Claimant would thus be left without recourse at least for the duration of the rehabilitative proceedings unless leave is granted to proceed with the admiralty proceedings. Hence, if the court refuses to grant leave it is imperative that the

realisation of their assets. The English experience with their administration regime was similarly disappointing. There was empirical and anecdotal evidence that administration was 'often employed merely as a convenient means to a delayed … liquidation of a business where immediate liquidation was either impractical or commercially inexpedient': Ian Fletcher, *The Law of Insolvency* (4th edn, Sweet & Maxwell 2009) 515.

73 Schedule B1, Insolvency Act 1986 (UK).

74 Companies Act (Sing), s 227C.

75 This interim moratorium is similar to that under the Insolvency Act 1986, except that under the latter, a dominant creditor can still appoint an administrative receiver in the interim period.

76 Companies Act (Sing), s 227B(8) provides that the JM order shall remain in force for 180 days from the date of the making of the order but the court may increase this period subject to such terms as the Court may impose.

Indemnity Claimant obtains an order prohibiting the vessel from leaving its territorial jurisdiction and potentially defeating the Indemnity Claimant's attempts at obtaining security. In Singapore, the moratoriums also stay arrest and other admiralty proceedings, including the judicial sale of the vessel under arrest, even by a maritime lienholder. Any application for a warrant of arrest and service on the vessel would constitute 'legal process against [the] property of the company'[77] and is certainly not a self-help remedy without the need for judicial assistance.[78]

4.1.3.3 Chapter 11 Bankruptcy

The automatic stay provides a period of time in which all judgments, collection activities, foreclosures, and repossessions of property are suspended and may not be pursued by the creditors on any debt or claim that arose before the filing of the bankruptcy petition. This stay automatically goes into effect when the bankruptcy petition is filed.[79]

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77 Within the meaning of ss 211B(1)(d), 227C(c) and 227D(4)(d) of the Companies Act (Sing) and para 43(6) of Sch B1 to the Insolvency Act 1986 (c 45)(UK). In *Re Olympia & York Canary Wharf Ltd* [1994] 2 EGLR 48, where the English Court of Appeal held that 'legal process' means a process which requires the assistance of the court. It does not extend to the service of a contractual notice, whether or not the service of such a notice is a pre-condition to the bringing of legal proceedings.

78 Another instructive way to assess the scope of the moratorium is to examine the extent to which it prohibits a creditor from exercising a self-help remedy against the company. It seems that generally self-help remedies are not prohibited. In *Electro Magnetic (S) Ltd v Development Bank of Singapore Ltd* [1994] 1 SLR 734, the Singapore Court of Appeal held that a contractual right of set-off was a self-help remedy and thus outside the provision. It referred, with approval, to Sir Roy Goode's argument that the prohibition does not cover self-help remedies (apart from distress) not involving the aid of the court. However, Belinda Ang J, speaking extra-judicially at the Maritime Law Conference 2017 on 12 October 2017 'Waking Up from the Shipowners' Nightmare!' <https://www.supremecourt.gov.sg/Data/Editor/Documents/Speech%20at%20Maritime%20Law%20Conference%202017%20.pdf> (accessed 18 March 2018), has argued that the moratoriums under JM and SOA do not apply to admiralty proceedings. Sections 211B(1)(c) (SOA), 227C(c) and 227D(4)(c) (JM) of the Companies Act (Sing) refer to 'the commencement or continuation of any proceedings … against the company'. In rem proceedings are against the vessel, the company's asset rather than the company itself. Further, she argued that admiralty proceedings do not fall within the phrase 'legal process' read eiusdem generis (together with the terms 'execution' and 'distress'). It should refer instead to similar legal processes like garnishee proceedings ie an execution proceeding to enforce, against the defendant's assets, a monetary judgment in personam. In contrast, a judgment in rem is against the res and such a judgment can be enforced against the res by a remedy in rem.

79 11 USC § 362(a).

4.1.3.4 Super Priority Financing

The debt-restructuring regime in many jurisdictions usually includes some form of mechanism whereby elevated priority or additional collateral is granted to creditors to encourage the injection of fresh funds to rescue the troubled debtor. The extension of rescue financing on the basis of it being accorded 'super priority' status is a recurring feature in the restructuring of beleaguered oil and gas players.[80]

In the US, the Bankruptcy Code encourages lenders to extend credit to Chapter 11 debtors by authorizing the debtor to grant liens over its property senior to existing liens. In addition, to the extent of any deficiency in the collateral value securing the debtor-in-possession (DIP) loan, the DIP lender is generally granted a super-priority claim, ranking ahead of general pre-petition and post-petition unsecured debt. Prior court approval is required and it must be shown that: (i) the applicant is unable to obtain such credit otherwise; and (ii) there is adequate protection of the interest of existing creditors.[81]

In Singapore, the latest amendments to the Companies Act provide for new rescue financing provisions,[82] which allow the court to grant the new financing[83] provided to assist in restructuring of the company (undergoing a scheme of arrangement (SOA)[84] or JM)[85] a security interest subordinate, equal or prior to existing security.

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80 Recent examples include the USD 60 million rescue funding for Marco Polo Marine. See <http://www.businesstimes.com.sg/companies-markets/nine-white-knights-pool-together-s60m-in-rescue-financing-for-marco-polo-marine> (accessed 20 January 2018).

81 11 USC § 362 – 364.

82 New s 211E, Companies Act (Sing) for schemes of arrangement and s 227HA, Companies Act (Sing) for JM.

83 To qualify as rescue financing, the financing 'must be necessary for the survival of the company as a going concern', and/or 'necessary to achieve a more advantageous realisation of the assets of a company than on winding up': Companies Act (Sing), s 211E(9).

84 Ibid, s 211(E)(1).

85 Ibid, s 227HA.

4.2 Cross-Border Insolvency

Arrest proceedings in one jurisdiction may be hampered by insolvency proceedings commenced in respect of the Main Contractor in others. This intrusion of the cross-border insolvency regime on arrest proceedings in multiple jurisdictions are important considerations, given the liberalization of the offshore oil and gas sector in many jurisdictions and participation by multinational vessel operators.[86] The arrest of an offshore vessel for a prior claim arising out of an incident in another jurisdiction is a distinct possibility given their operational frequency — many of these offshore vessels and assets are deployed all over the globe to take advantage of the varying working periods and monsoons.[87] This is complicated in the case of insolvency of a multinational operator and the possibility of proceedings taken out in various jurisdictions to recognise insolvency orders already granted in the COMI.[88]

4.2.1 UNCITRAL Model law

An examination of cross-border insolvency issues afflicting the offshore sector cannot be complete without referring to the UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law). The Model Law aims to provide a transparent, globally-accepted legislative framework for (i) access to local courts for foreign insolvency representatives, (ii) recognition of certain orders issued by foreign courts, (iii) relief to assist foreign insolvency proceedings, and (iv) co-operation among the courts of jurisdictions where the debtor's assets are

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86 Such as in Brazil and Mexico. In the late 1990s, 95% of OSV chartering activities in Brazil were undertaken by Petróleo Brasileiro SA (the national petroleum company). However, since the discovery and development in the basins of Campos (Rio de Janeiro) and Santos (Sao Paulo), many international offshore supply vessel operators have chosen to register their Vessels under the Brazilian flag to be able to tender for charters. For an overview of the oil and gas industry in Brazil, see Lorena Valente, 'Brazil's oil industry is back in business', Global Risks Insight, 22 November 2017, < https://globalriskinsights.com/2017/11/pre-salt-auction-brazil-back/> (accessed 25 March 2018).

87 Offshore vessels have limited range and do not traverse long distances like conventional liners; they are confined to operations within the territorial waters of a particular jurisdiction during a specific project. They are then transported to their subsequent operational area via heavy-lift vessels.

88 See eg in the context of rehabilitation proceedings commenced by Hanjin Shipping Co Ltd in Korea and subsequent recognition proceedings commenced by its foreign representative in relevant fora to obtain provisional relief in the nature of a general stay preventing the commencement or continuation of arrest proceedings. Recognition proceedings have been taken out in Singapore (in the case of *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195) and in Australia (in the case of *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404).

located.[89] To date, legislation based on the Model Law has been adopted by 45 jurisdictions,[90] notably the UK, Singapore[91] and Australia.[92] Jurisprudence prior to the adoption of the Model Law in respect of recognition of foreign winding up proceedings and their effects[93] has now been superseded by the harmonised system under the Model Law.

Under the Model Law, a foreign representative[94] can apply to a designated court in a state[95] for recognition of foreign insolvency proceedings. The Model Law distinguishes between recognition of foreign insolvency proceedings as either a main proceeding[96] or a non-main proceeding,[97] with each engendering different reliefs and consequences. The automatic consequences of a foreign insolvency being recognised as a main proceeding includes: (i) stays of actions or enforcement proceedings by creditors against the debtor or its assets; and (ii) a suspension of the debtor's right to transfer or encumber its assets.[98] Other states in which the debtor has assets are expected to recognise and support the main proceedings.[99] When foreign insolvency proceedings are recognised as non-main proceedings, separate

89 See text at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html> (accessed 20 January 2018).

90 See status at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> (accessed 20 January 2018).

91 The Model Law came into effect in Singapore on 23 May 2017 through s 41 of the Companies (Amendment) Act 2017 (No 15 of 2017)).

92 Through the Cross-Border Insolvency Act 2008 (Aus).

93 See the 'modified universalism' espoused in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852; *Singularis Holdings Limited v Pricewaterhouse Coopers* [2015] AC 1675; *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2014] 2 SLR 815. However, such jurisprudence will continue to be relevant in the context where the foreign representative has yet to commence recognition proceedings. For an exposition of pre-Model Law case law see Jesse Zhihe Ji, 'Cross-Border Rehabilitation: An Impediment to Ship Arrest in Singapore?' CML Working Paper Series, No 17/01, March 2017, <http://law.nus.edu.sg/cml/wps.html>.

94 A 'foreign representative' is defined in art 2(d) as 'a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding'.

95 Article 9. In Singapore, the designated court is the Singapore High Court.

96 A main proceeding is one taking place where the debtor had its centre of main interests (COMI) (art 2(b), Model Law). There is a rebuttable presumption that the COMI is the registered office or habitual residence of the debtor: art 16(3), Model Law. For more on the determining of the COMI of shipping groups see Lia Athanassiou, *Maritime Cross-Border Insolvency* (Informa Law 2017) 151-162.

97 A non-main proceeding is one taking place where the debtor has 'any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services' (Model Law, arts 2(c), 2(f)).

98 Article 19 set outs the relief that may be granted upon application for recognition of a foreign proceeding whilst Article sets out the effects of recognition of a foreign main proceeding.

99 Articles 25, 26, 27 and 30.

applications must be made to court for appropriate relief,[100] which would only be granted if the court is satisfied that the creditors' interests are adequately protected.[101]

4.2.2 Interaction between arrest/attachment proceedings and foreign insolvency proceedings

The interaction between Model Law and in rem proceedings is left up to the legislature of the respective enacting states, foregoing any uniform international solution to the issue. Article 20(2)[102] modifies the effect of the mandatory stay under art 20(1) by limiting its effect with reference to any exceptions or limitations that may exist under the law of the enacting country, such as local laws allowing the continuation of pre-existing claims by secured creditors.[103]

4.2.3 Treatment in various jurisdictions of ensuing arrest/ attachment proceedings after commencement of foreign insolvency proceedings

Given the current state of the industry, the Indemnity Claimants would do well to proceed expeditiously to obtain security for their claims in light of the defendant's impending insolvency.[104] The diverging treatment of maritime claims amongst the major offshore jurisdictions would mean that the Indemnity Claimant would have to consider carefully its options and strategy in obtaining security.

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100 Article 21.

101 Article 22.

102 Article 20(2) provides that '[t]he scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article are subject to [refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article]'.

103 *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (UNCITRAL Secretariat 2014) [183].

104 Prior to the recognition proceedings, whether the in rem proceedings will be allowed to proceed in spite of foreign insolvency proceedings taken out against the Main Contractor is left to the lex fori and the treatment in its existing jurisprudence. See n 93 above. However, at least in Singapore, the arresting party is expected to bring such insolvency proceedings to the attention of the assistant registrar hearing this application to discharge his duty of 'full and frank disclosure': *The Vasiliy Golovnin* [2008] SGCA 39 [83]-[84]; *The Bunga Melati 5* [2012] SGCA 46 [113]-[119].

The effects of supervening foreign insolvency proceedings on the arrest proceedings depend on the law of the jurisdiction where the arrest proceedings are commenced. After an order recognizing the foreign main proceeding has been made, the claimant will not be able to proceed against the vessel, unless (i) the forum provides that the art 20(1) mandatory stay is modified in respect of secured claims and (ii) the Indemnity Claim is regarded by the forum as a secured claim under insolvency law.[105]

The UK provides that a pre-existing admiralty claimant is not subject to the art 20(1) stay where the arrest proceedings have culminated in a judicial sale before the insolvency proceedings have commenced.[106] However, if the admiralty proceedings have not culminated in the judicial sale when insolvency proceedings are commenced, the claimant cannot continue to its proceedings in rem but must rather participate in the insolvency proceedings. In Singapore, the recognition of the foreign main proceedings under the Model Law should not have an impact on a secured in rem claim.[107]

In contrast, some countries, such as Japan,[108] provide no 'safe harbour' for pre-existing claims by secured creditors, but force all of them to participate in the subsequently-declared insolvency. Similarly, the US Bankruptcy Code preserves the effect of the mandatory stay upon recognition of a foreign main proceeding by applying a mandatory stay to (inter alia) 'any act to create, perfect, or enforce against property of the debtor any lien to the extent

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105 For more on the interaction between insolvency and arrest proceedings in the various jurisdiction see Davies (n 41).

106 Sub-paragraph 20(3)(a) of the Cross-Border Insolvency Regulations 2006 (UK) provides that the art 20(1) stay does not affect any right 'to take any steps to enforce security over the debtor's property' if that right would have been exercisable against the debtor company if it had been the subject of a winding-up order under the Insolvency Act 1986 (UK). Section 183(1) of the Insolvency Act 1986 provides that where a creditor has issued execution against the goods of a company and that company is subsequently wound up, the claimant cannot retain the benefit of the execution unless it has been 'completed' before commencement of the winding up, which means (under s 183(3)(a)) 'completed by seizure and sale'.

107 Article 2(3) of the Model Law as enacted by Singapore pursuant to s 50 of the Companies (Amendment) Act 2017 (No 15 of 2017): 'Without prejudice to paragraph 2 of this Article, the stay and suspension mentioned in paragraph 1 of this Article do not affect any right … (a) to take any steps to enforce security over the debtor's property…' There is 'no change in the law with respect to maritime claims in liquidation and JM situations'. See Indranee Rajah, 'Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond' <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Note%20on%20Debt%20Restructuring.pdf> (accessed 18 March 2018).

108 Act of Recognition of and Assistance for Foreign Insolvency Proceedings (No 129 of 2000), arts 27-29.

that such lien secures a claim that arose before the commencement of [the insolvency proceedings].' [109]

Australia took an intermediate position, where pre-existing secured claims are not exempt from the mandatory art 20(1) stay[110] if the insolvent debtor is in administration,[111] but are allowed to continue if the insolvent company is in liquidation.[112] The Federal Court of Australia has dealt with a raft of applications for recognition of foreign insolvency orders and rehabilitation proceedings[113] involving several South Korean container lines, such as Hanjin Shipping. The court's practice is to qualify the stay order by requiring any arrest application to be made to specialist admiralty judges[114] who would assess whether to issue an arrest warrant or for the plaintiff to prove in the foreign main proceeding. It has been held that a claim that is enforceable by an action in rem[115] or is secured by a maritime lien[116], is enforceable and not affected by any stay,[117] subject to countervailing public policy considerations (ie the court would have to balance the competing public policies reflected in the admiralty regime[118] and the provision for orderly administration in another jurisdiction of

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109 USC § 1520(a)(1), 11 USC § 362(a)(5).

110 Section 16, Cross Border Insolvency Act (Aus) provides that 'the scope and the modification or termination of the stay or suspension … are the same as would apply if the stay or suspension arose under: (a) the Bankruptcy Act 1966; or (b) Chapter 5 (other than Parts 5.2 and 5.4A) of the Corporations Act 2001; as the case requires'. Section 471C of the Corporations Act 2001 (Aus) provides that the mandatory stay of proceedings under s 471B when a company is being wound up in insolvency does not affect a secured creditor's right to realize or otherwise deal with its security interest.

111 Section 440B of the Corporations Act 2001 (Aus) provides that secured parties cannot enforce their secured claims while the company is in administration.

112 The rationale for this difference in treatment is that, to be considered for corporate rehabilitation the debtor had to have some prospect of surviving its insolvency, which was not applicable if the debtor was undergoing liquidation.

113 As of 2017, there have been six Korean rehabilitation proceedings recognized by the Federal Court of Australia under the Cross Border Insolvency Act.

114 Assigned to its Admiralty and Maritime National Practice Area. The Federal Court of Australia has general jurisdiction over both maritime and insolvency matters.

115 A plaintiff who commences a proceeding on a Maritime Claim (as defined in Admiralty Act, s 4) against a ship as an action in rem under any of ss 17, 18 and 19 of the Admiralty Act before any stay came into effect under arts 19 or 20(2) of the Model Law, will have a secured interest in respect of that claim simply because of the timing of the commencement of the proceeding in rem. (See *In re Aro Co Ltd* [1980] Ch 196 and *Programmed Total Marine Services Pty Ltd v Ships 'Hako Endeavour'* (2014) 315 ALR 66 [22], [37] per Allsop CJ).

116 Enforceable as an action in rem under s 15 of the Admiralty Act.

117 Under art 20(2) of the Model Law and s 16 of the Cross-Border Insolvency Act.

118 The significant public interest being to provide a ready form of security and protection to creditors providing important services to the ship or victims of a maritime wrong since ships are highly mobile and could flee the court's jurisdiction, with their owners continuing to incur liability to the detriment of existing creditors (see *Yu* (n 60) [40] and Sarah Derrington and James Turner, *The Law and Practice of Admiralty Matters* (2nd edn, OUP 2016) [2.21])

the debtor's affairs under the Model Law). Cases where the former prevails include the enforcement of the maritime lien by the unpaid crew.[119] On the other hand, where the vessel is arrested as security for an arbitration, the court should require security before releasing a ship from arrest, and to require the plaintiff to prove, such as by filing a proof of debt in the jurisdiction where the foreign main proceeding is taken out.[120]

4.2.4 Grant of super priority of rescue financing affecting admiralty proceedings

It is not entirely clear how the grant of 'super priority' will affect in rem proceedings commenced elsewhere. The court before which recognition of such foreign orders is being sought must work out the local functional equivalent of the foreign order. The court must first decide if secured creditors keep their rights, or if those rights have been suspended in the forum and will be determined in the foreign proceeding; and, second, the closest local equivalent of the foreign restructuring process so that the stay[121] will reflect the nature of the protection that the debtor actually has in the foreign jurisdiction.[122] Given that the Indemnity Claimant's security is likely to be eroded or nullified by the 'super priority' status accorded to the rescue financier, it is unlikely that the Court will grant leave for the in rem proceedings to proceed.

4.3 Priority to proceeds arising out of sale of the vessel

In the context of the Indemnity Claim, arrest of the vessel simply provides a provisional security designed to ensure that, if a judgment in rem is obtained, the arrested property is

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119 See *Hur v Samsun Logix Corporation* [2015] FCA 1154 [31]-[33]. Rares J observed that the fact that the crew are unpaid and are on a ship from which, if penniless, they cannot escape is a very good reason to ensure that claims to such maritime liens are immediately enforceable without prior leave sought. If the stay in art 20(2) was construed to preclude the ship's unpaid crew from exercising their maritime lien by arresting the ship when it reached port, the consequence might be the de facto forced labour of the crew until the ship finally reached its home port.

120 Steven Rares, *Ship Arrests, Maritime Liens and Cross-border Insolvency* (3 November 2017). <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171103> (accessed 18 March 2018).

121 Under the Model Law, art 20.

122 To the extent allowed under the local insolvency law.

available to satisfy the judgment.[123] However, whether the Indemnity Claimant is able to realise the security and obtain satisfaction of the Indemnity Claim depends on its priority to the sale proceeds.

The arresting forum's conflict of laws rules would determine the law to be applied in determining the priority and classifying the Indemnity Claim. In Canada[124], the US[125] and possibly, China,[126] the classification of maritime claims is a matter of substance, not procedure, so that recognition of foreign maritime liens is governed by the lex causae, not the lex fori. Other jurisdictions treat security as a matter of procedure to be determined by the lex fori, as does the UK,[127] Australia[128] and Singapore.[129]

This dichotomy internationally in the conflict of law rules would have differing consequences depending on where the arrest proceedings are commenced. In Fig 1 above, where the charterparty between Contractor 1 and the Main Contractor is governed by US maritime law, the arrest proceedings may be allowed to proceed depending on the jurisdiction where such proceedings are brought. In Singapore, the arrest proceedings to secure the indemnity claim

123 Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (OUP 2011) [4.19].

124 *Todd Shipyards Corp v Altema Compania Maritima SA (The Ioannis Daskelelis)* [1974] SCR 1248; *Marlex Petroleum Inc v Ship Har Rai* [1987] 1 SCR 47; *Holt Cargo Systems Inc v ABC Containerline NV* [2001] 3 SCR 907.

125 *Ocean Ship Supply v The Leah* 729 F 2d 971, 1984 AMC 2089 (4 Cir 1984). In that case, a ship obtained necessaries in Quebec City, Canada, giving rise to a statutory lien under Canadian maritime law. When the ship was eventually arrested in South Carolina by the supplier, the Court accepted that the supply of necessaries to the vessel in Canada did not confer on the supplier a maritime lien as would have been the case had the ship been so supplied in a US port, and released the ship from arrest.

126 Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations 2010, art 37 provides that 'parties concerned may choose the laws applicable to the right over the movables by agreement.' In the absence of any choice by the parties, rights in rem in movable property are governed by 'the law of the place where the property is located when the legal fact occurs', which would be the law of the place of arrest or attachment, it seems.

127 *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221.

128 *Ship Sam Hawk v Reiter Petroleum Inc* [2016] FCAFC 26, reversing the position in *Reiter Petroleum Inc v Ship Sam Hawk* [2015] FCA 1005. The Federal Court of Appeal considered the issue whether a maritime lien arising by operation of a foreign law would, in principle, be enforceable in Australia where the same facts and circumstances would not give rise to a maritime lien under Australian law. The majority adopted the approach in *The Halcyon Isle* [1981] AC 221 where it was held that the foreign right should be 'classified and characterised by reference to the law of the forum'. The Court determined what rights exist by reference to the lex causae and then assessed and characterized the lex causae to determine whether those rights would give rise to a maritime lien under Australian law (ie the lex fori). By this decision, the Australian approach was brought into line with English and Singapore law.

129 *The Andres Bonifacio* [1993] SGCA 70; *Precious Shipping Public Co Ltd v OW Bunker Far East (Singapore) Pte Ltd* [2015] SGHC 187. For more on the dichotomy on the conflict of law rules applied to determine the law applicable to the classification of maritime claims and their ranking, see Abou-Nigm (n 123) [6.17]-[6.79].

would not be allowed to proceed where the writ in rem was issued after the foreign insolvency proceedings were recognised. The opposite would be true if the same proceedings are brought (for example) in Canada or US because US law would characterise the claim as a maritime lien and Canada would apply US law (the lex causae in such characterisation).

However, matters of priority to the sale proceeds, as opposed to recognition of secured status, are determined by the lex fori.[130] In practice, the difference in ranking of claims is unlikely to vary substantially. Claims for property damage generally rank as unsecured claims, unlike personal injury claims or claims for incapacitation.[131] In Singapore,[132] UK[133] and New Zealand,[134] statutory rights of action in rem rank lowest, below mortgages, possessory and maritime liens, arresting party's expenses and sheriff's expenses.

4.3.1 Priority of the Indemnity Claimant further depreciated upon the grant of super priority to rescue financing

Even if the Indemnity Claimant manages to arrest the vessel or otherwise obtain security, the according of super-priority status to rescue financing extended to the Main Contractor would mean that it is depreciated in terms of priority.[135] Even where the Indemnity Claimant has obtained security in respect of[136] or has arrested the Vessel, rescue financing may be secured with a security interest over the Vessel with the same or higher priority. Further, the protection afforded by the ancillary orders may be insufficient to preserve the value of the security interest necessary to satisfy the Indemnity Claim. Under the new super-priority financing provisions introduced in Singapore, there are four different, escalating levels of super priority that may be granted to the debt from rescue financing:

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130 *The 'Posidon'* [2017] SGHC 138 [12]-[14]. See Martin Davies and Kate Lewins, 'Foreign maritime liens: should they be recognised in Australian courts?' (2002) 76 Aust LJ 775. The deference to the lex fori is driven by practical considerations — it would be impossible to rationalise the different treatment and priority accorded to the various classes of claims between the various leges concursus and grant foreign secured claims the same priority under the law creating the security interest given that the priorities accorded to such interests vary across jurisdictions.

131 Where there are public policy considerations elevating such classes of claims.

132 *The 'Eastern Lotus'* [1979-1980] SLR(R) 389; *Keppel Corp Ltd v Chemical Bank* [1994] 1 SLR(R) 54.

133 *The 'Ruta'* [2000] 1 WLR 2068.

134 *Fournier v The ship 'Margaret Z'* [1999] 3 NZLR 111.

135 If the indemnity claim is secured by issuing an in rem writ.

136 In the case where its claim has been recognized by the lex fori to give rise to a maritime lien.

Level 1: The debt takes priority together with the costs and expenses of the winding up but behind secured creditors;[137]

Level 2: The debt takes priority above all preferential and unsecured debts, behind only secured creditors;[138]

Level 3: The debt is secured by a security interest over property of the company that is unsecured or by a subordinate security interest over secured property;[139] and

Level 4: The debt is secured by a security interest over already secured property of the company and takes the same or higher priority over the existing security.[140]

The Singapore High Court has cautioned that the award of super priority will only be granted in an exceptional case.[141] For Levels 2 to 4, super-priority may only granted if the company would not have been able to obtain the rescue financing from any person unless the debt from the rescue financing was granted the super priority requested.[142] For super priority at Level 4, the debtor must show the court has to ensure that 'interests of the holders of the existing security interest(s)',[143] including that of maritime lienholders, are adequately protected. The statutory provision[144] prescribes certain ancillary orders to be granted by the Court to 'adequately' protect existing security such as the making of cash payments to the

137 Companies Act (Sing), s 211E(1)(a).

138 Ibid, s 211E(1)(b).

139 Ibid, s 211E(1)(c).

140 Ibid, s 211E(1)(d).

141 In *Re: Attilan Group Ltd* [2017] SGHC 283 [61], the Singapore High Court held that the grant of super priority would not 'ordinarily be resorted to and the courts would be slow to do so unless it is strictly necessary' and requires 'some evidence that the company cannot otherwise get financing [and] that it would be fair and reasonable to reorder the priorities on winding up'. The position in the US is similar. US courts are reluctant to grant priming liens (the functional equivalent in the US of security interests granted super priority under Companies Act (Sing), s 211E) and view such relief as an extraordinary last resort: *In the Matter of Qualitech Steel Corp,* 276 F 3d 245, 248 (7th Cir 2001). In this regard, given the effect that a priming lien has on existing creditors, courts should be 'particularly cautious' when determining whether the existing creditor that is being primed is adequately protected: *In re Mosello* 195 BR 277, 289 (Bankr SDNY 1996).

142 Whilst unavailability of financing is not a condition for the award of super-priority at Level 1, it is a factor taken into consideration by the courts. The company would need to provide some evidence of reasonable attempts at trying to secure financing on a normal basis to convince the court to exercise its discretion in its favour: *Re: Attilan Group Ltd* [2017] SGHC 283 [61].

143 Note that the definition of 'security interest(s)' is expansive and includes 'a mortgage, charge … lien or other type of security interest recognised by law': Companies Act (Sing), s 211E(9).

144 For a critical review of these protective measures in § 361-364 of the Bankruptcy Code which are in pari materia to ss 211E and 227HA of the Companies Act (Sing), see Peter D Russin, and Richard S Lubliner, 'Selected Chapter 11 Adequate Protection Issues' (2008) 16 Am Bankr Inst L Rev 387.

holder, sufficient to compensate the holder for any resulting devaluation of the holder's existing security interest[145] or providing the holder additional or replacement security to compensate the holder for any resulting decrease in the value of the holder's existing security interest.[146]

Further, the scope of these ancillary orders depends on the value of the protected entity's interest in the property at issue. There is no statutory guidance as to how to ascertain what the value to be protected is, which is left to be determined on a case-by-case basis. Given the continued oversupply in the OSV market, many of their valuations are depressed.[147]

It remains to be seen how the issue of 'adequacy' of protection will be dealt with in Singapore.[148] In the US, subordinate security interests who would receive nothing in the absence of post-petition financing with a priming lien are not entitled to adequate protection.

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145 This ancillary order is usually utilized when the security is depreciating at a consistent rate, such as the depreciation of the vessel or any operating asset languishing under arrest and the expenses in maintaining the vessel in the meantime. The periodic cash payments compensate the secured creditor/arresting party for such depreciation and its expenses.

146 The purpose of this method is to provide the secured creditor with a means of realizing the value of the collateral, if it should decrease during the JM or SOA, by granting an interest in additional property from which the secured creditor may realize the value of its loss.

147 <http://www.businesstimes.com.sg/companies-markets/bargain-hunting-in-osv-sub-sector-still-an-extreme-sport-for-select-few> (accessed 22 January 2018). Numerous vessels were sold by judicial sale at distressed levels. For example, see <http://www.seatrade-maritime.com/news/asia/swiber-sells-unused-vessel-to-pay-down-dbs-debts.html> (accessed 22 January 2018).

148 The Singapore High Court case of *Re: Attilan Group Ltd* [2017] SGHC 283 dealt with an application for super priority status under ss 211E(1)(a)-(b) rather than the creation of a new security interest under ss 211(E)(1)(c)-(d). However, it is clear that US case law on the Bankruptcy Code will be highly persuasive (see [66]-[70]). Courts in the US have taken the following non-exhaustive list of factors into account:

1. Whether the accrual of interest eroded the equity cushion. An equity cushion exists if the value of the security exceeds the value of the creditor's claim (the creditor is over-secured). The excess value, if any, is treated as an equity cushion which sufficiently protects the creditor without the need for adequate protection. Any subordinate security interests on the security are not considered in determining whether there is an equity cushion because they will be subordinated to the liens of senior creditors;
2. Whether the property was increasing in value;
3. Whether the debtor showed an inability to obtain rescue refinancing;
4. Whether the debtors had offered any other method of adequate protection; and
5. Whether current economic conditions suggested a realistic prospect for successful rehabilitation.

These factors were considered by the Bankruptcy Court of the Western District of Pennsylvania *In re Timber Products, Inc* 125 BR 433 (Bankr WD Pa 1990).

4.4 Cross-border Multiple Enterprise Group Insolvencies

The corporate structure adopted by offshore contractors were designed (in part) to segregate and contain their risks. However, the employment of such corporate structures may have significant ramifications for contractual counterparties, since they would not have recourse to the assets, which are held by other entities within the group.[149] As can be seen from the figure below, the EPIC Contractor (Main Contractor) is usually poorly capitalized, with assets held by a special purpose vehicle.

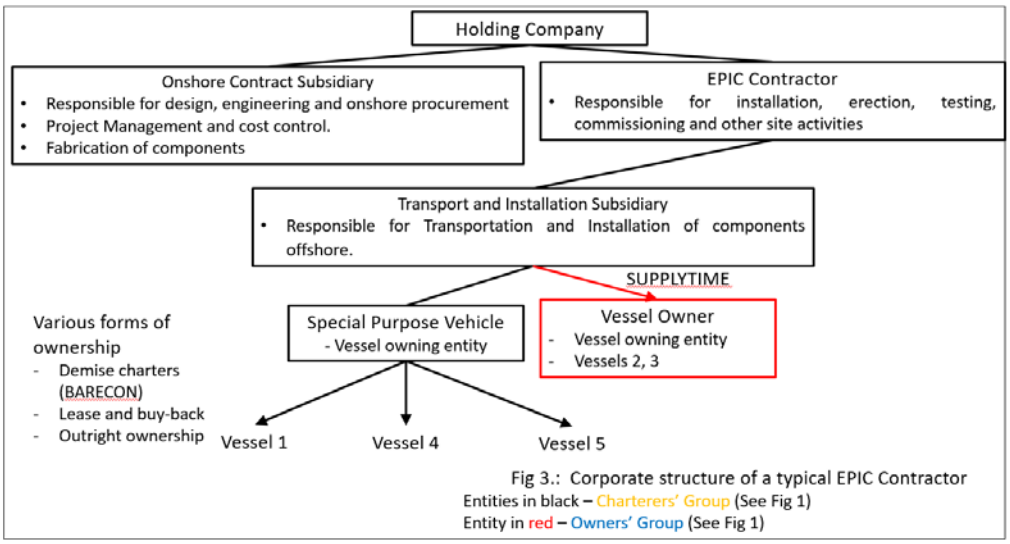

Fig 3.: Corporate structure of a typical EPIC Contractor
Entities in black – Charterers' Group (See Fig 1)
Entity in red – Owners' Group (See Fig 1)

The use of such corporate structures for tax, governance or limitation of liability reasons has been accepted by Courts as 'a legitimate way to conduct business in multiple jurisdictions as a single entity'[150] who are reticent in lifting the corporate veil to look behind the corporate structure for the purposes of identifying its beneficial owner.

The Model Law has no provisions dealing with cross-border enterprises comprised of multiple entities forgoing any coherent universal solution on the issue. However, individual

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149 *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195. In *The 'STX Mumbai' and another matter* [2015] SGCA 35, it was suggested in Singapore that, without lifting the corporate veil, evidence of the poor financial health of a group of companies, in particular, the evidence of group owner's insolvency, was sufficient to ground an assertion of anticipatory breach, namely, the inability to make good a debt, of a separate entity within the group.

150 *The Skaw Prince* [1994] 3 SLR (R) 146 at [19].

jurisdictions have unilaterally developed mechanisms for dealing with cross-border insolvencies involving multiple enterprise groups. In Australia, the statute makes parent companies liable for the debts of subsidiaries in certain circumstances[151] and for the group assets to be pooled[152] to pay creditors of one subsidiary where the court was 'satisfied that it was just.'[153] Similarly, New Zealand legislation allows the court to make a contribution order in the case of the insolvency of a related company and also provides for pooling orders in respect of insolvent related companies, where the court is satisfied that it is 'just and equitable to do so'.[154] The US courts also have inherent powers to order substantive consolidation.[155]

5 Legal Reform

KK provisions manage and allocate risks within an offshore project by channelling claims, from within and without the contractual structure, to the Main Contractor who will take out the necessary insurance to underwrite such indemnities. This contractual arrangement is premised on the financial strength of this single entity. However, this presumption was cruelly exposed by the recent insolvencies, many involving the EPIC contractor.[156] The unravelling of KK provisions at the outset of the Main Contractor's insolvency means that members within its group are left exposed to claims, leading to a domino effect in a catastrophic accident where members whose balance sheets are unable to withstand such claims have to file for insolvency given the outsized risks faced in the offshore industry.

Given the widespread adoption of KK provisions and the scale of the domino effect,[157] it is crucial to examine how and whether meaningful reform to these provisions can be achieved

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151 Corporations Act 2001 (Aus), s 588V makes the holding company liable for the subsidiary's insolvent trading if the company was aware or should have been aware that the subsidiary was trading while insolvent.

152 Ibid, s 579E.

153 Ibid, s 579E(1).

154 Companies Act 1993 (NZ), ss 271, 272.

155 Bankruptcy Code (US), §105. The court, where satisfied, can order the assets and liabilities of different entities be consolidated. The consolidated assets create a fund from which all claims against the consolidated debtors are satisfied.

156 See Part 2 above.

157 See Part 1 above on the major incidents offshore.

and whether legislative reform and government intrusion[158] is justified to uphold the efficacy of a private arrangement voluntarily entered into.

5.1 Reform of KK provisions

Given the need to reconcile competing considerations, any concerted effort to revise KK provisions used in industry standard forms is incremental at best. Recent attempts include those by BIMCO[159] in revamping the SUPPLYTIME form. Fortunately, there are protections to ameliorate the effects of the Main Contractor' insolvency on its group members.

5.1.1 Limitation of liability

In general, liability for damage to the facilities under construction is the largest any participant in the project can face, due to the cost of such facilities and repairs occasioned by such damage.[160] The risk of loss or damage to the facility is borne by the Main Contractor.[161] Smaller contractors and suppliers, especially OSV owners and operators, will not want to risk the viability of their business on a single contract, given the limited profit margins and lack of visibility on the adequacy of insurance taken out.[162] These contractors have sought to limit

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158 Given the prolonged downturn, several governments have stepped in to offer financial support to the beleaguered oil and gas sector. For example, SPRING Singapore's Bridging Loan to provide one-off financial support for companies in the Marine & Offshore Engineering sector to weather the severe slowdown. This bridging loan provides funds for SGD 5million to each eligible country and SGD 15 million per borrowing group. See <https://www.spring.gov.sg/Growing-Business/Loan/Pages/Bridging-Loan-for-Marine-Offshore-Engineering-companies.aspx> (accessed 23 January 2018).

159 There have been criticisms that the amendments were largely 'cosmetic' — to deal with existing drafting issues rather than a substantive overhaul, including the failure to stipulate a minimum level of insurance by the charterer. For further critical analysis on the new SUPPLYTIME form, see Robert Gay, *Chartering Offshore Vessels: SUPPLYTIME 2017* (Sweet & Maxwell 2018).

160 Whilst the standard CAR policy is reasonably comprehensive, there is no guarantee that it will respond in every circumstance. Further, deductibles can be substantial — up to USD 5 million for each and every claim. Further, insolvency and failure to pay premiums due may result in insurance coverage withdrawn. See Part 3.1 above.

161 Under the LOGIC form of contract, the risk of physical loss or damage to the facility whilst in the care, custody and control of Contractor prior to the completion and handover of the works is borne by the Contractor, except for losses arising out of certain defined risks eg war risks or the negligence of the Company's group. Under cl 14 of the SUPPLYTIME charterparty, the risks are borne by the Charterer.

162 The OSV owners are not the party responsible for placing the risk in the insurance market due to the 'channelling structure' of the KK provisions.

their liability to a low fixed amount in the event of damage.[163] Given the continued malaise and oversupply in the offshore sector, shipowners and contractors may not be able to effectively insist on such limitation.[164]

Fortunately, there are international conventions in force allowing certain participants to limit their liability[165] including the International Convention relating to the Limitation of the Liability of Owners of Sea-Going Ships 1957 (LLMC 1957) and the Convention on Limitation of Liability for Maritime Claims[166] (LLMC 1976) in respect of certain maritime claims.[167] They allow the Indemnity Claimant to mitigate the Main Contractor's insolvency by limiting the claims brought by members from other groups or other third parties.[168]

However, the right to limit under the LLMC 1957 and LLMC 1976 conventions is not universal. In an off-shore project, only OSV owners are entitled to limit and not owners or operators of other offshore assets. The LLMC 1976 excludes ships 'constructed for, or adapted to, and engaged in, drilling'[169] or 'floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof'.[170] Nonetheless, some

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163 Beadnall (n 15) [12.42]-[12.44].

164 Kari Reinikainen, 'Oversupply of offshore vessels to extend beyond 2022' (*IHS Markit Maritime Portal*, 21 September 2016 <https://fairplay.ihs.com/commerce/article/4275357/oversupply-of-offshore-vessels-to-extend-beyond-2020> (accessed 4 February 2018).

165 The usual KK provisions in offshore contracts preserve parties' rights to limit under law (See SUPPLYTIME 2017, cls 14(c), 14(d); TOWCON 2008, cl 25(d) and TOWHIRE 2008, cls 23(d), 24)

166 1976 UNTS 1456. The LLMC 1976 has been ratified by 53 countries, including the UK, Singapore and Mexico. The limitation of maritime claims in the US is governed by the Limitation of Liability Act, 46 USC §§181-196.

167 LLMC 1976, art 2(1) provides, amongst other things, that the following claims 'whatever the basis of liability may be' shall be subject to limitation of liability:

1. Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting therefrom; and
2. Claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations.

There are also conventions in place in respect of claims arising out of oil pollution damage. See for example, the International Convention on Civil Liability for Oil Pollution Damage, which entered into force on 19 June 1975.

168 For instance, C_1 in Fig 1 above. To put this into perspective, property damage claims, such as damage to the other ships, property or the facility, involving an Anchor Handling Tug Supply (AHTS) vessel, with a deadweight tonnage of approximately 2000 tonnes, will be limited under the LLMC 57 (with the 1979 amending Protocol) and the LLMC 76 to USD 200,000 and USD 2.9 million respectively.

169 LLMC 1976, art 15(4).

170 Ibid, art 15(5)(b).

State Parties to the convention have contracted out of this exclusion, thus allowing the owners of such vessels to limit their liability.[171] The balance may be tilted further in favour of the shipowner who may be able to commence limitation proceedings in jurisdictions with more favourable limitation regimes.[172]

Operation of limitation of liability within the context of KK provisions may result in an imbalance of compensation payable in favour of the vessel owner.[173] There is English case law to the effect that charterers cannot limit their liability in respect of claims brought against them by the shipowner where they were not themselves acting in a shipowner's capacity.[174]

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171 Article 15(4) provides that the Convention shall not apply to 'ships, which have either been constructed for or adapted to drilling, and are engaged in drilling' when the State Party: (a) by its national legislation has established a higher limit of liability than that in art 6; or (b) has become party to an international convention regulating the system of liability in respect of such ships. In the UK's case, this exclusion of such vessels does not appear in Sch 7, Part I of the Merchant Shipping Act 1995 (UK) and therefore art 15(4) does not have the force of law. As a result, the owners of such vessels can avail themselves of the limitation provisions of the LLMC 1976 provided that they satisfy the definition of 'ship' contained in para 12 of Sch 7, Part II of the Merchant Shipping Act 1995. A similar position exists in Singapore with the absence of art 4 of the Convention in the Schedule to the Merchant Shipping Act (Sing). There is no such exclusion in the US or under the LLMC 1957. The US Limitation of Liability Act applies to 'all seagoing vessels' (§188). Article 1(1) of the LLMC 1957 provides that 'the owner of a sea-going ship' shall be entitled to limit. For an in-depth discussion on the limitation of liability under the various international conventions see Ch 3 (The 1976 Limitation Convention and its 1996 Protocol) in Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims* (4th edn, Informa Law 2005).

172 For example, jurisdictions that are signatories to the LLMC 1957. The difference between the 1957 and 1976 LLMC limits can be immense, in some cases, up to 300%. Eg in *The Reecon Wolf* [2012] SGHC 22, the limitation fund of the *MV Reecon Wolf*, a container ship of approximately 12000 deadweight tonnes, under the 1957 Convention was approximately USD 550,940 as compared to a limitation fund of approximately USD 2.91m under the 1976 Convention. The 1957 Convention, the limitation fund for property claims is set at 1,000 Gold Francs per tonne (SDR 66.67 per tonne under the 1979 amending Protocol) whereas for personal claims the fund is set at 3,100 Gold Francs per tonne (SDR 206.67 per tonne under the 1979 amending Protocol). Under the 1976 Convention, the limits were set at SDR 333,000 for personal claims for ships up to 500 tonnes with additional amounts based on tonnage and SDR 167,000 plus the following additional amounts based on tonnage on ships above 500 tonnes.

173 Courts have held that there is nothing to choose between the LLMC 1957 and LLMC 1976. The LLMC 76 forum is not determinative and that the court would grant a stay according to the principles set down in *Maritime Corp v Cansulex Ltd* (*The Spiliada)* [1986] UKHL 10. A defendant can apply to have service set aside on the ground that there is an alternative jurisdiction 'in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. The existence of a legitimate personal juridical advantage for one party should not deter the court from granting a stay if it was satisfied that substantial justice would be done in an alternative, more appropriate forum (*Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2003] SGHC 142; *The Herceg Novi* [1998] 2 Lloyd's Rep 454).

174 In *Aegean Sea Traders Corp v Repsol Petroleo SA (The 'Aegean Sea')* [1998] 2 Lloyd's Rep 39, Thomas J held that the 1976 Convention does not provide (and is not intended to provide) an entitlement to charterers to limit for these types of claims brought against them by shipowners. To conclude otherwise would mean that the limitation amount or fund could potentially be depleted by claims by the shipowners against charterers when the intent had been for it to be available for cargo and other third party claimants external to the operation of the ship. In *CMA CGM SA v Classica Shipping Co Ltd (The 'CMA Djakarta')* [2004] 1 Lloyd's Rep 460, the court held that the charterer had to be acting qua owner undertaking an activity

The Indemnity Claimant will be able to prove liability for the entire Indemnity Claim in the Main Contractor's insolvency since the latter's liquidator is not entitled to avail itself to such limitation. The ability of the shipowner to limit liability will go some way in alleviating any fall-out from the Main Contractor's insolvency. However, other participants[175] who do not fall within the conventions will have to rely on any express limitation terms in the contract.

5.1.2 Adoption of mutual hold harmless schemes to fill contractual gaps in KK provisions

The contractual gap traditionally existing between the various parties simultaneously operating within the same offshore field needs to be filled to ensure the integrity of KK provisions. Where there is no privity between parties working simultaneously in the field, and where 'other contractors' are not included in the 'Company Group',[176] there is no contractual indemnity and, in that case, liability for damage will fall to be determined under general principles of law. A group member can only rely on the Main Contractor to indemnify him against claims from third parties. Where the enforceability and efficacy of this indemnity obligation is compromised due to the indemnitor's insolvency, the indemnitee is left without recourse and protection from claims from these 'third parties'.

This perceived flaw (the lack of privity between parties operating within the same area) has led to some operators adopting mutual hold harmless schemes on an installation or project basis. The adoption of such schemes was incremental and piecemeal until the first large-scale adoption of the Industry Mutual Hold Harmless (IMHH) scheme,[177] which went live on July 2002.[178]

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usually associated with ownership to the extent that it operated or managed the vessel, including a demise charter.

175 For example divers, ship managers and other asset operators.

176 As defined (for example) at cl 14(a) of SUPPLYTIME 2017.

177 Formulated with the input of the Leading Oil and Gas Industry Competitiveness (LOGIC). The IMHH deed can be found on LOGIC's website at <http://www.logic-oil.com/imhh/documents> (accessed 7 March 2018).

178 This scheme has since terminated in 2011 and LOGIC has established a new deed, which extends the scheme to the end of 2021. 22 companies have already signed up to the IMHH deed, including affiliates of Aramark, Halliburton, Subsea 7, Trinity and Weatherford: see Pia Mandler, 'New Deed Offers Clarity on Risk Allocation Offshore and £Million Annual Savings' (Oil & Gas UK) <https://oilandgasuk.co.uk/new-deed-offers-clarity-on-risk-allocation-offshore-and-million-annual-savings/> (accessed 20 February 2018). The IMHH is a voluntary long-term arrangement and allows new participants at any time with the aim of

However, the IMHH scheme has its own drawbacks, chiefly the lack of visibility as to the potential indemnitor's financial standing. Each participant must look to its counterparty's other contractors to indemnify it in respect of any claims. This is a disadvantage since the shipowner may not be in a position to ascertain these parties' financial strength and insurance position. Another drawback is the voluntary nature of the IMHH scheme; this is manifested where the counterparty fails to: (i) undertake that all of its other contractors and subcontractors sign up to the scheme or, in the alternative, (ii) remain liable and indemnify against claims by any of its other contractors and subcontractors not party to the scheme. This means that existing participants do not have recourse to these contractors and subcontractors.[179]

In short, a contractor will also take more of a risk on the financial strength of the other contractors involved in an IMHH scheme which may unknown to it. In the circumstances, having entities operating in a particular field or participants in a particular project sign on to the IMHH scheme whilst preserving the existing KK arrangements may be a simple interim solution.

5.2 Legislative reform

5.2.1 Direct rights of action statutes

As previously highlighted,[180] many countries[181] have enacted legislation, which mitigate the effects of the counterparty's insolvency by conferring the injured party direct rights of action against the insurers of the person liable (direct action statutes). The aim of such legislation is to protect the insurance proceeds from the effects of the insured party's insolvency. In their

covering all contractors operating in the UK Continental Shelf and is not tied to a specific contract for services or to specific facilities: Barbara Jennings, Standard Bulletin November 2008, <http://www.standard-club.com/media/23525/14292_SB_report_NOV_08_disclaimer.pdf> (accessed 27 January 2018). It covers all claims arising from, out of or relating to offshore oil and gas services and in connection with injury or damage to personnel, property and consequential loss.

179 These challenges are exacerbated where the IMHH scheme is introduced in areas where there are no publicly available list of the participants such as on the Norwegian side of the North Sea.

180 See Part 3.1 above.

181 Such direct rights of action statutes exist in the UK, Scandinavia and most US States, with Spain and Turkey both recently enacting new maritime codes providing for direct rights of action against insurers. For example, the Third Parties (Rights Against Insurers) Act 2010 (UK), which came into force in the UK on 1 August 2016, replacing the Third Parties (Rights Against Insurers) Act 1930 (UK).

absence, any money paid out under a policy taken out by a party that has since gone into liquidation will go to the liquidator, and will form part of the insured's assets for distribution to all creditors. These direct rights of action are particularly useful since the Indemnity Claimant would then be able to proceed against the Main Contractor's insurer directly and circumvent the 'Pay-to-be Paid' provisions in insurance policies.

Unfortunately, marine insurance is excluded from the scope of such statutes in the UK[182] and Singapore.[183] Further, the UK courts have upheld the enforceability of such clauses and even go so far as to preclude the operation of these clauses from being circumvented by granting an injunction to restrain the insurers from proceeding with claims in a different forum from that provided for in the Club rules or policy.[184] This is diametrically opposite to the position in the US, where the courts have held that 'Pay to be Paid' clauses in marine insurance and P&I Club rules are contrary to public policy.[185]

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182 Section 9(5) of the Third Parties (Rights Against Insurers) Act 2010 (UK) states that transferred rights are not subject to any condition requiring the prior discharge by the insured of the insured's liability to the third party, potentially circumventing any 'Pay to be Paid' Clauses where the rights of the insured will be transferred to the injured third party subject to payment of the outstanding premiums. However, s 9(6) limits the effect of s 9(5) by preserving the rule in The '*The Fanti and The Padre Island*' (n 37) on 'Pay to be Paid' Clauses in cases of marine insurance and the P&I Club rules except in relation to death or personal injury claims. Section 9(7) states that 'contract of marine insurance' has the meaning given by the Marine Insurance Act 1906 (UK), s 1 ie ' … a contract whereby the insurer undertakes to indemnify the assured … against marine losses, that is to say losses incident to marine adventure'.

183 In Singapore, the position remains that under the predecessor UK statute. The Third Parties (Rights Against Insurers) Act (Sing) provides that the insurer can continue to rely on any defence it would have had against its insured as against the third party ie payment of premiums or calls a condition precedent to the liability of the insurer or club respectively. Note that it has been held that the predecessor UK act (and by extension the Singapore Act) applies to P&I clubs: see *Wooding v Monmouthshire & South Wales Mutual Indemnity Society Ltd* [1939] 4 All ER 570, 595 per Lord Wright and *In re Allobrogia Steamship Corporation (The 'Allobrogia')* [1978] 3 All ER 423.

184 *Shipowners' Mutual* (n 43). See Part 3.1 above.

185 In *Saunders* v *Austin W Fishing Corp* 224 NE 2d 215 (Mass 1967), for example, the court held that such clauses were unenforceable as being against public policy and in that case the seaman was able to recover directly from the insurers. Some US states prohibit the issue of an insurance policy without an express provision that the claimant shall have a right of action against the insurer in the event of the assured's insolvency: see eg the Louisiana direct action statute codified in Part XIV of the Insurance Code, LSA-RS 22: 655. Further, in *Olympic Towing Corporation* v *Nebel Towing Co* 419 F 2d 230 (5th Cir 1969) and *American Sugar Co v Vainqueur Corp* [1970] AMC 405, the prohibition was extended to include P&I coverage. However, this decision was not followed in subsequent cases (eg see *Miller v American SS Owners Mutual Protection & Indemnity Co* 509 F Supp 1047 (SDNY 1984); *Metropolitan Life Insurance Co* v *McCarson* 467 So 2d 277, 279 (Fla 1985)). For an in-depth discussion on the US direct action statutes see Raymond Kierr, 'The Effect of Direct Action Statutes on P&I Insurance and Various Other Insurances or Maritime Liabilities on Limitation of Shipowners' Liability'(1969) 43 Tul L Rev 638; Nicolas Foster, 'Marine Insurance: Direct Action Statutes and Related Issues' (1998-1999) 11 USF Mar L J 261.

Whilst opinions on the desirable scope of government intervention may differ, a certain level of protection must be afforded to the most vulnerable individuals, such as divers and vessel crew, by preserving their right to claim directly against the insurers for personal injury and incapacitation.[186] The decision on which forms of insurance are excluded from the purview of the direct action statute and the range of such claims is ultimately an issue of public policy to be dealt with by the respective legislatures.[187] However, it must be recognized that insurance coverage (both lability and property insurance) forms the linchpin of the KK regime as it reinforces the allocation of risk and underwrites the mutual indemnities.

5.2.2 Concerted efforts at harmonization of laws

Given the international nature of the offshore market,[188] harmonization of laws on an international level is crucial. There should be concerted efforts by courts in the various jurisdictions to preserve parties' contractual bargain by respecting parties' choices of law and of jurisdiction, as evidenced by their forum selection clauses.[189]

From the above exposition on the Model Law,[190] it is clear that the uncertainty as to the interaction between the insolvency and admiralty regimes[191] and the unwarranted

186 For example, see ss 9(5) and 9(6) of the Third Parties (Rights Against Insurers) Act 2010 (UK).

187 The UK Parliament debated the exception for P&I Clubs and Marine Insurers. The consensus was that marine insurance was a 'relatively contained area of insurance and not one that was likely to have an impact on the wider public' and that such clauses were settled practice. However, the UK Parliament drew the line at personal injury and death. See the exchange between Lord Hunt of Wirral and David Hertzell, Law Commissioner during the first sitting of the Committee stage (Special Public Bill Committee) before the House of Lords on 12 January 2010.

188 See Part 4.2 above.

189 The Hague Convention of 30 June 2005 on Choice of Court Agreements (arts 5 and 6 respectively provides that the designated court shall have jurisdiction and for contracting states to suspend or dismiss proceedings in breach of an exclusive choice of court agreement). Article 2 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 requires signatories to enforce agreement to arbitrate. Abou-Nigm (n 123) [6.110]-[6.116] has argued that the classification of maritime claims and their ranking should be determined by the governing law, unless there are 'circumstances amounting to an application of the public policy exception, grounded on international public law issues for disregarding the application of the governing law.'

190 See Part 4.2 above and also Ji (n 93).

191 See previous discussion at Part 4.2 above.

encroachment by the former on the latter[192] has exacerbated the inherently low priority universally accorded to the Indemnity Claim in respect of proceeds from the vessel sale.[193]

6 Conclusion

KK provisions have, since their inception, provided a workable system for the allocation of risk and losses in offshore construction projects.

However, the recent wave of insolvencies and corporate rehabilitations in the offshore oil and gas sector has challenged the integrity and efficacy of KK provisions due to the termination of insurance and P&I coverage, lack of any real security underwriting the Main Contractors' obligation to indemnify and the impediment posed to enforcement action by the insolvency regime.

Given the length of the downturn in the sector and the persistent low oil prices, the various challenges are not going away in the immediate future. These new challenges require industry participants to respond through concerted revisions to these provisions (through filling the gap in the KK provisions by the large-scale adoption of hold harmless schemes) and legislative reform by governments (through the enactment or extension of direct action statutes) to ensure their continued efficacy.

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192 The respective priority schemes under the admiralty and insolvency regimes.

193 Whilst there may be policy considerations for elevating the ranking of Indemnity Claims and to exclude them from the application of insolvency law and the Model Law, these calls should be resisted as the Indemnity Claimants are not a discrete group of persons and the elevating of Indemnity Claims under the either the admiralty regime or the insolvency regime would be at the expense of other group of maritime claimants or creditors. Determining which group of maritime claimants or creditors to be subrogated to that of the Indemnity Claimants would involve difficult questions of competing interests. The preferred solution would be the harmonisation of direct action statutes internationally and to extend them to maritime insurance, because that would preserve the compact between the insurers and the insured's counterparties under the KK provisions. The counterparties have a contractual right to be indemnified by the Main Contractor under the KK provisions and, in the event of the Main Contractor's insolvency, its insurers. This compact is clearly evidenced in the new UK direct action statute, where the injured party is allowed (except in the context of marine insurance) to claim against the insured's liability insurance by paying the premium stated in the policy taken out by the insured.