

GUIDELINES ON MANAGEMENT OF APPLICATIONS FOR ARREST OF VESSEL WHERE VESSEL OWNER OR BAREBOAT CHARTERER IS THE SUBJECT OF CROSS-BORDER INSOLVENCY PROCEEDINGS

INTRODUCTION

- A. The overarching objective of these Guidelines is to enhance coordination and cooperation among courts in the management of applications for the arrest of vessels (“Arrest Application(s)”) where the owner or bareboat charterer of the subject vessel or a related entity within the same enterprise group is undergoing cross-border proceedings relating to insolvency or adjustment of debt in more than one jurisdiction (“Restructuring Proceedings”), so as to maximise, to the extent permissible, the collective interests of all parties and to prevent the intentional or inadvertent frustration of the restructuring objective by such an Arrest Application.
- B. The Guidelines set out the best practices that may be suitably adopted by a court in one jurisdiction (“the Arresting Court”) faced with an Arrest Application and an application for the recognition of, and/or consequential relief or pre-recognition interim relief (“Recognition Application”) in relation to, Restructuring Proceedings commenced in a foreign jurisdiction (“the Foreign Insolvency Court”) by or in relation to the owner or bareboat charterer of the subject vessel or a related entity. The Guidelines envisage that the Arresting Court addresses its attention to the potential impact of the arrest proceedings on the Restructuring Proceedings, and to the potential impact of the Restructuring Proceedings on the arrest applicant’s prospect of recovery.
- C. These Guidelines should be implemented in each jurisdiction in such manner as the jurisdiction deems fit, in whole or in part, with or without modification, and to such extent as the domestic laws may permit.¹
- D. These Guidelines recognise that in some jurisdictions, the insolvency and admiralty jurisdiction are vested in different courts. The term “Arresting Court” should be understood to refer compendiously to these different courts and it is for the individual courts in each jurisdiction to determine how best to co-ordinate among themselves in implementing these Guidelines.
- E. These Guidelines are not intended to be exhaustive and, in each case, consideration ought to be given to the special requirements of the case.
- F. Courts should encourage and where necessary direct, if they have the power to do so, the parties to make the necessary applications to the relevant court(s) to facilitate the implementation of these Guidelines, and encourage the parties to act in a manner that will promote the objectives and aims of these Guidelines wherever possible.

¹ Possible modalities for the implementation of these Guidelines include practice directions and commercial guides.

SCOPE

- G. These Guidelines apply where an Arrest Application is made against a vessel that is owned or bareboat chartered by an entity, where that entity or a related entity within the same enterprise group is the subject of Restructuring Proceedings commenced in a Foreign Insolvency Court. These Guidelines do not address the situation of the other charterers. This is because in most jurisdictions, a vessel can only be arrested in relation to a debt owed by the owner or bareboat charterer, and not a time or voyage charterer. For the avoidance of doubt, these Guidelines may also apply to sister ship arrests to the extent recognised and permitted under the law of the Arresting Court.
- H. These Guidelines may suitably apply:
- (i) regardless of whether the jurisdiction of the Arresting Court or the Foreign Insolvency Court has adopted legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997); and
 - (ii) regardless of whether the judges of the Arresting Court or the Foreign Insolvency Court are members of the Judicial Insolvency Network (“JIN”).
- I. These Guidelines are procedural in nature and are not intended to:
- (i) interfere with or derogate from the jurisdiction of or the exercise of jurisdiction by a court in any proceedings, including its authority over or supervision of an insolvency office holder, if appointed, in those proceedings;
 - (ii) interfere with or derogate from the rules or ethical principles by which an insolvency office holder is bound according to any applicable law and professional rules;
 - (iii) prevent a court from refusing to take an action that would be manifestly contrary to the public policy of the jurisdiction; or
 - (iv) confer or change jurisdiction, alter substantive rights, or interfere with any function or duty arising out of any applicable law.
- J. A “related entity” generally means an entity that is interconnected with the owner or bareboat charterer of the subject vessel by being part of the same enterprise group with the latter. An “enterprise group”, in turn, means two or more enterprises that are interconnected by control or significant ownership. This general definition of “related entity” and “enterprise group” is subject to the relevant definitions that might be found in each jurisdiction’s legislation and/or jurisprudence.

MANAGEMENT OF RECOGNITION APPLICATIONS

Guideline 1: Where a Recognition Application is made to the Arresting Court, the applicant should inform the Arresting Court if the debtor owns any vessels that are engaged in international commercial trade. This is to allow the Arresting Court to identify any issue peculiar to the claims against vessels owned or bareboat chartered by the debtor.

Guideline 2: The Arresting Court should also generally direct the publication or advertisement of orders and decisions made in relation to Recognition Applications, principally in a newspaper circulating generally within its jurisdiction, as well as in such leading maritime publications as the Arresting Court directs. The specific modalities of publication or advertisement may be formulated having regard to the usual practice and procedure of the Arresting Court.

MANAGEMENT OF ARREST APPLICATIONS

Guideline 3: On the filing of an Arrest Application, the applicant should be required to draw the Arresting Court's attention to any order made in respect of a Recognition Application that has been granted by the Arresting Court, or any Recognition Application that is pending before the Arresting Court which the applicant is aware of. The Arresting Court should take this into account when calibrating the appropriate relief and considering, for example, whether the scope of the relief granted pursuant to or pending disposal of a Recognition Application should include the vessel sought to be arrested, to the extent permitted by the laws of its jurisdiction. It is desirable that the Arrest Application be heard by a Judge.

Guideline 4: The applicant should be required to inform the Arresting Court of any Restructuring Proceedings commenced in a Foreign Insolvency Court by or in relation to the owner or bareboat charterer of the subject vessel or a related entity which the applicant is aware of. This would include information on the nature and status of those proceedings, such as information on any attempts to realise the debtor's assets (including the subject vessel) through a going concern sale that might benefit from the vessel's preservation. The applicant should also inform the Arresting Court of the locations of all other vessels in which the owner or bareboat charterer of the subject vessel concerned has an interest, to the extent such disclosure has been made in the Restructuring Proceedings in the Foreign Insolvency Court. The purpose of this is to ensure that the Arresting Court is kept fully apprised of the interests of the creditors participating in the Restructuring Proceedings in the Foreign Insolvency Court.

Guideline 5: If there are ongoing Restructuring Proceedings in the Foreign Insolvency Court, the Arresting Court should consider whether notice of the Arrest Application should be given to the insolvency office holder (where one has been appointed) and/or the owner or bareboat charterer of the subject vessel (as appropriate), for the application to be heard on an opposed *ex parte* or *inter partes* basis, so that the insolvency office holder and/or the owner or bareboat charterer of the vessel concerned (as the case may be) may attend to provide further information on the status of the Restructuring Proceedings in the Foreign Insolvency Court.

Guideline 6: In deciding whether notice should be directed under Guideline 5, the Arresting Court should remain mindful of the Restructuring Proceedings in the Foreign Insolvency Court and any recognition and relief, interim or otherwise, that has been or may be granted by the Arresting Court in a Recognition Application if one has been filed in the Arresting Court. The

overriding consideration should be the risk of flight of the vessel. In assessing the risk of flight and whether notice should be directed, the Arresting Court may bear in mind considerations which include:

- (i) the nature and size of the debt and any security interests;
- (ii) whether there is any realistic prospect of recovery of the claim against the vessel, by considering, *inter alia*, where the applicant ranks in terms of priority;
- (iii) the nature of the call in the port;
- (iv) the urgency of the arrest; and
- (v) the extent of disruption that any arrest order may cause to the Restructuring Proceedings in the Foreign Insolvency Court, having regard to the size of the overall debt position of the debtor.

Guideline 7: In deciding whether to issue a warrant of arrest (in jurisdictions where this is discretionary), the Arresting Court may consider the same factors set out in Guideline 6.

Guideline 8: In managing the Arrest Application, the Arresting Court may further consider the following options:

- (i) adjourning the Arrest Application to such time as there is greater visibility in the Restructuring Proceedings in the Foreign Insolvency Court, and where appropriate, adopting interim or conservatory measures over the subject vessel;
- (ii) having the applicant bear the burden of persuasion that an order or warrant for arrest should be issued, unless the applicant has secured interests and/or priority under the law of the Arresting Court and can demonstrate reasonable prospects of significant recovery;
- (iii) facilitating, through communications with the Foreign Insolvency Court, the release of the vessel to the Foreign Insolvency Court in the event that the applicant's claim has been satisfied or secured.

Guideline 9: Where the arrested vessel is laden with cargo and expenses have to be incurred to discharge the cargo to facilitate the judicial sale of the vessel, the issue of liability for such discharge expenses shall be determined by the Arresting Court.

CONSEQUENTIAL PROVISIONS

Guideline 10: The JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters may be suitably adopted for use to govern communication and coordination between the Arresting Court and the Foreign Insolvency Court.

Guideline 11: An order made by an Arresting Court or Foreign Insolvency Court under these Guidelines should be subject to such amendments, modifications, and extensions as may be

considered appropriate by the relevant court, and to reflect the changes and developments from time to time in any parallel or related proceedings. Notice of such amendments, modifications, or extensions should be made to the other court(s) involved in the parallel or related proceedings, as soon as it is practicable to do so.