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CHARTERING THE MURKY WATERS OF MARITIME CROSS BORDER INSOLVENCY

By

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Abstract

This paper studies the interaction of law, economics and management in the context of maritime cross border insolvency through a self-developed “Past-Present-Future” Model. The main source of finance in the shipping industry is loan facilities extended by banks and backed by a mortgage on the ship as security. A unique feature of the industry is the mobility of the main asset of the shipping company i.e. the ship. Under maritime law, the ship has an independent personality and may be arrested by creditors for outstanding claims.

When a shipping company faces insolvency, both insolvency law and maritime law try to assist the creditors with the payment of their dues. In this way, the purpose of both is the same; however the approach they employ is different. Insolvency law seeks to bring all assets of the debtor before a single forum. In contrast, maritime law allows maritime creditors to obtain security for their claims by arresting the ships in multiple jurisdictions. These conflicting approaches often lead to a delay in the decision making in a restructuring effort (where time is of essence) as the rights and obligations of different stakeholders differ based on the applicable law.

This paper argues that to resolve this conflict, all proceedings should be brought before a central insolvency court (where the shipping company has its “center of main interest”). The proceedings brought by maritime claimants before the local courts should be stayed subject to adequate protection of their existing rights. The two key issues to be addressed in a maritime restructuring attempt are (a) renegotiation of charter rates and (b) entering into standstill and debt postponement agreement(s) with creditors. The option of arrest, though a powerful tool, is a double edged sword. On one hand it provides protection to a creditor but on the other, it has associated costs involved which may make it economically unviable in the long run. Furthermore, such recourse will almost certainly prevent the shipping company from continuing as a going concern thereby rendering any restructuring attempt useless. The single most important factor which can make or break a restructuring attempt is the support of the national government.

Keywords: *cross-border insolvency; maritime law; shipping cycles; national governments; Hanjin; restructuring*

Table of Contents

List of Tables

List of Figures

List of Abbreviations

CKYHE	Alliance of COSCO, K-Line, Yang Ming, Hanjin and Evergreen
CMA CGM	Compagnie Maritime D'affretement – Compagnie Generale Maritime
COMI	Center of Main Interest
COSCO	China Ocean Shipping Company
DWT	Dead Weight Tonnage
EBITDA	Earnings Before Interest Taxes Depreciation and Amortization
ECA	Export Credit Agency
EOD	Event of Default
FMP	Foreign Main Proceedings
FSC	Financial Services Commission
GDP	Gross Domestic Product
Hanjin	Hanjin Shipping Company
HMM	Hyundai Merchant Marine
ISM	Interpretive Structure Modeling
JBIC	Japan Bank for International Cooperation
KDB	Korea Development Bank
KEXIM	Korea Export Import Bank
KIS	Korea Investors Service
KRW	Korean Republic Won
KOBC	Korea Ocean Business Corp
K-Sure	Korea Trade Insurance Corporation
LNG	Liquefied Natural Gas
MRQ	Main Research Question
NEXI	Nippon Export and Investment Insurance
NSFR	Net Stable Funding Ratio
PPF Model	Past-Present-Future Model
OECD	Organisation for Economic Co-operation and Development
SPV	Special Purpose Vehicle
SRQ	Sub Research Question
TEU	Twenty-foot Equivalent Unit
UNCITRAL	United Nations Commission on International Trade Law
YoY	Year-over-Year

1 Introduction

1.1 Background

Given the unique cyclic nature of the shipping industry, the periodic fall of shipping companies[1] is not uncommon. The economic crisis in 2008 had an adverse impact on almost all sectors, including container shipping, which exacerbated the regular cyclic fall of shipping companies. As a result of the economic crisis, the freight rates fell which resulted in negative cash flows and in turn led to financial difficulties for many carriers. Consequently, many shipping companies faced insolvency in the last decade.

When a shipping company faces insolvency, the creditors will seek to protect their position. Different creditors will have different rights based on the nature of their debts, the jurisdiction in which legal proceedings have been initiated and also the law governing their contract. A unique feature of maritime law is the ability of the creditor to arrest the ship itself, in addition to bringing proceeding against the owner of the ship. Due to the mobility of ships, such proceedings may potentially be initiated in any jurisdiction that a ship calls in during the course of its trading.

1.2 Problem Discussion

When a shipping company faces insolvency, both insolvency law and maritime law try to assist the creditors with the payment of their dues. The purpose of both insolvency and maritime law is therefore same; however the approach they employ is different.

Under maritime law, the ship has an independent personality and may be arrested by creditors for outstanding claims. Concurrently, it is also an asset capable of liquidation in insolvency proceedings that may be initiated in another foreign court. Insolvency law seeks to bring all assets of the debtor (i.e. the ships) before a single forum. In contrast, maritime law allows maritime creditors to obtain security for their claims by arresting the ships in multiple proceedings in many jurisdictions.

If the restructuring of the shipping company is to be attempted, it is imperative that the shipping company continues as a going-concern. Since the only feasible way of doing this is through

[1]The discussion in this paper may be applied across the shipping industry but we will concentrate on container carriers, and we will use the term “container carrier” synonymously with “shipping company”.

plying of the company's ships, the protection of such assets is necessary. This protection is threatened by the remedy of ship arrest accorded to maritime claimants. Here arises the conflict between the rights of a maritime claimant (under maritime law) and the aim of restructuring (under insolvency law). The success or failure of a restructuring attempt depends upon the bargaining position of the main stakeholders. Typically, such stakeholders would be the shipping company, the lead creditor bank, the national government and the third party creditors. The rights and remedies of these stakeholders differ in different jurisdictions. For example, a bunker supplier under US law will have different rights than a bunker supplier under UK law. If the maritime claim proceedings are brought before the US court and the insolvency proceedings are brought before the UK court, a conflict arises as to the rights available to the maritime claimant. This would have a bearing on the restructuring process.

Time is of essence in a cross border maritime insolvency. This includes both the timely protection of the assets and the timely formulation of a business plan. The former is possible only when the conflict between the two competing courts – i.e. the maritime court and the insolvency court is resolved and a clear jurisdiction is established. The latter is possible only when all the stakeholders understand the economics of shipping, the nature of ship finance and the instruments / options available to inject (further) capital. All this has to done concurrently with the protection the rights of the various stakeholders involved.

1.3 Purpose of Study

The purpose of this study is to establish a link between the economics (and trends) of the shipping market, ship finance structure and the conflict between maritime and insolvency law.

We aim to assess how the economic trends affect ship finance structure. We then link the ship finance structure to the rights (and obligations) of different stakeholders (i.e. the shipping company, the lead creditor bank, the government and the third party creditors). As noted, such rights often conflict under maritime law and insolvency law in the event of a shipping insolvency. The main purpose is to study how these competing rights can be reconciled so that the cross-border maritime insolvency management process can be made more effective i.e. - less time consuming, more transparent, less costly and to the overall benefit of all stakeholders.

The value addition of this paper is the development of a "Past-Present-Future" Model of analysis (described under section 2.2.3 below). Further, the findings of an industry survey on the positions that benefit different stakeholders have been tabulated in the form of a checklist (using ISM (described under section 2.3 below) can be used by stakeholders during restructuring negotiations.

1.4 Research Questions

1.4.1 Main research question

What steps can be taken to make cross-border maritime insolvency management process more effective?

1.4.2 Sub research questions

a) How have the unique economic features of the shipping industry influenced the ship finance structure in the past decade?

b) What are the rights (and obligations) which are created for different players under such finance?

c) What issues of conflict arise between maritime law and cross-border insolvency law?

d) How can the competing rights under maritime and insolvency laws be reconciled so that the cross-border maritime insolvency management process can be made more effective?

1.5 Scope and limitations

To the best of our knowledge, there is no study available that attempts to link the trio of law, economics and management in the context of maritime cross border insolvency. The extant literature individually covers these three areas but does not do so collectively. This research adds value by identifying key points (derived from the interplay between these three areas) that various stakeholders in a cross-border maritime insolvency should keep in mind when they come to the discussion table.

There is a lack of data available on shipping bank loans and defaults because of issues of confidentiality. Furthermore, every restructuring process is unique. It is guided by the nature of finance, the economics of the industry (even within the industry like tankers, containerships, bulk carriers etc.), the position of the company in the market, the rights of the creditors etc. which differ on a case to case basis. Therefore, only a broad strategic roadmap to make cross-border maritime insolvency management process more effective can be formulated. The ultimate success or failure of the restructuring process will depend upon microeconomic and case specific factors, which are beyond the scope of any general academic study.

1.6 Structure

The paper is structured as follows. After this introduction, Chapter 2 describes the method of research. We will first describe the research approach followed by the research design i.e. the literature collection, data collection (focusing on interviews) and the data analysis (using the hypotheses method). Chapter 3 studies the relevant literature and outlines the theoretical framework for the discussion. The broad topics covered are (a) the economics of shipping, (b) the key components of ship finance, (c) the interaction between maritime and insolvency law and (d) the stakeholders involved in cross-border maritime insolvency management process. The discussion in Chapter 4 uses the insolvency of Hanjin as a case study to put the theoretical framework into perspective. Chapter 5 discusses the qualitative data collected by the way of a questionnaire and tests the results against a set of hypotheses. Chapter 6 answers the research questions and concludes.

2 Methodology

This chapter describes the method of research for this study. We will first describe the research approach followed by the research design i.e. the literature collection, data collection (focusing on interviews) and the data analysis (using a self-developed model – the "Past-Present-Future" model (PPF Model). Thereafter, we will describe our results through interpretive structural modeling (ISM).

2.1 Research Approach

The research questions enumerated above are descriptive and analytical in nature. They aim to understand a phenomenon that requires an understanding of practical circumstances. The collection of qualitative data is necessary to achieve this objective. This qualitative data has been collected by way of a questionnaire answered by 25 shipping partners across law firms in four jurisdictions - Singapore, UK, India and Dubai ("Questionnaire"). A draft questionnaire was initially circulated to the thesis supervisor and to three of the eventual respondents for their comments. Based on their input, modifications were made and the final Questionnaire was circulated to 58 lawyers through email. Of these, 25 lawyers provided meaningful responses.

Some of the respondents represented clients in the recent Hanjin proceedings (the details of which are set out in Chapter 4). For reasons of legal privilege, the most respondents requested that their responses be kept confidential. Some respondents were also subsequently contacted over the telephone to discuss the issues. As an unfortunate result of the COVID-19 pandemic, scheduled in-person interviews could not be conducted.

Any course of action adopted by stakeholders in an insolvency proceeding will inevitably be guided by legal advice. Therefore, the insight of shipping lawyers was considered to be the most reliable form of primary data and deemed a suitable proxy for the decision making of the various stakeholders. As the research questions are sought to be answered using a deductive approach, it was relevant to understand what prompted the stakeholders to act in certain ways.

We have attempted to link the theoretical framework, derived from the literature review, with the real life example of the Hanjin insolvency. Since this thesis involves an instrumental case study, quantitative data has also been taken into account. Through a combination of qualitative and

quantitative data analysis, the findings can be generalized and the conclusions will be helpful to various stakeholders involved in a maritime insolvency restructuring process.

2.2 Research Design

We need a deductive approach to answer the research questions. Therefore, we will first study the existing literature, which provides the theoretical framework. This work seeks to bring together economics, law and management. The readers may be more familiar with one or two of these areas than another. This is the reason why existing literature on the key concepts is discussed, so that least recourse to other sources may be required to understand the discussion and findings. We will simultaneously apply theory to the case study involving Hanjin in the literature review, where this is apt.

2.2.1 Literature Collection

The literature collection was guided by the issues raised in the Questionnaire and the hypotheses formulated to answer the research questions. The sources of literature review are authoritative textbooks and articles published in various academic journals. In relation to the legal cases from multiple jurisdictions that have been referred to, original orders and judgments of the courts (where available) were studied, and commentaries on these cases were also reviewed.

2.2.2 Data Collection

The data collection for this study has two aspects.

The primary data has been collected by way of the Questionnaire followed by interviews with some of the respondents. This primary data has been used to answer the hypotheses. The response to the Questionnaire / interviews with respondents provided in-depth information and practical insights.

The secondary data in relation to Hanjin was not easily accessible. We had to rely on online resources. The annual reports have been taken down from the official website of Hanjin, which now only provides a creditors' bulletin board. The majority of the secondary data has been obtained from recent studies / articles written on the subject. The events of the Hanjin insolvency are derived primarily from the reputed shipping newspaper TradeWinds, based on an exhaustive

review of their coverage of the Hanjin insolvency between 2016 and 2020. However, these sources do not have the same standards as academic journals and therefore, the credibility of such data is not to the same standard as academic sources.

The major focus of the study is on qualitative analysis. Minor variance in the quantitative data will not affect the conclusions.

2.2.3 Data Analysis

The value addition of this paper is the development of a new model for analysis – the "Past-Present-Future" model ("PPF Model"). In general, the PPF Model works as follows:

1. The research questions are first defined.
2. Various hypotheses to be tested are formulated which answer the research questions.
3. A questionnaire is generated after the formulation of various hypotheses. The relevant respondents are identified. The questionnaire is kept closed-ended to achieve a quantitative result.
4. A real-life practical event which relates to the research questions is identified. We use quantitative data and a list of events to analyse actual actions. This is used as a base case-study and is the component comprising the "Past" segment of the PPF Model.
5. The next step involves analysis on two grounds: (a) what the response of various stakeholders in the current situation would be, and (b) the extant literature and theoretical framework on the expected response. The data for (a) is collected through the use of a questionnaire / interviews and the data for (b) is collected using academic writings. This is the component comprising the "Present" segment of the PPF Model.
6. We then identify a scenario in which stakeholders are currently facing similar circumstances. We study the actions being taken by similar stakeholders in that scenario, to conceivably deal with the future. This is the component comprising the "Future" segment of the PPF Model.
7. On this basis, we test our hypotheses on three fronts using both theoretical and practical frameworks. We then develop an action plan to address the issue(s) through interpretative structural modeling.

The Questionnaire was structured after formulation of various hypotheses to answer the research questions. The link between the hypotheses, relevant research questions and conclusion is described in detail under section 5.2 below. The responses to the Questionnaire have been analyzed to either accept or reject the hypotheses.

Through the hypotheses, we study what professionals believe the approach to the conflict between maritime law and insolvency law should be, and the competing rights and obligations of the different stakeholders. Their opinion has been sought through the Questionnaire. Most of the questions were deliberately kept closed-ended to achieve a quantitative result. Each response is then applied to the relevant hypothesis. Based on whether the majority of responses either support or reject the position formulated by a hypothesis, the relevant hypothesis is accepted or rejected. Some responses do not have an impact on the hypothesis being tested. As a final step, we apply the acceptance or the rejection of our hypotheses to the theoretical and practical framework to check whether there are any unexpected results / deviations.

2.3 Result Analysis

The results are given through a form of “interpretative structural modeling” (ISM). The method used in this paper is “interpretative” because the discussion with experts interprets the trends and their interconnectedness. It is structural because it transforms such phenomenon into a graphical structure / action plan. The results of our study are put into a checklist of key issues that the stakeholders should keep in mind when undertaking a cross border maritime insolvency restructuring process. The checklist is a useful tool for stakeholders where a shipping company has filed for protection and is trying to restructure / grow as a going concern. Suggestions for improvement in the legal approach to dealing with the restructuring/ insolvency of a shipping company have also been provided.

3 Literature Review

3.1 The economics of shipping

The shipping industry is cyclical. However, cycles are not unique only to shipping. They appear in many industries and are generally of three different types – long, short and seasonal (Stopford, 2009). Since shipping companies would face insolvency during short periods of 7-10 years, and international container trade is not seasonal, we shall not discuss long and seasonal cycles in this paper. We need to briefly study the short term cycles to understand as to why many mid-sized shipping companies face bankruptcy at periodic intervals. (Stopford, 2009, p. 93) explains that a short term shipping cycle has 4 distinct stages, as follows:

1. Trough – In this stage there is surplus shipping tonnage and the freight rates fall. As a consequence, the low freight rates and low credit availability will produce negative cash flows. In light of the resulting financial pressures, the banks may foreclose on the company.
2. Recovery – As supply and demand moves towards balance, the freight rates will rise above operating the costs and laid up tonnage falls.
3. Peak/Plateau – In this stage, the freight rates rise. The consequent high earnings increase liquidity in the market. Banks are keen to lend against the strong value of the collateral assets.
4. Collapse – In this stage, supply overtakes demand and freight rates fall. Liquidity remains high and there are fewer ship sales since owners are unwilling to sell their ships at a discount to recent peak prices. Banks are not very keen to lend.

So why do shipping companies face insolvency at periodic intervals? In part, the answer is that the uncertain nature of short cycles makes it impossible for shipping companies to properly determine a strategy to deal with these. There is "*no simple formula for predicting the "shape" of the next stage of the cycle, far less the next cycle*" (Stopford, 2009, p. 101) and so even though we know cycles exist, as they never recur in exactly the same way and the peaks and troughs of future shipping cycles cannot be accurately forecasted. As a consequence, a shipping company cannot effectively determine its strategy to deal with these. "*Economic conditions, the "business cycle", trade growth and the ordering and scrapping of ships are the fundamental variables which can be analyzed, modeled and extrapolated*" (Stopford, 2009, p. 132). However, many

"black-swan" events (like the current COVID-19 pandemic, the 9/11 attacks, the closure of the Suez Canal etc.) play a big role in the fortunes of shipping companies.

As pointed out by (Choi, Kim, & Han, 2018, p. 1011), many shipping companies "*lack strategies to deal with the repeating boom and bust cycles of the shipping market, and which leads to liquidity risk*". Those shipping companies which fail to have the correct strategy at the correct time will face bankruptcy at periodic intervals of the short cycle – which typically lasts about 7-10 years.

Moreover, none of the market players tend to exercise a proactive or a differentiated strategy. Even within an alliance, (Caswchili, Medda, Parola, & Ferrari, 2014) empirically found that container shipping companies do not select their partners on the basis of similar industrial strategy. Thus, most of the times, the strategies are reactive – whether they are intra-alliance or in response to other alliances. These "reactive" strategies may not be the "best" strategies for the individual shipping company – and often lead to insolvency.

(Fusillo & Haralambides, 2020) observed that in liner shipping, "*the balance of supply and demand is a critical parameter in the determination of the direction, level and stability of freight rates*". The container shipping industry is characterized by excess capacity (which is mainly due to attempts to achieve economies of scale, as well as due to the costs associated with removing existing but smaller vessels from the market) and often the shipping companies "*overreact to positive demand growth signals and fail to react in time when demand retreats*" (Fusillo & Haralambides, 2020).

(Hoffman, 2010, p. 124) suggested that the industry has five ways to adjust its supply to a decline in demand. First, it will stop ordering new builds. Secondly, it may scrap vessels. Thirdly, it may "*terminate or postpone existing orders at the shipyards*". Fourthly, "*vessels may slow steam, thus reducing the effective capacity supplied by the existing fleet*". Lastly, the industry may "*temporarily withdraw the existing tonnage from service*". The combined effect of these reactions is a reduction in business and the consequent lack of liquidity for shipping companies.

(Karakitsos & Varnavides, 2014, p. 211) found that shipping cycles are caused by business cycles and that the synchronization of the cycles is distorted by the delivery lag of the shipyards. They found that a typical two-year delivery lag causes shipping cycles to follow with a lag as the supply is based on past expectations of current demand (Karakitsos & Varnavides, 2014, p. 211).

Let us now put the shipping cycles into perspective in the context of the 2008 financial crisis. Just before the 2008 financial crisis, the shipping industry was at a peak (i.e. stage 3 of the short term cycle, as discussed above). In this period of growth, shipping finance was readily available. (Lozinskaia, Merikas, Merika, & Penikas, 2017), in their analysis of the impact of the crisis, observed that prior to 2008 bank loans were easily accessible, at up to 80% of loan to value for new vessels, with most of the new vessels scheduled for delivery in the years 2010–2011. When the 2008 financial crisis hit, (Lozinskaia, Merikas, Merika, & Penikas, 2017) found that the probability of default of shipping companies was positively associated with overvaluation and negatively with GDP and a company's size. They also found that the shipping industry faced a trough (i.e. a period of subdued economic activity) for two reasons: (a) slow growth of global demand for seaborne trade as a result of the crisis, and (b) rising supply of vessels entering the market. As a result, charter rates as well as vessel values fall sharply, leading companies to loan defaults and, eventually, to bankruptcy. (Girvin, 2019) observed that the over-supply of ships, many of which were ordered during the preceding peak market, aggravated a growing imbalance between demand and supply.

Given the cyclic nature of the shipping industry, it is therefore important for lenders to evaluate the overall shipping economic scenario in order to determine credit risk. There are numerous recent post-Hanjin studies in this area. After the collapse of Hanjin, (Choi, Kim, & Han, 2018) developed an early warning index in the Korean shipping industry by using signal approach i.e. constructing an effective system of early warning indicators anticipating a crisis. The index is calculated using 60 different variables, such as the global economic growth rate, maritime freight, and multiple business indicators. (Opitz, Seidel, & Szimayer, 2018, p. 286) found that in late 2007 there were "*warning signals of the possibility of a crisis in the shipping market*". Accordingly, "*market participants could have reduced or even stopped the ordering of new vessels about 1 year before the crash*" and managed capacity in line with expected market demand. The banks should have intervened by tightening shipping loans (Opitz, Seidel, &

Szimayer, 2018, p. 287). (Nam & An, 2017) examined the relation between the default risk, as measured by the Altman K-score (the bankruptcy predictor of Altman K-Score combines several variables in a statistically derived combination), and firm value, as measured by the Return on Assets (ROA) of shipping companies. They found that the Altman K-Score is significantly linked with firm value and that higher performing firms as measured by the ROA exhibit higher financial health as measured by K-Score. However, these methods of evaluation are not straight-forward means to determine market efficiency and credit risk. (Panayides, Lambertides, & Savva, 2011) found that some shipping firms were highly operating efficient (including Hanjin at that time) but not market efficient at the same level. Therefore it is difficult to point to a single parameter that can determine whether there is a credit risk or not.

In conclusion, it is important to analyse the economic/ market conditions that may affect the performance of shipping companies. This periodic analysis is important both for banks (to take a decision on advancing loans) and insolvent shipping companies (to propose a business plan) in a restructuring management process. We will revisit this in section 3.4, below.

3.2 Sources of finance

Reviewing the sources of finance for shipping companies is key to understanding any restructuring or insolvency process that they may be subject to. In the previous section, we have seen that shipping companies face exacerbated liquidity issues in times of financial crisis. The shipping industry is highly capital intensive, with the two major sources of financing being banks (primarily through a loan facility secured by a mortgage) and the government (through export credit agencies). The banks and the government therefore become key players when a shipping company faces restructuring during insolvency. Their respective bargaining positions in a restructuring management process depend upon the nature of security, which in turn typically depends upon the nature of finance. Consequently, it is necessary to study the sources of finance.

3.2.1 Bank Finance

Bank financing is one of the main sources of capital to the shipping industry. As it offers a flexible and low cost of capital (Giannakoulis, 2016), bank debt is considered the most attractive form of financing for shipping companies. This bank debt is typically at an interest cost of 200-300 basis points above LIBOR (Giannakoulis, 2016, p. 75). Even after "*the 2008 financial crisis*

and the consequent decision of a number of banks to reduce their shipping exposure, bank financing remains highly competitive for ship-owners as compared to any other source of capital" (Giannakoulis, 2016, p. 75). (Lee & Pak, 2018) observed that while there are concerns about the shrinking of shipping loans by the net stable funding ratio (NSFR) of Basel III, syndicated shipping loans amounted to USD46.8 billion in 2016, accounting for approximately 75% of the total supply of shipping finance.

Given the high risk of shipping insolvency, credit risk (i.e. the risk that the bank will not be able to timely recover its loan, interest and other cost incurred) analysis is very important. There are several factors that impact this credit risk. (Mitroussi, Abourghoub, Haider, Pettit, & Tigka, 2016, p. 6) found that "*capital intensiveness, high volatility in freight rates and prices, cyclicality, seasonality, strong business cycles and exposure to direct fluctuations of regional and global economies create a risk laden investment environment for banks*". (Adland & Jia, 2008, p. 153) showed that "*period time charter default risk depends upon freight market conditions, period charter duration and the financial condition of the charterer*".

However, a credit analysis is not always straightforward. (Stephenson Harwood, 2006) outlined four characteristics that make it difficult to carry out the conventional credit analysis. These are (a) capital intensity, (b) mobility of assets, (c) volatility and (d) opaque business structures leading to secrecy on both operational and financial matters. To protect its position during a default which may lead to the insolvency of a shipping company, a bank typically incorporates many safeguards into a shipping loan agreement. These safeguards will also determine the legal position of the banks if the shipping companies face insolvency. Two important operative clauses of a loan agreement, which are relevant from the perspective of a shipping insolvency, are "covenants" and "events of default" ("EOD").

3.2.1.1 Covenants

Covenants seek to "*ensure that the borrower's financial condition, business, assets (including, without limitation, the ship) and any security on assets over which the bank will have recourse (in case of event of default) remain within the parameters of the bank's initial credit approval of the loan*" (Spoullos, 2016, p. 218).

Positive covenants include the responsibilities of the borrower "*to comply with the terms and conditions of their financial and other obligations, to register the vessel in a ship registry reasonably acceptable to the lender*", to disclose to the bank any event of default and to ensure that the value of the vessel always exceeds a certain percentage of the loan outstanding (Otto & Scholl, 2015, p. 64). Negative undertakings "*usually include restrictions on issues such as asset disposal, making loans, granting credit or giving guarantees, borrowing and allowing encumbrances*" (Spoullos, 2016, p. 218). A breach of a covenant will "*trigger an event of default and the bank's right to accelerate repayment of the loan*" (Spoullos, 2016, p. 218).

3.2.1.2 Events of Default

EODs are "*the events set out in the loan agreement, which, should they occur, will entitle the bank to accelerate the loan (i.e. cancel any outstanding lending commitment and declare all amounts owed to the bank to be immediately due and payable or payable on demand) and enforce the security*" (Spoullos, 2016, p. 224).

Typical EODs include the failure to repay the loan or to pay interest, material misrepresentation, breach of covenant, material adverse change, insolvency of borrower etc. (Otto & Scholl, 2015, p. 66). In practice, EODs are "*the "teeth" of the loan agreement*" and the "*threat they pose is always the best leverage for the bank during restructuring negotiations*" (Spoullos, 2016, p. 224).

(Drobetz, Haller, & Meier, 2016, p. 29) observed that "*banks are reluctant to liquidate their collaterals from non-performing loans even when loan-to-value covenants are broken*". Even if an EOD does occur, for example in the event of an impending insolvency, a bank should weigh in various factors before deciding whether it is preferable to accelerate and enforce or seek to negotiate a restructuring of the loan. Some of these factors are (Spoullos, 2016, p. 225):

i. What is the physical location of the ship?
ii. What is the physical condition of the ship – i.e. the age, maintenance etc?
iii. How favorable is the relevant jurisdiction, where the ship is located, for arrest and enforcement procedures?
iv. What are the existing charter commitments and the prospects of generating revenue (i.e. the market outlook)?

v. Are there any trade creditors with claims against the ship that may rank ahead of the mortgage in that jurisdiction?
vi. What is the cost of enforcement?
vii. Are there prospective buyers for the ship?

As discussed in section 4.2.2 below, these are essential questions a bank would need to evaluate in the restructuring management process.

EODs are also used to entitle the mortgagee to take possession of the vessel. Typically the loan document would require such notices of EODs to be issued. The bargaining position of the bank in the restructuring process becomes stronger once the mortgagee bank is entitled to take possession of the vessel. This is particularly helpful when there are competing similar value claims from ship-yards who also seek to enforce a possessory lien over the assets. The competing rights of possession (between banks and shipyards) give rise to interesting questions of law which are beyond the current scope of this paper.

3.2.1.3 Debt to equity swap

Another common aspect in ship finance and restructuring is debt to equity swap. This is an arrangement under which a loan is "converted" to an equity share after a set timeframe elapses, or at the lender's discretion; which means that if the shipping company cannot pay back the loan, then the creditor can seek to potentially recover in the form of shares in the company (Bhogal & Trivedi, 2019, p. 286).

In most insolvency scenarios, shipping companies are forced to agree a debt to equity swap. The rationale is as follows: if the trigger is pulled on the default by the creditor, and the shipping company is unable to repay, in all probability, this will entail a loss for the creditor – they may rank lower in priority than other claimants and recovery may be uncertain. They may therefore prefer to exercise the debt to equity swap option. As the shipping industry is cyclic, if (and when) the market conditions improve, the value of the shipping company will also increase. The erstwhile creditor (now shareholder) will then gain from the increase in the share value of the shipping company. This option may also be attractive to the shipping company as it will relieve immediate liquidity concerns and allow the company to continue as a going concern.

3.2.1.4 Shipping Bonds

Bonds are negotiable debt instruments similar to loans – the difference being that, for bonds, there is a secondary public market for their trading (Karatzas, 2016). Bonds also have a shorter maturity period than loans. The key terms associated with a shipping bond are (Karatzas, 2016, p. 148):

a) "*Principal amount*": the amount of money borrowed when the bonds are originally issued, typically in the range of hundreds of millions of dollars;
b) "*Maturity*": the period of time within which the principle amount has to be paid back to the investors;
c) "*Maturity date*": date on which the last payment of the principal is due;
d) "*Coupon*": this is similar to "annual interest rate" for loans and is the "price" the borrower pays for utilizing the principal amount for one calendar year;
e) "*Coupon payments*": payment of interest which takes place annually or semi annually.
f) "*Current yield*": the coupon divided by current market value of the bond;

(Karatzas, 2016, p. 155) observe that "*shipping high yield bonds have been yielding 6% at the very least, and more typically in the range 7-9%, while bonds bearing coupons of 12% or more are not unheard of*".

Since shipping bonds are issued at high cost, the shipping company resorts to this form of financing only when its options are limited. Since the 2008 crisis and the Basel III regulations, lending from shipping banks has become more expensive. In times of financial crisis, when the banks are not willing to induce more capital, shipping companies often resort to issuance of bonds to get the required liquidity. For example, "*in 2009, during their restructuring process, tanker owner General Maritime based in New York issued USD300 million in senior unsecured bonds bearing a 12% coupon, reflecting the weak state of the tanker market and the particular circumstances of the issuer*" (Karatzas, 2016, p. 155).

For the purposes of our discussion on insolvency later, it is important to note that for a shipping bond, the principal amount is usually due as a bullet payment on maturity. This would put

pressure on a shipping company facing insolvency and negotiations would often be required with bondholders to (re) negotiate terms for payment.

3.2.1.5 Mortgage

The ship mortgage gives the lender rights against the vessel itself, and not just personal rights against the ship-owner. (Stephenson Harwood, 2006, p. 125) noted the essential features of a ship mortgage, namely *"(a) it gives the lender in rem rights against the mortgaged vessel; (b) it gives the lender priority over unsecured creditors of the ship-owner; (c) it enables the lender to take possession of the ship in the event of a default by the owner; and (d) it allows the lender to sell the ship to realize funds to satisfy the lender' debt*".

(Norton & Chiste, 2016, p. 234) observed that "*although mortgages are the traditional form of security for bank loans taken alongside other forms such as assignment of earnings, insurances and guarantees, they suffer from numerous shortcomings*", specifically in the context of an impending shipping insolvency. The most significant drawback is that the underlying asset to which a mortgage is attached can decline in value leading to a negative loan to value ratio (Norton & Chiste, 2016, p. 234). The value of ships is known to be "*very volatile, driven in part by the shipping cycle which itself lags behind the wider economic cycle (shipping service provisions constituting a derived demand)*" (Norton & Chiste, 2016, p. 234)

The rights of a mortgagee bank often clash with (and rank lower in order of priority to) the rights of a maritime lien holder. The concept of a maritime lien is discussed below in section 3.3.3.2. Aside from maritime liens holders, a mortgagee bank may also be affected by a possessory lien holder. Thus, ship-repairers, for example, should be well advised to exercise their possessory lien before the ship leaves the yard (Mandaraka-Sheppard, 2013).

3.2.1.6 Ship leasing and chartering

In a typical lease agreement, one party will pay another an amount of money for the use of the fixed asset (i.e. a vessel in the shipping context). The party using the asset is called the lessee and the party providing the use of the asset is called the lessor. In a typical ship leasing structure, a leasing institution sets up a Special Purpose Vehicle ("SPV"), which will own the vessel (Alexopoulos & Stratis, 2016, p. 201). The vessel is then acquired by "*a combination of equity*

capital, which is committed by the leasing institution and debt capital raised from a debt financier (shipping bank) and secured by a first priority mortgage on the vessel" (Alexopoulos & Stratis, 2016, p. 201). Finance leases are common in the shipping industry. In terms of ownership, such finance leases are usually in the form of "*bareboat charter in of vessel(s) or as sale and immediate bareboat charter back of same vessel(s), and are accompanied with purchase obligations at the end of the lease*" (Alexopoulos & Stratis, 2016, p. 204).

The bareboat charter structuring has major implications on the locus of a creditor to arrest the vessel in the event of impending insolvency. A vessel under a bareboat charter is typically considered an asset of the bareboat charterer and is prone to arrest in most jurisdictions. For example, if a shipping company had taken a vessel on a bareboat-charter from a SPV (and assuming that the bareboat charter is continuing), then such vessel is considered to be an asset of the shipping company and prone to arrest.

However, if the vessel was taken on a time-charter by the shipping company from the SPV, then the ability to arrest may not be straightforward given that the vessel may not be considered to be an asset of the shipping company. The owner in this case would be the SPV. In such a situation, if shipping company faces insolvency, does such vessel constitute an "asset" which would have protection in case of temporary stay of proceedings (if granted)? The lack of transparency and the complex nature of such arrangements often force the courts to give a wide protection and considered all such vessels as "assets" of the shipping company when providing a temporary against proceedings in the event of insolvency.

Many times, the use of chartering arrangements as a form of ship financing leads to "*legal complications regarding whether the ship was truly leased or whether the chartering arrangement is a sale in disguise*" (Rodrigue, 2016). This lack of clarity and transparency often leads to panic in an insolvency situation, and to protect its individual position, each creditor is likely to move for the arrest of the vessel. The problem is that most courts across jurisdictions are willing to grant an arrest order on a *prima facie* basis with no requirement for a counter security and little scope for liability for wrongful arrest in the event the technical criteria is not met. This leads to interruptions in the operations of the company, and is a major impediment in the restructuring process.

3.2.2 Government Funding

Many times local shipping companies are supported by their governments, often via subsidies which can take the form of a government financing operational losses and debts (ITF, 2019). Export Credit Agencies ("ECAs") are "*mostly government-controlled or quasi-governmental organizations whose role is to support their respective home country's export of goods and services by extending export finance structures*" (Alexopoulos & Stratis, 2016, p. 193).

During the period from 2000 to 2008, the role of ECAs in ship finance was rather limited as traditional debt financing sources were readily available from shipping banks (Alexopoulos & Stratis, 2016, p. 194). As a result of "*the financial and shipping crisis, a number of shipping banks were faced with problems in their shipping portfolios and increased regulatory (Basel III) constraints, which forced them to either scale down their lending or leave the industry*" (Alexopoulos & Stratis, 2016, p. 194). This increased the role of ECAs.

The ECA can manifest itself in two major forms – (a) the ship-owner will either get funding from international commercial banks, on the back of a guarantee or an insurance policy issued by an ECA, or (b) the ship-owner will get the funding directly from the ECA (Alexopoulos & Stratis, 2016, p. 195).

Under option (a), the "ECA-guaranteed" financing structure, the ECA "*promotes and facilitates the export of a maritime asset by issuing a guarantee / insurance product*" (Alexopoulos & Stratis, 2016, p. 195). Foreign commercial banks extend the necessary financing (for example a term loan facility) to the overseas buyer/importer of the maritime asset being financed on the back of this ECA guarantee/insurance policy (Alexopoulos & Stratis, 2016, p. 195). Under this arrangement, the commercial bank is effectively assured that it will receive payment, by the ECA, in the event of a payment default by the ship-owner (provided that the policy's considerations and requirements are met), whether connected to any insolvency event or any other commercial event (Alexopoulos & Stratis, 2016, p. 195). Since the guarantee / insurance cover is backed by the ECA's government, the commercial bank's guaranteed exposure is not treated as a shipping risk but rather as a sovereign risk (Alexopoulos & Stratis, 2016, p. 195). K-SURE in Korea, SINOSURE in China and NEXI in Japan are common providers of such ECA-guaranteed financing structures (Alexopoulos & Stratis, 2016, p. 196).

Under option (b), as an alternative to the ECA-guaranteed/ insured financing structure, the export-import bank of the shipping company's country may extend a direct loan to the ship-owner (Alexopoulos & Stratis, 2016, p. 196). Under this arrangement, it will "*either issue a term loan facility to the borrower or will participate in a banking consortium with other commercial lenders, which has been put together for the purposes of financing the specific assets*" (Alexopoulos & Stratis, 2016, p. 196). As an example, in Korea, China and Japan, the respective export-import banks Korea Export Import Bank (KEXIM), Korea Development Bank (KDB), CEXIM and Japan Bank for International Cooperation (JBIC) are typically involved in such financing arrangements (Alexopoulos & Stratis, 2016, p. 197).

As will be seen in our later analysis of the Hanjin-insolvency under section 4.2.3, ECAs play an increasingly important role for the shipping companies.

3.3 Interaction between Insolvency law and Maritime law

In the previous section, we have seen how banks and the government play an important role in ship finance and have a say in the event of the insolvency of a shipping company. In addition to banks and governments, one of the most critical relevant parties in insolvency proceedings are the third party creditors of the shipping company such as bunker suppliers, ship-repair yards, necessaries suppliers etc. The position of such creditors depends upon the rights conferred by two sets of law – insolvency law and maritime law, under each of which the creditors are likely to have differing bargaining positions in a restructuring process.

3.3.1 Insolvency

Simply put, insolvency is a debtor's inability to meet his or her financial commitments. The traditional way of identifying insolvency is by the so-called "balance-sheet" test: upon a balance of the debtor's liabilities and assets, the former exceed the latter with the consequence that all the liabilities cannot be discharged in full (Fletcher, 2009). A different – but commercially more useful – indicator of financial distress is known as the "cash flow" test, which is based on the objective demonstration of the debtor's inability to meet obligations at the time of falling due (Fletcher, 2009).

3.3.2 Cross-border Insolvency

UNCITRAL was formed in 1996 with the express mandate to further the progressive harmonization and unification of international trade law. In May 1997, UNCITRAL adopted the Model Law. The preamble to the Model Law states its purpose is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency as to promote the objectives of cooperation between courts, greater certainty for trade and investment, fair and efficient administration of cross border insolvencies that protect the interest of the creditors and other interested persons, protection and maximization of the value of assets and facilitation of the rescue of financially troubled businesses (United Nations, 2014).

Under the Model Law, after the commencement of foreign proceedings and appointment of a foreign representative, the representative may apply to the courts of a signatory state for recognition of the foreign proceedings in which the foreign representative has been appointed (Toh, 2017). Foreign proceedings may be recognized as foreign main proceedings ("FMP") if taking place in the State where the debtor has "the centre of its main interest" ("COMI"). From the time of filing an application for recognition until that application is decided upon, the court may, at the request of the foreign representative, grant relief of a provisional nature including stay of execution against the debtor's assets where relief is urgently needed to protect the assets of the debtor or the interests of the creditors (Toh, 2017).

(Dawson, 2018), using the principle of modularity, identified a short coming of the COMI approach which is relevant to the shipping context. It is common knowledge that most vessels are owned by SPVs. Such SPVs often have no other asset other than the vessel. The SPV structure is adopted to ring fence the assets of the shipping company. One of the practical reasons is to prevent a "sister-ship" arrest - if vessels "A" and "B" are both owned by C, and C owes D a debt in respect of vessel "A", then D is entitled to even arrest the vessel "B" in respect of such claims. The Model Law's COMI test assumes that there is just one main proceeding, leaving open the question of how to handle the insolvency of a multinational debtor group which may have entities registered in multiple jurisdictions.

There are four principles on which the Model Law is built. They are (United Nations, 2014):

i. The "*access*" principle: This principle establishes the circumstances in which a "foreign representative" has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought.
ii. The "*recognition*" principle: Under this principle, the receiving court may make an order recognizing the foreign proceeding.
iii. The "*relief*" principle: Under this principle, if an application for recognition is pending, interim relief may be granted. If a proceeding is recognized as a "main" proceeding, automatic relief subject to some discretion follows.
iv. The "*cooperation*" and "*coordination*" principle: This principle places the obligation on both courts in different States to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvency estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.

There are two core but opposing approaches in international insolvency law, towards cases of cross-border insolvency. These rival approaches are based on the (contrary) principles of territoriality and universality.

3.3.2.1 Territorialism

The doctrine of "Territorialism" follows the concept that each national insolvency law is limited to its state territory. This means that all assets in that state territory shall be seized and distributed in accordance with local law, even though the insolvency proceedings were opened in a foreign jurisdiction (Goretzlehner, 2019, p. 44). At the same time, Territorialism means that the jurisdiction of the court where the insolvency proceeding was started, stops at its national border and therefore assets of the insolvent company which are located abroad are not included in the proceedings, as these fall into the jurisdiction of another state (Goretzlehner, 2019, p. 44). The reasoning behind this strict and "domestic-jurisdiction-centered" principle is based on the idea of sovereignty of states.

3.3.2.2 Universalism

The principle of "Universalism" is the direct opposite of the territorial approach. It means that there is a single law and a single jurisdiction covering all assets of the insolvent company (Goretzlehner, 2019, p. 45). The applicable law will be determined "*by the insolvency court*

where the debtor's insolvency proceeding is opened (lex concursus), which is usually the debtor's home jurisdiction" (Goretzlehner, 2019, p. 45). In short, the doctrine of "Universalism" follows that the opening insolvency court's laws will be applicable even to the assets situated in other states and jurisdictions.

The advantages of "*an insolvency proceeding adhering to the principles of Universalism are that the number of proceedings are minimized and that all creditors of the insolvent company worldwide are treated equally, as they come under the same laws and regulations*", i.e. that of the opening / main insolvency court (Goretzlehner, 2019, p. 45). On the other hand, an insolvency proceeding under a pure universalistic approach may interfere with foreign legal relationships in other jurisdictions. Suppose Company A and Company B enter into a legal relation in Country C. If insolvency proceedings are initiated over Company A's assets in Country D, then the legal relation would be subject to the law of Country D. This is not what the parties decided, and the effect "*cannot be justified with the argument of a more efficient and cheaper global insolvency proceeding, as the freedom of contract as well as the freedom of choice of law should prevail*" (Goretzlehner, 2019, p. 46).

There is a modification of the Universalistic approach, which is based on the concept that the central insolvency court in the debtor's home country, or more precisely at his COMI, is not solely responsible to manage the global insolvency of the transnational company, but the main court will be assisted by courts in all those states where the insolvent company has further assets (Goretzlehner, 2019, p. 45). Modified universalism anticipates "*that states may be unwilling to cede sovereignty over locally situated assets and creditors and reluctant to tolerate outcome differences that would arise were the local assets and claims administered under the laws of the main insolvency court's priority rules rather than local priority rules*" (Walters, 2019).

3.3.3 Maritime Law

Trade is conducted throughout the world primarily by way of ships. Ships sail from port to port, calling at various jurisdictions. As mentioned previously, unique feature of the shipping industry (i.e. a shipping company) is the mobility of its assets (i.e. the ships). Two unique concepts associated with maritime law are the concepts of action *in rem* and maritime liens.

3.3.3.1 Action in rem

An admiralty action *in rem* is an action against *the res*, which is usually a ship but could in some situations also include other kinds of maritime properties, like cargo and freight (Toh, 2017, p. 19). The action *in rem* is characterized by service on and arrest as well as detention of *the res*, which unless released, is judicially sold free of all encumbrances. The proceeds of sale of *the res* are then used to satisfy the creditor's claims.

3.3.3.2 Maritime Liens

The maritime lien is a unique feature of maritime law. It is "*an encumbrance or charge over a ship or other res like cargo or freight, which accrues from the moment the underlying claim giving rise to it attaches, travels secretively with the res, survives any change of ownership of the res (except one brought about by judicial sale) and is carried into effect by an action in rem"* (Toh, 2017, p. 269). A maritime lien holder is accorded higher priority vis-à-vis other maritime claimants and so enjoys a better chance of having its claims satisfied when proceeds of sale the vessel are insufficient to meet all the claims made against *the res* (Toh, 2017, p. 269). A maritime lien remains unaffected by any change of ownership except one brought about by sale by a court pursuant to arrest proceedings. There is always "*a risk that a ship purchased other than through judicial sale may, unknown to the purchasers, be encumbered with maritime liens, which unlike mortgages, are not recorded in any registers*" (Toh, 2017, p. 269).

In countries such as the UK, Singapore, Australia and other commonwealth jurisdictions, the claims that (typically) give rise to traditional maritime liens are wages of the crew and master, salvage, collision and damage done by a ship. Most other claims are maritime claims secured by statutory rights *in rem*. In practice, these would include claims for necessaries such as supplies, cargo damage, breach of charter-parties etc. But in countries such as United States, the scope of maritime liens is much wider. Claims such as bunker supplies and even cargo claims are given the status of a maritime lien.

3.3.4 Conflict between Insolvency and Maritime Law

The core objective of both insolvency and maritime law is to allow the creditors the payment of their claims. The basic difference between these is in their approach. Insolvency law seeks to centralize all assets of the debtor in a single forum to that these may be distributed in a simple

manner for the benefit of all creditors (Chong, 2018). Maritime law, on the other hand, contemplates a multiplicity of proceedings in a multiplicity of fora, which allows maritime creditors to obtain security for their claims by arresting the ships that is connected with their claims in any jurisdiction where she may be found (Seitz, 2009).

The Model Law makes no express reference to rights which may have been acquired under maritime law, whether in a domestic or international context. In the context of an admiralty claim, the Model Law is likely to work in the following way:

- If the ship-owner has commenced rehabilitation or liquidation proceedings in another state and such proceedings are recognized as "a foreign main proceedings" (under Article 2(a) read with Article 17 of the Model Law) by the courts of the a Model Law signatory state before which the admiralty proceedings are commenced, then (because of Article 20(1) of the Model Law), the admiralty action is to be stayed.
- However, this stay of the admiralty action is subject to any discretion conferred under insolvency related legislation of the signatory state on the courts before which the admiralty action is commenced to allow the creditor to commence or continue such proceedings (under Article 20(2) read with Article 20(4) of the Model Law) (Toh, 2017, p. 162).
- This discretion is usually exercised to protect the rights of enforcement of the claim of secured creditors which, in the context of the admiralty action, are likely to include a creditor who has issued his admiralty writ *in rem* before the rehabilitation or liquidation order is made by the court before which the foreign main proceedings are brought (Toh, 2017, p. 162)

It is this discretion which becomes problematic when determining the rights of creditors. (Toh, 2017, p. 161) suggests that the Model Law was not drafted with the characteristics of admiralty law and procedure, including its central features of arrest of vessels, in mind. For example, under maritime law, maritime liens supersede changes of ownership and mortgages. However, this has not been addressed under the Model Law and there seems to be nothing in the Model Law that would justify stripping local creditors of their rights by the virtue of recognition of foreign proceedings (UNCITRAL-INSOL-World Bank, 2017). Furthermore, there is a probability that the commercial judge addressing cross-border recognition may lack the relevant knowledge of maritime law. This is further complicated by the fact that different countries have different

regimes of maritime liens; in some, maritime lien could apply to a wide variety of claims (like bunker supplies in the US) while in others (like the UK) they might be limited to, for example, collision, salvage and wages (UNCITRAL-INSOL-World Bank, 2017)

3.3.5 What can be done?

A shipping company facing insolvency may seek protection from being wound up from the courts of the jurisdiction in which it is incorporated, typically by commencing some form of rehabilitation proceedings in such courts, which may also order a moratorium to be imposed on proceedings commenced or to be commenced against the assets of the shipping company (Toh, 2017). The effect of any moratorium order on an admiralty claimant's right to arrest in another jurisdiction would depend, *inter alia*, on whether and if so, to what extent, such moratorium order is recognized by the courts of the arresting jurisdiction (Toh, 2017). This is where cross border insolvency principles come into play.

(Davies, 2018) suggests that the solution may lie in "*a 'middle path' that achieves the main goal of universalism, recognizing the primacy of the insolvency proceedings, while also preserving the right of admiralty claimants to secure their claims by proceeding against the debtor's assets wherever they may be found*". This middle path depends upon the notion of reciprocal comity, by which each country – that of the admiralty arrest or attachment and that of the insolvency proceedings – respects the legitimacy of the others' proceedings and laws.

At the UNCITRAL meeting in April 2019, a separate sub-session was dedicated to maritime insolvency issues. During the meeting it was noted that features of maritime law such as the secrecy of maritime liens and the ease of forum shopping made handling maritime insolvency particularly difficult (UNCITRAL-INSOL-World Bank, 2019). The more specific issue of Article 20(2) of the Model Law envisaging exemptions from an automatic stay upon recognition of foreign main proceedings was discussed, noting that in those jurisdictions in which the Model Law was enacted with exemptions encompassing maritime liens, that article would not prevent the arrest and sale of the ship even though the foreign main proceedings concerning that ship was recognized in the arresting jurisdiction (UNCITRAL-INSOL-World Bank, 2019)

Most courts would recognize foreign insolvency proceedings and grant a stay which would assist the foreign representative. The more complex question is whether the status of various creditors

– which may differ from jurisdiction to jurisdiction – would be recognized and respected by the main insolvency court. This would have a bearing on the respective bargaining position of the creditors in the restructuring management process.

We have seen in section 3.3.3.2 above that the nature and the ranking of a maritime lien differs from jurisdiction to jurisdiction. This situation is typically known as "conflict of laws" and is an entire field of separate study. In the narrower context of shipping insolvency, a court where the assets of the shipping company are situated would have three broad choices to make, i.e. decide the law:

a. governing the underlying claim which is the cause of action;
b. that confers the maritime lien or a statutory right in rem; and
c. that would govern the priority between competing claims (both maritime lien and maritime claims) when the value of the assets (normally the sale proceeds) are lesser than the cumulative claims.

In most jurisdictions, such as England, Australia, Singapore and other Commonwealth countries, courts have held that the *lex fori* (i.e. law of the forum) governed both the recognition of the status of the foreign claims and the question of the priorities (Xu, 2018). However, in the US and the Canada, generally the status of the foreign claim is a matter for the governing foreign law, while the priority issue is for the *lex fori*.

So, in short, the priorities of the foreign maritime claims in distributing the proceeds of the ship's judicial sale would in almost all cases be governed by the law of the forum. The recognition of the status of the foreign claims would differ. This decision would probably be reflected in the scope, modification or termination of the stay under Article 20(2) of the Model Law, and also Article 21 providing for additional appropriate relief.

3.4 Maritime restructuring / management process

(Jaffe, 1984) observed that the process of targeting a structure for reorganization involves an analysis of the debtor's situation in three stages: *"[1] developing a profile at the outset of how it is hoped the debtor will "look" after the reorganization; [2] winding down or discontinuing those operations which are to be abandoned and preserving those which it is hoped can be*

saved; and [3] maintaining the debtor's operations during the period of reorganization. In the shipping context, the ability to continue as a going concern simply may not exist at the time of insolvency or, even if it does exist, may well dissipate within the time require to effect the legal process of reorganization." Timing, therefore, is the crucial element of a shipping reorganization (Jaffe, 1984).

(Keech, 1984, p. 1247) observed that the "*disruption caused by arrest or attachment may well be fatal to shipping company reorganization*", even if the arrest can ultimately be avoided or set aside. When a vessel is delayed by arrest or attachment, the costs of operation mount at the same time that practical problems multiply. Creditors who are attempting reorganization will "*become restive if vessels are frequently seized abroad, for the operational risks will mount with each trip*" (Keech, 1984).

(Heller & Hayden, 1984) introduced the concept of "*adequate protection*", a term of art, which is "*central to a consideration of both the right of a debtor to use collateral and the right of the creditor to lift or modify the automatic stay*". It "*recognizes the debtor's need to use the vessel in order to generate funds to continue his operations and fund his plan of reorganization, even though he has defaulted on a secured obligation*" (Heller & Hayden, 1984, p. 1217). In exchange for the protection of the automatic stay which enables him to continue operations, however, the debtor must adequately protect the creditor's interest in the collateral (Heller & Hayden, 1984).

We have seen the role, rights and obligations of three key players – the banks, the government and the third party creditors in a shipping insolvency. Now, let us analyze what may be done in a restructuring management process. A restructuring management process will involve many stakeholders. It would be worthwhile to list down the key players and the options they have in the process (Lammerskotter, 2015, p. 287):

3.4.1 Shipping Company

The shipping company plays a key role in the restructuring. Its attitude (and the acceptance level of the problem) can make or break the effort. It also plays a key role in timing, which is, as will be seen, one of the key pivotal points in restructuring. The shareholders can supply liquidity in the form of a shareholder loan or a capital increase, or give guarantees backed by their personal wealth to the banks in exchange for new loans. They can also agree to sell certain assets of the

company to raise cash. In addition, if they cannot contribute with their own cash injections, they can pave the way for a third-party investor to enter the company, which would mean that existing shareholders must accept a dilution of their shareholding, often through a debt to equity swap discussed above under section 3.2.1.3 (Lammerskotter, 2015, p. 287).

3.4.2 Banks

Shipping, being a very capital intensive industry with high leverage (i.e. high amount of debt), is hugely dependent upon banks. Naturally, banks play a key role in all restructurings. The banks can ease the cash-outflow of a company by accepting a full or partial moratorium on the principal payments. Interest payments can be converted into "payments in kind", meaning that part of the interest payment is only due at a later stage (Lammerskotter, 2015, p. 287). Loans can also be "*restructured to temporarily allow for a "pay-as-you-can" period in which case the company only pays to the bank if its cash flow allows for it*" (Lammerskotter, 2015, p. 288). Another option is for the banks to provide for a bridge facility i.e. a short-term cash injection to help a company through the crisis. This facility is usually highly priced and often combined with a share pledge (Lammerskotter, 2015, p. 288). This means that if the bridge facility is not repaid, then the bank shall receive (parts of) the shareholdings in the company. The banks also have the option of tranching of the loans. This means that banks "*divide their loans into various tranches such as a fully senior tranche and a junior tranche*" and fresh money / investment enters between the senior and the junior tranche (Lammerskotter, 2015, p. 288).

3.4.3 Government

The issues in an international shipping reorganization are extremely complicated because shipping companies exist in different countries for different purposes. "*National pride, local employment, the need to earn foreign currency and the national balance of payment*" may all affect the operation of a shipping company (Keech, 1984, p. 1284). If the company is partially owned by a government or if government loans or guaranteed ship mortgages are involved, political factors are likely to come into play.

3.4.4 Others

The other stakeholders that can contribute to a restructuring are usually the suppliers and customers, and also the ship-yards and owners of vessels which may be time-chartered to the

shipping company. It is often tricky to decide the level (and the timing) of transparency to these groups (Lammerskotter, 2015, p. 288). This is because of two main factors in the shipping industry context. The first is that the customers often have the chance to switch their suppliers on a short notice, which would lead to a reduced cash-inflow for the restructuring company (Lammerskotter, 2015, p. 288). The second is the availability of the option of initiating an arrest of a vessel. If the customers, who are already due some amounts, are informed of the impending (greater) financial troubles, they will try to secure their outstanding by becoming a secured creditor by initiating the arrest of the vessel (Lammerskotter, 2015, p. 288). Such action triggers a chain reaction, and any attempt to restructure a company by continuing operations is hampered.

Typically, the restructuring management process will involve:

Table 1: Restructuring management process

Preparation Phase	**Negotiation Phase**	**Implementation Phase**
• Analyze business concept • Create business plan / cash flow plan • Define liquidity requirements • Create sources of funds analysis • Identify stakeholders • Agree on possible contributions of stakeholders • Define negotiation objectives and strategy.	• Present company and liquidity requirements to stakeholders • "Round table" negotiations • Individual negotiations • Conduct independent business review • Address third party investors	• Agree on individual contributions between stakeholders and company • Draft and sign the restructuring agreement • Start implementing.

[Source: (Lammerskotter, 2015, p. 291)]

4 Review of Hanjin: Case Study

We shall now apply the theoretical framework to the case study of Hanjin (Chapter 4) and the survey conducted by way of the Questionnaire (Chapter 5). The following timeline [adapted from (Braden, 2016); (Batra, 2014); (Song, Seo, & Kwak, 2019) and news articles from TradeWinds website] is helpful:

4.1 Brief timeline of the Hanjin insolvency proceedings

Table 2: Timeline of the Hanjin insolvency proceedings

Year	Event
2008-09	The container shipping industry lost USD15 billion as a result of the global financial crisis. Hanjin lost USD1.1 billion in 2009.
2009-2012	Hanjin issued bonds because banks became more conservative. The average face value of bonds reached KRW 700 million per annum between 2009 and 2012.
2010	The European economic crisis affected Asia – Europe trade, which was critical to Hanjin, representing 22.7% of the company's revenue in 2010.
2010	The Chinese GDP growth reversed in 2010.
2011	Before the financial crisis, enormous mega-ships were ordered with the understanding that global container demand would grow at 2.2x, with "x" being global GDP growth, which averaged around 4 percent from 2000 to 2008.
2011	Hanjin lost USD487 million in 2011, erasing the progress from a profit of USD229 million in 2010 that would have helped to offset losses of 2009.
2012-2014	Hanjin issued convertible bonds worth USD9.2mn on 25 September 2014 to shore up the balance sheet and attempted to raise another USD 150mn via overseas bond sales. The debt service ability (Net Debt/EBITDA) deteriorated from 4.8x to 15x. The financial leverage (Net Debt/ Equity) stood at 0.98.
2014	Hanjin focused on selling profitable assets to generate liquidity. It sold domestic/ overseas container terminals. Activities and assets of bulk LNG shipping divisions were divested to H-Line from 2014.
2015	Hanjin posted a low profit of USD 6 million. The ship orders placed in 2015 grew nearly 100% YoY despite the impact overcapacity was already having

	on freight rates. The freight rates fell, with the Asia-North Europe rates at about USD205/TEU on 19 June, 2015, and the Asia – Mediterranean rates at USD195/TEU on 16 October 2015 according to the Shanghai Shipping Exchange.
2015	Hanjin had its credit rating cut on the back of weak freight rates. Korea Ratings Corp (KTC) downgraded the company to BB+ from BBB-, prompting the stock to fall as much as 17%. KTC, affiliated to Fitch Ratings, blamed a delay in earnings recovery and liquidity concerns.
2016	The Trans-Pacific spot rates to the US West Coast hit a record low of USD728 in April 2016. Hanjin accounted for roughly 7 percent of the Trans-Pacific trade when it collapsed. Typically, such freight rates were in the range of USD1800-2000.
2016 (22 April)	Hanjin hands over the control of operations to its largest creditor, the Korean Development Bank.
2016 (6 June)	Hanjin started negotiations to secure lower charter rates from ship-owners.
2016 (21 June)	Ratings agency Korea Investors Service (KIS) downgraded Hanjin to CCC.
2016 (26 July)	Rumors of missed payments to suppliers began as the company continued reduced charter talks.
2016 (16 August)	Hanjin announces second-quarter results: a net loss of USD182mn.
2016 (20 August)	Hanjin misses deadline to submit financial support measures to creditors.
2016 (25 August)	Hanjin submits a financial improvement plan proposing an injection of USD360mn via selling stock to affiliate Korean Air and raising another USD90mn from other asset sales. Evidence emerges that Hanjin has stopped paying charter companies and it now owes Seaspan USD18.6mn
2016 (29 August)	Media reports surfaced that Hanjin's banks, including the KDB, have rejected the restructuring plan.
2016 (31 August)	Hanjin files for receivership in the South Korean court.
2016 (1 September)	Vessels are ordered to slow-steam or stop to avoid risk of arrest. Ports and tug companies start to refuse Hanjin ships. Terminals ask shippers for stevedoring fees for cargo already in port. Freight rates start to peak as shippers look for capacity outside CKYHE alliance.

[Source: Self via (Braden, 2016); (Batra, 2014); (Song, Seo, & Kwak, 2019) and news articles from TradeWinds]

Due to limited access to information about the position taken by each relevant stakeholder (i.e. Hanjin, KDB, Government and the third party creditors) in Hanjin's insolvency, we cannot precisely outline the same. However, for the purposes of our discussion below, we assume the typical rights and obligations described in Chapter 3 above applied in general to Hanjin's proceedings. Further, where we do not have information on the positions taken by the stakeholders in relation to these rights and obligations, we assume that they were in line with the responses to the Questionnaire that were obtained from the 25 different respondents (each of whom are legal professionals who routinely advise stakeholders in insolvency proceedings).

4.2 Key decisions taken

We can see that the following were the key decisions taken by the main stakeholders in the lead up to the Hanjin insolvency:

4.2.1 Hanjin

As of September 2016, it was reported that Hanjin owned 37 containerships and chartered 62 others, making it the world's seventh largest container shipping line, which represented about 3.2% of the global container shipping capacity (Rodrigue, 2016). Legally, we had a situation where the 37 containerships which were directly owned by Hanjin were subject to the full asset seizure by creditors under the bankruptcy protection, but the matter was more complex for the 62 chartered ships (Rodrigue, 2016).

According to (Shin, Tae-Woo, & Sung-Woo, 2019), Hanjin failed to set up effective chartering policy that reflected trends in the shipping market. Typically, shipping companies operate owned vessels to reduce financial risks in adverse shipping market conditions. While competing European shipping liners could operate their own big containerships, Hanjin did not own containerships with capacity exceeding 13,300 TEU during market downturns (Shin, Tae-Woo, & Sung-Woo, 2019). Therefore, Hanjin needed to charter big container vessels to maintain their shipping alliance position and to service shipping networks (Shin, Tae-Woo, & Sung-Woo, 2019). Consequently, the company chartered some vessels long term with high charter rates with the expectation that the shipping market would recover quickly (Shin, Tae-Woo, & Sung-Woo, 2019). Hanjin chartered seven container vessels (10,000 TEU) at 43,750 ($/day) for 10 years (Shin, Tae-Woo, & Sung-Woo, 2019, p. 137). Unfortunately, contrary to Hanjin's expectation,

the prolonged slump of the shipping market persisted. As a result, Hanjin suffered from their high charter rate with long duration in the depressed container shipping market in which the oversupply of global container fleet exceeded 20 million TEUs as of July 2016 (Shin, Tae-Woo, & Sung-Woo, 2019, p. 137).

However, it should be noted that owning ships is not necessarily a better strategy than chartering them. (Lun, Pang, & Panayides, 2010) observed that large carriers find it advantageous to provide liner services with owned ships rather than chartered vessels. However, (Bang, Kang, Martin, & Woo, 2012) demonstrated that the higher proportion of chartered vessels indicated better efficiency in performance. An econometric study of nine shipping carriers (including Hanjin) over a period of seven years (2009-2015) by (Ha & Seo, 2017) showed that the impact of economics of scale and of chartered vessel ratio out of the total tonnage of ships that the company possesses has an insignificant effect on the company's profits.

In May 2016 it was reported that Hanjin had asked ship-owners to take a 30% reduction in charter rates for a period of three-and-a-half years in exchange for equity in a restructured Hanjin (Angell M. , 2016). However, Seaspan (one of the main ship-owners from whom Hanjin had chartered vessels) took a hard line with Hanjin's moves to cut its charter rates, with Seaspan CEO Gerry Wang reportedly saying "*We are not here to entertain a rate reduction. We believe (any rate cut) is a violation of the contracts*." (Angell M. , 2016). Till mid-August 2016, it was reported that Hanjin was working to restructure charters with 22 separate ship-owners as it needed KRW 1.2 trillion over the next 18 months to repay debt and operate (Pierce, 2016).

(Song, Seo, & Kwak, 2019) observed that corporate strategies employed in the changing market conditions were fundamental reasons for Hanjin's collapse. A number of decisions made by top management proved to be failures either due to timing or due to a deficiency of liner shipping know-how; the high operating cost (one of the direct causes of insufficient working capital that Hanjin was facing) can be mainly attributed to corporate strategies like a high ratio of chartered vessels, issuance of shipping bonds and bad timing of ship-investment (Song, Seo, & Kwak, 2019).

An example of erroneous corporate strategy that Hanjin employed is as follows. In 2012, the shipping industry saw a trend of the use of larger vessels which furthered the problem of

oversupply of tonnage with carriers like Maersk introducing the “Triple E” class vessels (with tonnage of more than 18000 TEU) around this time. Other carriers, including Hanjin, were forced to either invest in similar-sized ships (which were very capital intensive) or risk being left behind (Pauli & Wolf, 2017). Despite the market circumstances of low shipping demand and overcapacity issues, Hanjin decided to charter big container vessels to maintain their shipping alliance position and to service shipping networks (Shin, Tae-Woo, & Sung-Woo, 2019). Hanjin received its first 10,000 TEU container ship in 2010 and two 13,1000 TEU vessels in 2012 (Song, Seo, & Kwak, 2019).

Yet another example of Hanjin's bad timing / strategy are the alliances (i.e. cooperative agreements between the major carriers) it maintained. In May 2016 it was reported that Hanjin had won approval from bank creditors for its voluntary restructuring with the condition, *inter alia*, that Hanjin needed to ensure it stays part of a major alliance (Dixon[2], 2016). When Hanjin collapsed in 2016, it was a part of the CKYHE alliance (with other members being COSCO, K Line, Yang Ming and Evergreen). As of April 2017, Hanjin was set to join as a partner of THE Alliance to be formed in April 2017 by Hapag-Lloyd (which was being merged with United Arab Shipping Co), K Line, Mitsui OSK Lines, NYK and Yang Ming (Lewis[1a], 2016). The decision to change alliances at the time of restructuring may have been a reason for no support from CKHYE. In fact, in early August 2016, Evergreen said that it would not move any of its customers’ cargoes on Hanjin vessels and also wouldn't move Hanjin's cargoes on its ships (Martin, 2016).

4.2.2 Banks

One of the peculiarities with the Hanjin situation was that the main lender for Hanjin was KDB i.e. a state-backed bank. Therefore, the financing decision involved two key players – the bank and the government. In addition, some foreign banks were also exposed to defaults by Hanjin. TradeWinds reported that some 30 international banks were said to be exposed, with six major lenders — DVB, ING, DNB, HSH Nordbank, Commerzbank and Nord/LB — holding the biggest chunks of debt, although not all banks on that list agreed that they belong on it (Rust, 2016). However, not much information or data is available on the exact structure or terms of these loans. To fill this gap and for the purposes of our analysis, were assume that the shipping loans included the standard terms discussed in section 3.2 above.

For the purposes of our discussion, we will distinguish between foreign banks and the state-backed KDB (the main creditor). The approach of KDB is discussed with the role of the Korean government below. We assume that the position the foreign banks would have taken would be in line with the responses received from the majority of the shipping lawyers who were respondents to the Questionnaire.

There was a consensus amongst the respondents that legal advice on the arrest of ships is one of the foremost issues when a shipping company faces insolvency. Almost all respondents considered the option of "*the relevant jurisdiction, where the ship is located, for arrest and enforcement procedures*" as the most important factor to consider when a bank sought advice regarding a shipping company facing insolvency. Given that most jurisdictions do not require a counter security and are willing to grant an arrest on a "prima facie" basis, a majority of the respondents said that they would have advised the foreign banks to initiate legal proceedings against the Hanjin vessels at the earliest. This would have been when initial defaults started occurring on a regular basis in or around early 2016. Since the arrest of the vessel impedes trading, and hence will prevent the shipping company from operating as a going concern, many banks are hesitant to initiate such proceedings till almost the very end. Here we see a conflict between legal protection sought and practical reality of commerce.

The strategic thinking behind such legal advice to arrest seems to be to ensure the best possible bargaining position in the restructuring management process. The banks are aware that such legal proceedings are most likely to be temporarily stayed once the FMP proceedings are initiated by the defaulting shipping company and recognized by the local courts. Nonetheless, taking such a pro-active step sends a clear signal to the shipping company that the bank is going to take an aggressive position in any restructuring negotiations. If the bank manages to arrest the vessel before the moratorium/stay order sets in, and such an arrest is upheld and allowed to be continued by the local court, then the bank is in an even better position. In such a situation, the bank would be willing to vacate the order of arrest only upon some sort of security being provided.

However, this approach has its own short comings. In practice, what happens is that many third parties creditors (discussed below) would themselves arrest the vessel or file caveats against

release of the vessel. This means that unless and until all claims (and not just those brought by the bank) giving rise to the (numerous) arrest proceedings are either satisfied or secured, the vessel would not be free to trade and the shipping company may not be able to continue as a going concern, which seriously impedes the restructuring process.

Another practical problem with the arrest of the vessel is the cost of associated expenses. This is where the timing and swiftness of the restructuring process is very important. It is not as if the bank can simply arrest the vessel and sit back. There are many associated expenses such as legal fees, crew sign-off and repatriation expenses, maintenance and agency fees, insurance costs etc., which are involved. If the ship is under arrest, and these expenses continue to mount, banks often do not have the appetite to continue attempting restructuring and would instead look to enforce the collateral.

A majority of the respondents shared that in their experience, in most cases of insolvency, the banks had already given notices of EODs to the shipping companies (discussed in section 3.2.1.2 above). In cases where the loan had not yet been accelerated, the lawyers would advise the bank to do so. This approach has an impact on the quantum of the claim. If the loan is accelerated, typically the whole amount becomes due. The quantum of this amount varies on upon case to case basis, but the bigger the figure, the more of a deterrent it is for smaller claimants (discussed below in section 4.2.4) to pursue competing claims. These smaller claimants would think that in any event they would not get anything if the vessel is sold, as they rank below the mortgagee bank which has a large claim. If there are fewer claimants, it is easier for the bank to negotiate with the shipping company to work out a restructuring plan.

During the telephone conversations that were conducted with some respondents, it was observed that the banks also sought to attempt forced refinancing (though this area was not a part of the Questionnaire). The banks attempt such refinancing either at par (i.e. explore if other creditors such as second priority mortgagees or other lenders are interested in buying out the loan to improve their overall position) or at discount (identifying a party that is interested in assuming the loan at discount). The level of this discount is determined by taking into account the difference between the value of the collateral and the loan outstanding, as well as the employment status (Anagnostopoulos & Tsamanis, 2016, p. 262).

Based on the above, we assume that the foreign banks took the following decisions:

i. Restrained from arresting Hanjin vessels till the very end;
ii. Attempted refinancing (presumably with KDB);
iii. Issued notices of EODs under various breaches of covenants.
iv. Were willing to put a partial moratorium on principal payments; and
v. Were willing to take a haircut.

4.2.3 Government

The Korean financial crisis in November 1997 affected all industries. The Korean government introduced a policy (in 1999) mandating that the debt-to-equity ratio of family-controlled conglomerates was not to exceed 200% (Lee T. , 1999). As a consequence, Hanjin was forced to sell 29 containerships with charter-back conditions to improve their debt-to-equity ratio (Lee, Lin, & Shin, 2012). Hanjin was therefore forced to reduce their debt-to-equity ratio irrespective of the shipping market conditions. As a consequence, Hanjin had to increasingly resort to chartering ships (instead of owning them), since the purchase of new vessels became virtually impossible under these regulations.

Hanjin was considered "too big to fail" (Deloitte, October 2016). However, the Korean government did not provide financial support for its largest carrier. In 2015, Korea's biggest shipyards made record loses, amounting to USD6.7 billion (Logan, 2016). Consequently, both the ship-building and the port industry required government support. When faced with the decision of how to allocate the limited, available funds, i.e. which sector to rescue effectively, the Korean government favoured the shipbuilding sector, resulting in the saving of Daewoo, Hyundai Shipping and Hyundai Heavy Industries instead of Hanjin (Pauli & Wolf, 2017).

The primary reason for favouring the shipbuilding over the shipping industry in the governmental rescue plans were domestic employment rates (Song, Seo, & Kwak, 2019). Korean shipbuilders provided work for a far greater number of individuals domestically than the shipping industry and it was argued that without governmental support, the trend of job-losses would be far more accentuated (Pauli & Wolf, 2017).

In late July / early August 2016, Yim Jong-yong, chairman of the state Financial Services Commission (FSC), confirmed that the Korean government had no plans to bail out the company and ruled out aid for restructuring Hanjin (Dixon[3], 2016). By end August 2016, Hanjin's creditors (including KDB) unanimously rejected the rescue plan. Hanjin was expected to need at least KRW 1.3 trillion for the next 12 months for charter fees, operational capacity and to pay back outstanding loans (Dixon[4], 2016) which it could only partially finance. It was reported on 30 August 2016 that KDB chairman Lee Dong Geol said Hanjin had shown some efforts to turn around, but its voluntary debt-restructuring deal ends on 4 September, and then it will "probably" have to decide whether to file for court receivership (Dixon[4], 2016).

4.2.4 Third parties

When Hanjin filed for bankruptcy proceedings, its ships were refused permission to offload or take aboard containers because there were no guarantees that third parties would be paid. Many of its ships were denied entry into ports or were left unable to dock. This lead to an understandable panic amongst the third party creditors, and in particular bunker suppliers who typically provide for a credit period of about 30 days of payment. The Hanjin vessels, being unable to move, became sitting ducks for arrest proceedings.

A majority of the respondents admitted that would have advised such third party creditors to initiate proceedings to arrest the vessels even if such proceedings were likely to be temporarily stayed. Such creditors, knowing that their claims would rank low in priority (as discussed above in section 3.3.3), nonetheless are willing to expend money to initiate such proceedings in the hope of a quick settlement. In practice, the claim amount of such creditors is likely to be miniscule as compared to the claims of a bank. So if it comes to a situation where the vessel is to be judicially sold and the sale proceeds are to be used to satisfy the claims to the greatest extent possible, such third party creditors would in reality receive nothing. This is because the claim of the bank is inevitably always going to exceed the value of the vessel sold in a distress sale. However, if the bank itself is willing to negotiate with the shipping company and allow the vessels to ply (which would require any arrest to be vacated), then existing proceedings against such vessel are considered to be a nuisance value which is often paid by the bank itself in the larger interest of the restructuring process. The third party creditors hope for such quick settlement.

In practice, this is what happened. Many of the court judgments and online news reports indicate that some Hanjin vessels had already been arrested by the time the FMP were initiated / these were recognized by local courts. As we have seen from the above time line, the defaults in payments started happening in/ around June/ July 2016. Some of the respondents shared that they had successfully arrested Hanjin vessels and even managed to get partial settlement of claims for some of their clients during this short period of June- August 2016.

4.2.5 Courts

Let us now apply the aforementioned theoretical framework to the Hanjin court proceedings in 4 main jurisdictions – Singapore, Australia, UK and the United States.

4.2.5.1 Singapore

In Singapore, in September 2016, Abdullah JC in *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* ([2016] SGHC 195) was faced with an ex-parte application for, *inter alia*, recognition of a Korean court rehabilitation order, temporary restraint of all pending, contingent or fresh proceedings against Hanjin and its Singapore subsidiaries and a stay of all present proceedings against these entities until 25 January 2017. These orders were granted, save for an existing admiralty action, under which a Hanjin vessel had already been arrested by the time the *ex parte* application was made (Toh, 2017, p. 160).

In urging the court to exercise its inherent powers, Hanjin argued that the application made was an essential part of the series of applications that Hanjin had made across the world to prevent piecemeal and haphazard resolution of the company's difficulties (Ang B. , 2016). Any such "*disparate treatment would imperil Hanjin's rehabilitation and there would be a disorderly scramble amongst Hanjin's creditors to act quickly to seize and/or exercise their lien on vessels and containers which constituted Hanjin's principle business assets*" (Ang B. , 2016). Abdullah JC relied on the inherent jurisdiction of the court as the source of its power to grant such orders, paying particular emphasis on fairness of the Korean court process on all creditors, Korean and international. He was "*mindful of the impact on Singapore creditors, particularly the restraint of admiralty proceedings by barring the arrests of vessels*" (Ang B. , 2016). However, the need for orderly resolution and satisfaction of claims, as well as the possible benefits to all interested parties of the rehabilitation of Hanjin, were significant factors. He relied on the provisional

observations of the Singapore Court of Appeal in the case of *Beluga* [2014] 2 SLR 815, which he saw "*as an endorsement of the universalistic approach in the winding-up of a foreign company and was comfortable extending the approach to other forms of insolvency proceedings, including restructuring and rehabilitation*" (Ang B. , 2016).

According to (Toh, 2017, p. 160), the Singapore court went a step further than what is typically required under the provisions of the Model Law. Under the Model Law, an admiralty claimant may obtain the leave of court to proceed with his action *in rem* if the writ is issued before the rehabilitation or winding up order is made in the foreign main proceedings. This is in contrast with the restraint order passed by the Singapore court in *Re Taisoo Suk* which, on its face, does not exclude such pre-existing admiralty action. Save for the pre-existing arrest, the restraint order was so all embracing so as to extend to secured creditors like a mortgagee and a maritime lien holder (Toh, 2017, p. 160).

4.2.5.2 Australia

About two weeks after filing the application in *Re Taisoo Suk* in Singapore, Mr Tai-Soo Suk applied for recognition of Hanjin's Korean rehabilitation proceedings in New South Wales, Australia. In *Tai-Soo Suk v Hanjin Shipping Co Ltd* ([2016] FCA 1404), Jagot J granted, ex-parte, the recognition of the Korean proceedings as a "foreign main proceeding", and Mr Tai-Soo Suk as the foreign representative as well as further consequential relief.

4.2.5.3 United Kingdom

The English court, in *In the Matter of Hanjin Shipping Co., Ltd No. CR-2016-005448*, per Article 20(1) of the Model Law, granted a wide automatic stay to stop all the action to enforce any mortgage, lien or other security over Hanjin's asset except with the consent of the administrator or the permission of the court (Xu, 2018). The application was made under the Cross Border Insolvency Regulations before Mr Justice Nugee in the Companies Court in London and was the first major European recognition of the Korean rehabilitation process (Dixon[1], 2016). The court did allow the eight arbitrations that already had been commenced to continue up to and including the publication of interim final awards by the arbitration (J Xu, 2018). Nonetheless, the court emphasizes that any further steps in those arbitration or to seek to enforce any awards which the claimants may obtain against Hanjin is not allowed (J Xu, 2018).

4.2.5.4 United States

The US bankruptcy court, in *In re Hanjin Shipping Co.*, 2016 AMC 2113, 2114 (S.D.N.J., 2016), recognized the Korean proceeding as foreign main proceeding and issued an automatic stay order to say the pending or any future actions against Hanjin without preserving any exemption for maritime actions. As expected, the maritime lien holders opposed the relief arguing that maritime lien rights under the United States were superior to those rights in other countries, including Korea. The court did accept that maritime lien claimants were in a better position for supplies in the United States than they were anywhere else but focused on the Universalist approach and the purpose of automatic stay, and therefore refused to grant relief exceptions for maritime lien claimants. In reaching such conclusion, the court balanced the interest of all parties (i.e. Hanjin, global and local creditors) in mind and held that the stay must forbid arrests as to allow Hanjin's vessels to enter US ports.

However, the approach is not uniform. (Davies, 2018, p. 115) observed that just a few weeks after the US court's decision in *In re Hanjin Shipping Co.*, a Korean court held that a maritime lien holder could proceed against a ship chartered, but not owned, by Hanjin because "*the ship was not property of the debtor and so was not subject to the compulsory stay that followed the opening of the Hanjin rehabilitation proceedings*".

In conclusion, we see that there were indicators of impending financial difficulties for Hanjin since the economic downturn of 2008. The chartering decisions, which were not really driven by market conditions, but rather by government regulations and actions of competitors, led to liquidity issues. Hanjin expected the national government to intervene and bail out the company. However, this was not the case. We shall analyze the reasons for this in section 5.5 below, and the involvement of the government is one of the hypotheses we shall test in the next chapter.

As we have seen in the recent Hanjin cases, (most) courts are pragmatic and had extended the moratorium against proceedings to not only the vessels owned by Hanjin, but also restrained any enforcement or execution against the vessels beneficially owned or chartered by Hanjin and its subsidiaries. This approach is a welcome step. As long as the vessels were under charter by Hanjin, its right to trade would have been affected. The scope of ensuring that Hanjin may continue business crucially depended upon such wide protection.

5 Analysis of the Questionnaire

In order to structure our survey and address the research questions, we developed the following hypotheses extracted from the theoretical framework outlined in Chapter 3 and the practical issues outlined in Chapter 4:

5.1 The main hypotheses to test

Table 3: The main hypotheses to test

H1	The creditor bank needs to understand the core operational strategy of the shipping company.
Issue addressed:	*The influence of the cyclic nature of the shipping industry / economic conditions on financing decisions.*
H2	The option of arrest / commencement of an action *in rem* should be restricted.
Issue addressed:	*The conflict between insolvency and maritime law: right to proceed against the vessel(s) in different jurisdictions.*
H3	There is a need for uniform recognisation of maritime liens across jurisdictions.
Issue addressed:	*The scope of rights of a maritime claimant in different jurisdictions and the bargaining position in the restructuring process.*
H4	The government should interfere to bailout a shipping company in distress.
Issue addressed:	*The role of stakeholders in the restructuring process*.
H5	The courts should adopt a "Universalist" approach to maritime cross border insolvency.
Issue addressed:	*The conflict between insolvency and maritime law: consolidation of claims before a single forum.*
H6	The moratorium / stay order should be widely worded.
Issue addressed:	*The conflict between insolvency and maritime law: protection of the main asset of the shipping company i.e. the vessels so that the shipping company may continue as a going concern.*

[Source: Self]

To recap, our research questions are:

Main Research Question [MRQ]: What steps can be taken to make cross-border maritime insolvency management process more effective?

Sub research questions [SRQ]:

a. How have the unique economic features of the shipping industry influenced the ship finance structure in the past decade?
b. What are the rights (and obligations) which are created for different players under such finance?
c. What issues of conflict arise between maritime law and cross-border insolvency law?
d. How can the competing rights under maritime and insolvency laws be reconciled so that the cross-border maritime insolvency management process can be made more effective?

5.2 How the hypotheses are connected to the research questions

Table 4: Connection of hypotheses to the research questions

Hypothesis	Research Questions
H1	MRQ, SRQ (a), (b)
H2	MRQ, SRQ (b), (c), (d)
H3	MRQ, SRQ (b), (c), (d)
H4	MRQ
H5	MRQ, SRQ (b), (c), (d)
H6	MRQ, SRQ (c), (d)

[Source: Self]

The aim of this discussion is to understand the link between Chapter 4 and Chapter 5 i.e. the actions taken by various stakeholders in the Hanjin proceedings and course of action that would be typically taken given the theoretical framework and on the basis of legal advice. As can be seen below, the main findings (discussed in greater under section 5.5 below) are:

1. The banks failed to understand Hanjin's core operational strategy and take pre-emptive measures. For example, the charter rates should have been re-negotiated much earlier, assistance from CKYHE should have been sought and maritime indicators such as earnings from core trade routes, economic growth rate etc should have been taken into account to restructure the loan facilities.

2. The option of arrest of Hanjin's vessels was a powerful tool, especially in the hands of small creditors. The attempt to restructure Hanjin (which in any event failed) would have been much more difficult had the courts across jurisdictions not intervened and given wide protection to Hanjin operated ships.

3. The wide protection that was given to Hanjin operated ships was rightly balanced by adequate protection to the claimants who had initiated proceedings before the local courts. This approach of "comity of nations" is the right approach which was adopted my most courts. Nonetheless, the lack of uniformity in maritime law itself across jurisdictions, for example, in the recognition of maritime liens, creates uncertainty in the legal position of a creditor, which in turn would determine the bargaining position of such creditor in the restructuring management process.

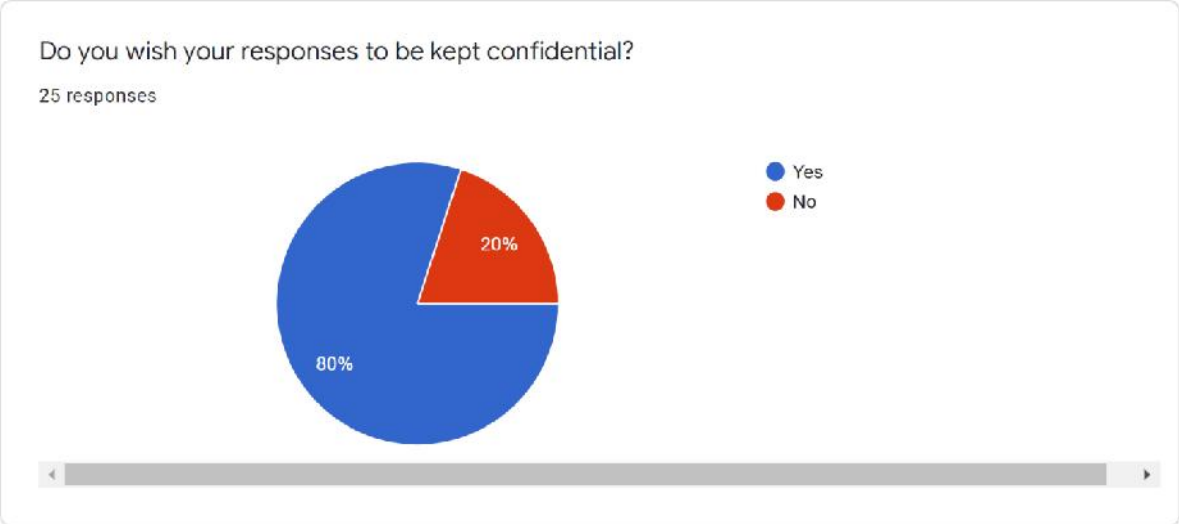
4. The Korean government should not have intervened to bail Hanjin out of this crisis. This is a very debatable finding for two reasons. The first is that the Korean government may not have bailed out Hanjin, but it did provide financial assistance (for reasons discussed in detail under section 5.5.4) to another container carrier HMM, which was facing similar crisis. The second reason is that governments across jurisdictions (Germany/Hapag-Lloyd, France/CMA-CGM, China/COSCO, Taiwan/Evergreen and Yang Ming) have provided financial assistance to shipping companies in distress. It seems that this is the single most distinctive factor that will make or break an attempt to restructure a shipping company.

5.3 Questionnaire Results

A. Cross Border Maritime Insolvency

1. Do you wish your responses to be kept confidential?

Figure 1: Questionnaire Answer 1



[Source: Self]

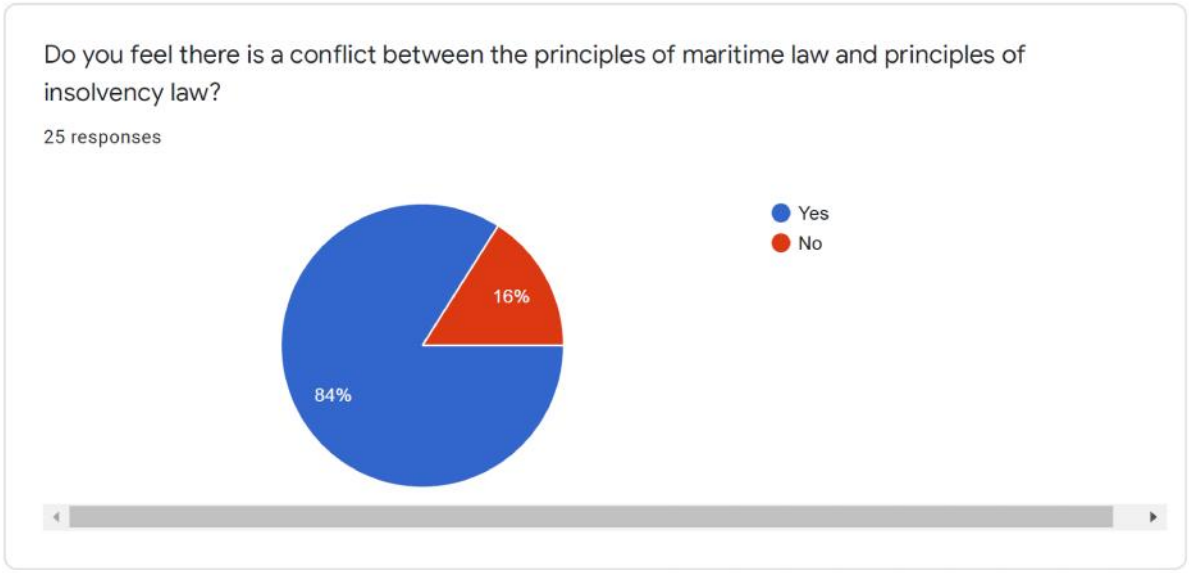
Table 5: Questionnaire Answer 1

Result	**Yes [80%] / No [20%]**
Analysis	This question was necessary as some of the respondents were/are directly involved in the Hanjin proceedings. A number of such proceedings are still on-going across jurisdictions. For reasons of legal privilege, most of the responses were requested to be confidential.
Effect on Hypothesis	**None**

[Source: Self]

2. Do you feel there is a conflict between the principles of maritime law and principles of insolvency law?

Figure 2: Questionnaire Answer 2



[Source: Self]

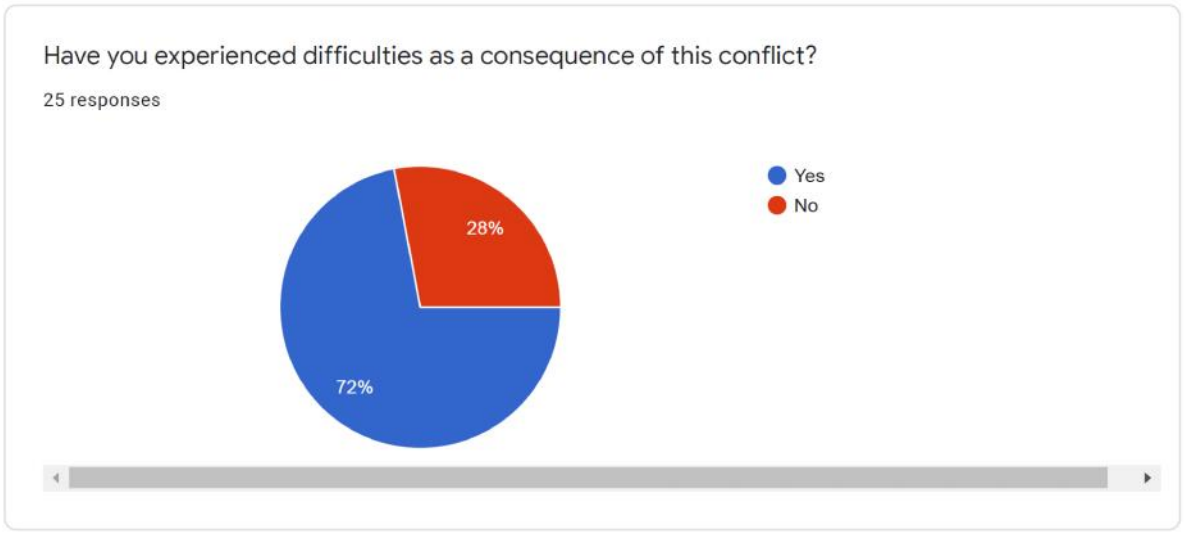
Table 6: Questionnaire Answer 2

Result	**Yes [84%] / No [16%]**
Analysis	The majority of the respondents recognized the conflict between the principles of maritime law and insolvency law. We spoke over the phone to one of the three respondents who opted for option "No". It was clarified that since these laws exist in distinct spheres, a harmonious construction / interpretation is possible. The aim of both regimes is same i.e. to help the creditors. The difference is in the approach.
Effect on Hypothesis	**H3 and H5 are accepted**

[Source: Self]

3. Have you experienced difficulties as a consequence of this conflict?

Figure 3: Questionnaire Answer 3



[Source: Self]

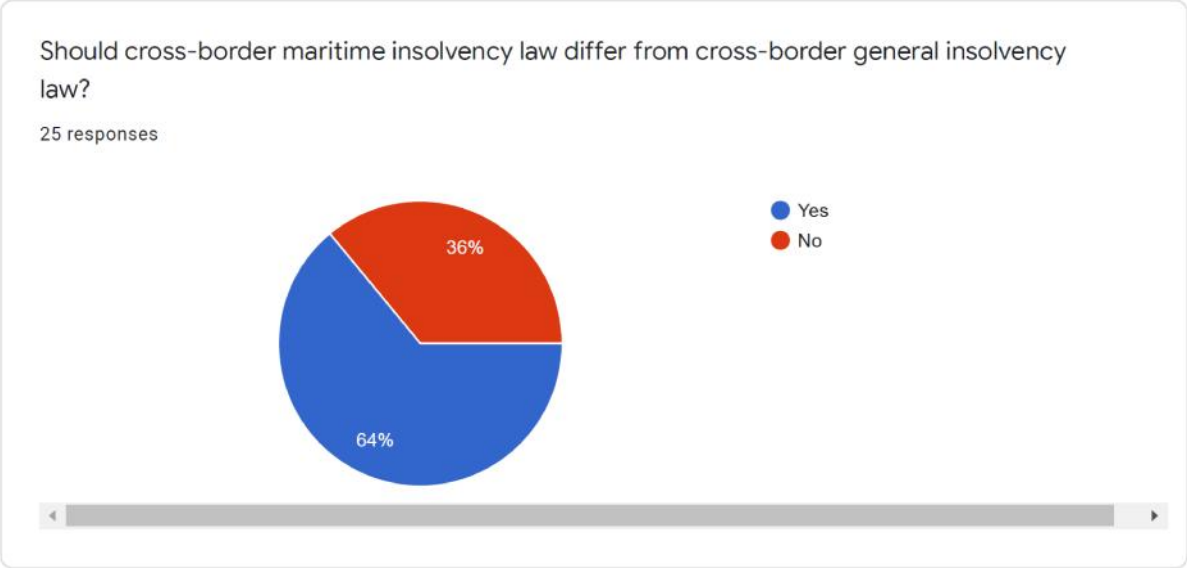
Table 7: Questionnaire Answer 3

Result	**Yes [72%] / No [28%]**
Analysis	The majority of the respondents admitted having difficulty in explaining to clients the conflict of laws across jurisdictions. An important observation shared by many lawyers was that not only clients but many times judges who were not conversant with the niche principles of maritime law were at a loss to reconcile the conflict.
Effect on Hypothesis	**H3 and H5 are accepted**

[Source: Self]

4. Should cross-border maritime insolvency law differ from cross-border general insolvency law?

Figure 4: Questionnaire Answer 4



[Source: Self]

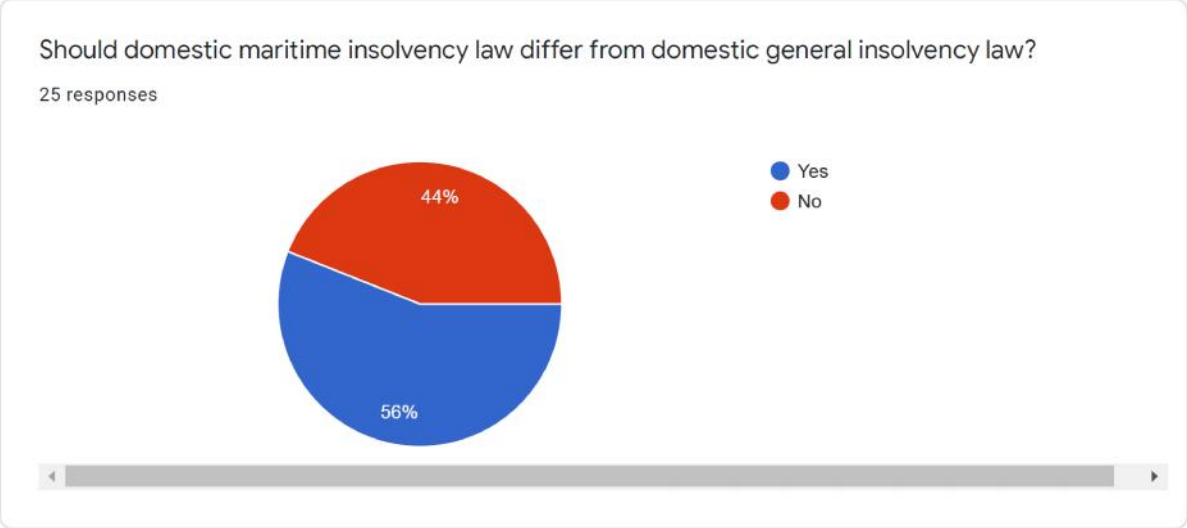
Table 8: Questionnaire Answer 4

Result	**Yes [64%] / No [36%]**
Analysis	The majority of the respondents recognized the need to have separate maritime insolvency law principles from general insolvency law principles. The main reasons given were (a) the unique nature of the res i.e. the ship can be arrested in different jurisdictions, and (b) maritime liens.
Effect on Hypothesis	**H2 is rejected**

[Source: Self]

5. Should <u>domestic</u> maritime insolvency law differ from domestic general insolvency law?

Figure 5: Questionnaire Answer 5



[Source: Self]

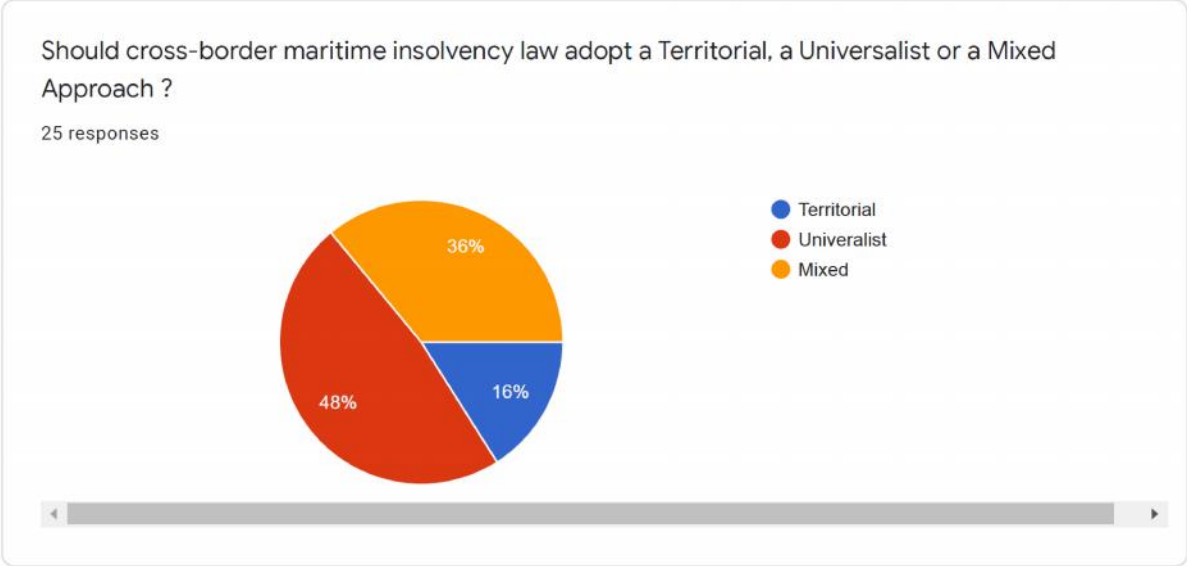
Table 9: Questionnaire Answer 5

Result	**Yes [56%] / No [44%]**
Analysis	This question was almost evenly divided. The main argument for there being no need for a difference in domestic maritime insolvency law and domestic general insolvency law was that the res (i.e. the ship) and the principles of insolvency law were in the same jurisdiction. If the overall principles are from the set of laws in the same jurisdiction, then maritime insolvency law and general insolvency law should be read harmoniously. Some respondents were of the opinion that maritime insolvency law should be a subset of the overall insolvency law.
Effect on Hypothesis	**None** - since the issue does not address cross border insolvency which is the basis for the all the given hypothesis. Further, the response was almost evenly divided in opinion.

[Source: Self]

6. Should cross-border maritime insolvency law adopt a Territorial, a Universalist approach or Mixed approach?

Figure 6: Questionnaire Answer 6



[Source: Self]

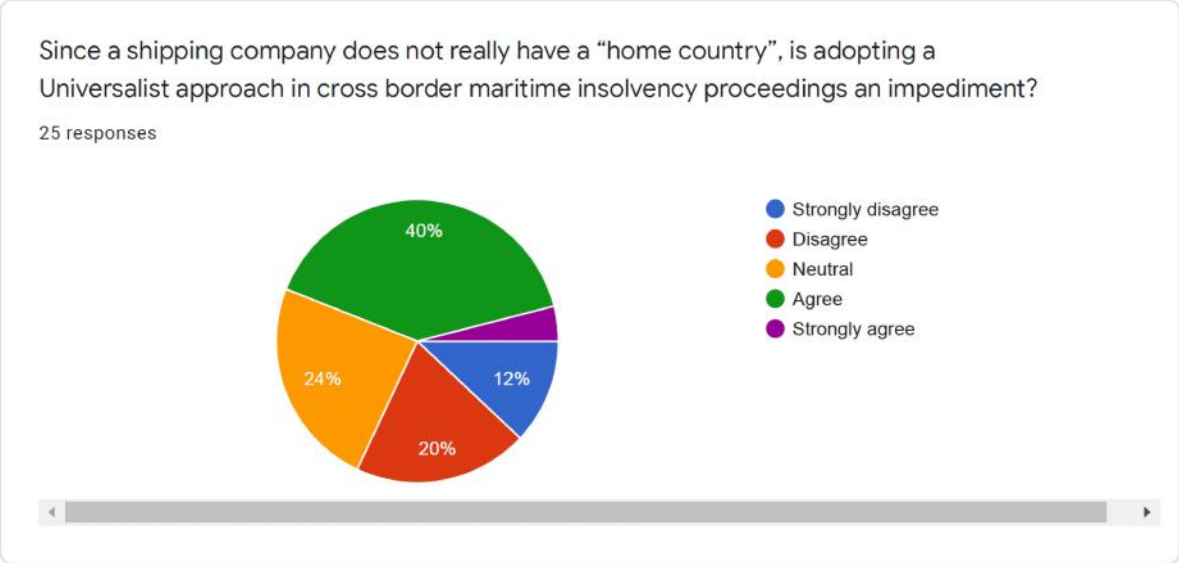
Table 10: Questionnaire Answer 6

Result	**Territorial [16%] / Universalist [48%] / Mixed [36%]**
Analysis	This question was also divided in opinion. There was a general consensus on the need for Universalism. However, many respondents were skeptical on the practicality of the "Mixed" approach. They were of the view that reciprocal comity is theoretically possible but difficult and time-consuming to achieve in practice.
Effect on Hypothesis	None of the options achieved a 50% majority. However, the mixed approach may be argued to be a modification of the "Universalism" principle. Therefore, **H5 is accepted**.

[Source: Self]

7. Since a shipping company does not really have a “home country”, is adopting a Universalist approach in cross border maritime insolvency proceedings an impediment?

Figure 7: Questionnaire Answer 7



[Source: Self]

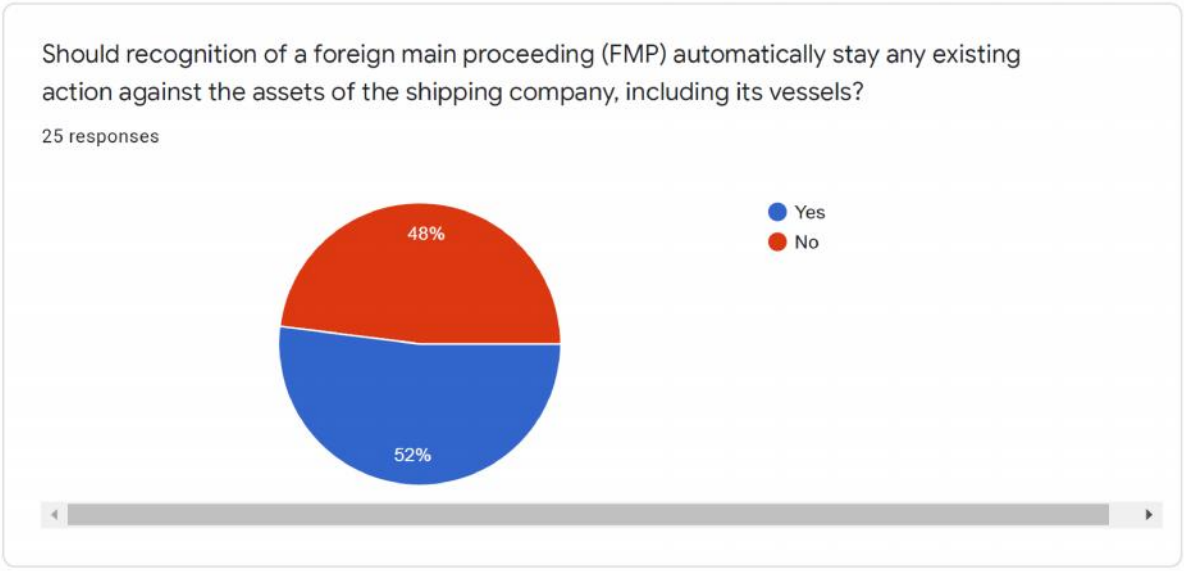
Table 11: Questionnaire Answer 7

Result	**Strongly disagree [12%]; Disagree [20%]; Neutral [24%]; Agree [40%]; Strongly agree [4%]**
Analysis	With 32% disagreeing and 44% agreeing, the decision whether to accept or reject the hypothesis was based on the follow-up calls with some of the respondents who were neutral. When asked to make a choice, the majority disagreed and stated that in most cases, it was possible to identify the “home country”. Many respondents identified the major company with nations i.e. CMA with France, Hanjin with Korea, Evergreen with Taiwan, Hapag Lloyd with Germany etc. Therefore, adopting a “Universalist” approach was not considered a serious impediment as it was likely that insolvency proceedings would be commenced in these “home” countries which were also the “center of main interest”.
Effect on Hypothesis	**H5 is accepted**

[Source: Self]

8. Should recognition of a foreign main proceeding (FMP) automatically stay any existing action against the assets of the shipping company, including its vessels?

Figure 8: Questionnaire Answer 8



[Source: Self]

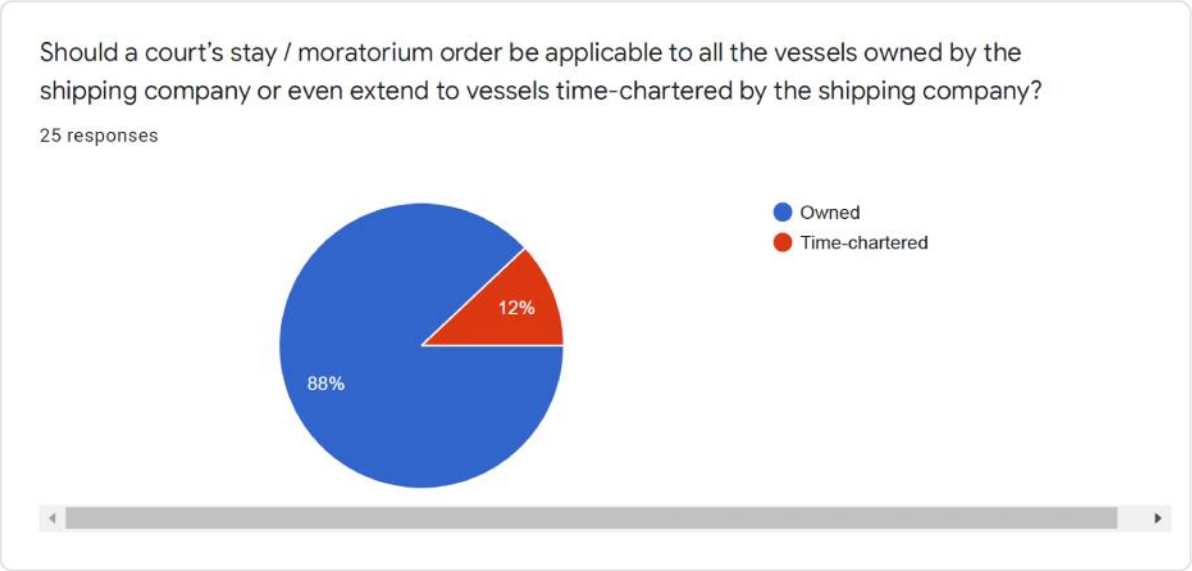
Table 12: Questionnaire Answer 8

Result	**Yes [52%] / No [48%]**
Analysis	This question was also almost evenly divided in opinion. The conflict seems to be whether the stay should automatically apply to vessels. It is often difficult to ascertain whether the vessel in question is actually an asset of the shipping company i.e. the difference between a registered owner and a beneficial owner. Further, the nature of charter agreements / leasing agreement is often not clear at the time that an application is made before the local court for the recognition of the FMP. Therefore, many respondents felt that the foreign representative should have the onus to prove that the asset actually belongs to the shipping company before any stay is granted.
Effect on Hypothesis	**None** – because of the almost evenly divided opinion, we will not take into account this response when deciding whether to accept or reject H2 and H6

[Source: Self]

9. Should a court's stay / moratorium order be applicable to all the vessels owned by the shipping company or even extend to vessels time-chartered by the shipping company?

Figure 9: Questionnaire Answer 9



[Source: Self]

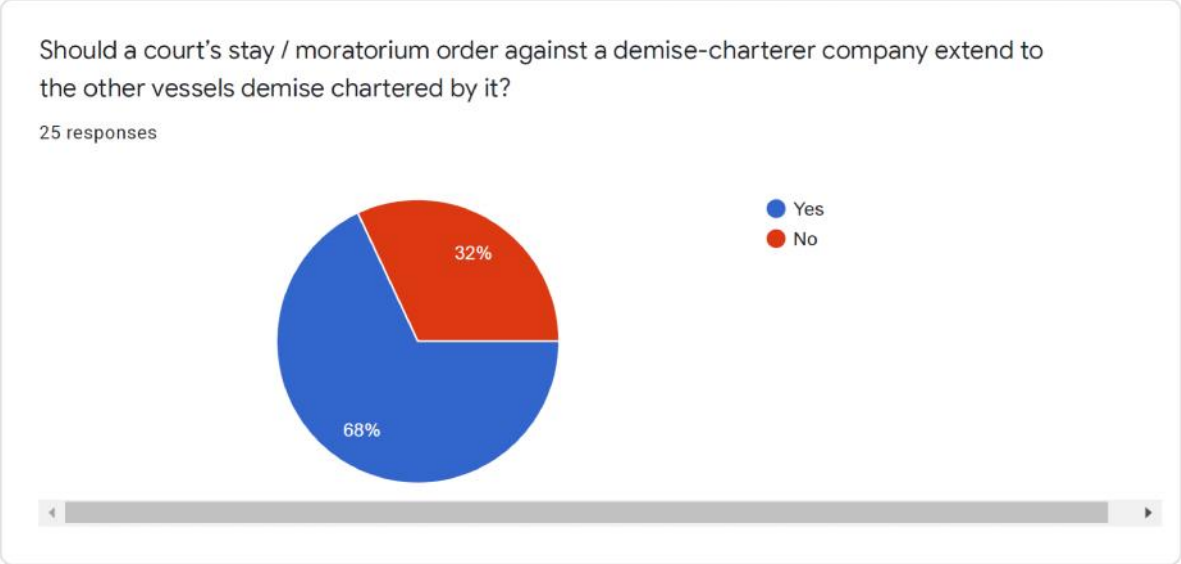
Table 13: Questionnaire Answer 9

Result	**Owned [88%] / Time-chartered [12%]**
Analysis	The majority of the respondents were of the opinion that the moratorium should only be applicable to the vessels owned by the shipping company and not extend to vessels time-chartered by the shipping company. However, this is not the approach taken by the courts as we saw in the Hanjin related cases. The wide approach taken by the courts can be attributed to practical realities – if the shipping company has to continue as a going concern, the time-chartered vessels should also be protected. As we have practically seen, about half 60% of the fleet are normally chartered in.
Effect on Hypothesis	**H6 is rejected**

[Source: Self]

10. Should a court's stay / moratorium order against a demise-charterer company extend to the other vessels demise chartered by it?

Figure 10: Questionnaire Answer 10



[Source: Self]

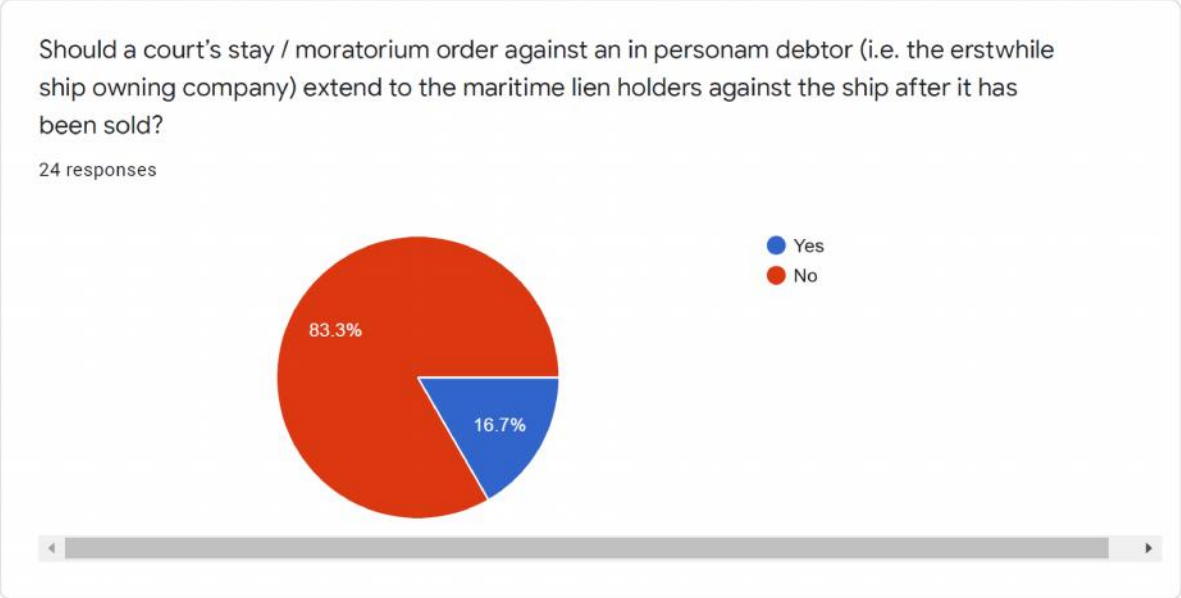
Table 14: Questionnaire Answer 10

Result	**Yes [68%] / No [32%]**
Analysis	The majority of the respondents were of the opinion that the moratorium order should extend to other vessels demise chartered by the shipping company as both are considered to be the assets of the shipping company. This is in conjunction with the widely worded stay orders seen in many jurisdictions during the Hanjin proceedings.
Effect on Hypothesis	**H6 is accepted**.

[Source: Self]

11. Should a court's stay / moratorium order against an *in personam* debtor (i.e. the erstwhile ship owning company) extend to the maritime lien holders against the ship after it has been sold?

Figure 11: Questionnaire Answer 11



[Source: Self]

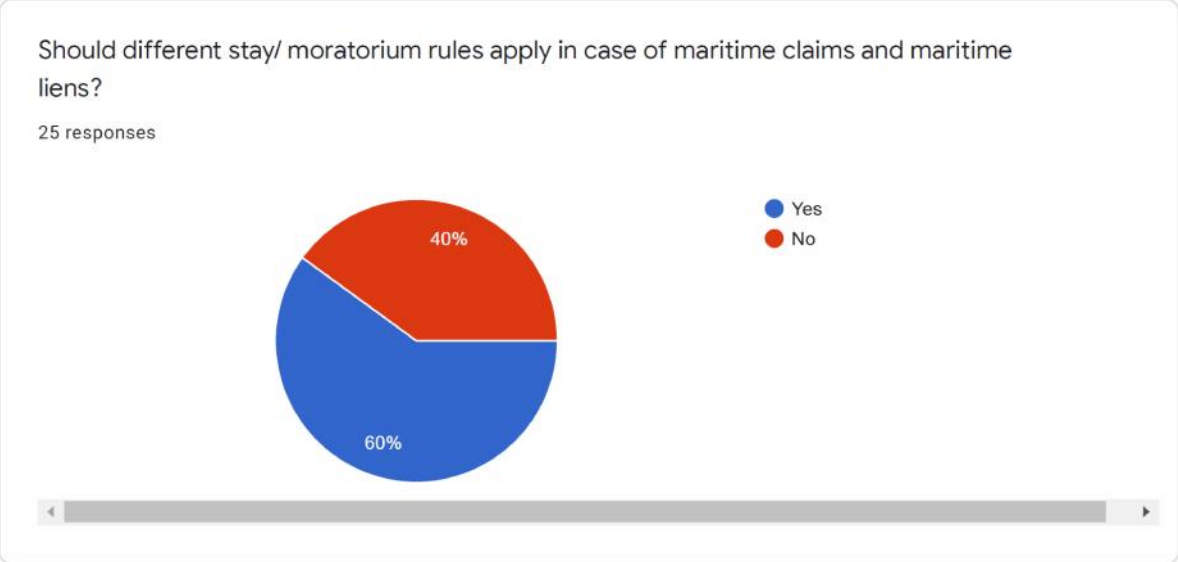
Table 15: Questionnaire Answer 11

Result	**Yes [16.7%] / No [83.3%]**
Analysis	The majority of the respondents were of the opinion that the moratorium order should not extend to maritime lien holders after a vessel has been sold. The reasoning is that a maritime lien travels with the res. It is not affected by the sale of the vessel (unless the vessel is judicially sold). The ship is no longer the asset of the shipping company. However, the rights of the maritime lien holder continue against the ship. These rights should not be restricted by the stay order.
Effect on Hypothesis	**H6 is rejected.**

[Source: Self]

12. Should different stay/ moratorium rules apply in case of maritime claims and maritime liens?

Figure 12: Questionnaire Answer 12



[Source: Self]

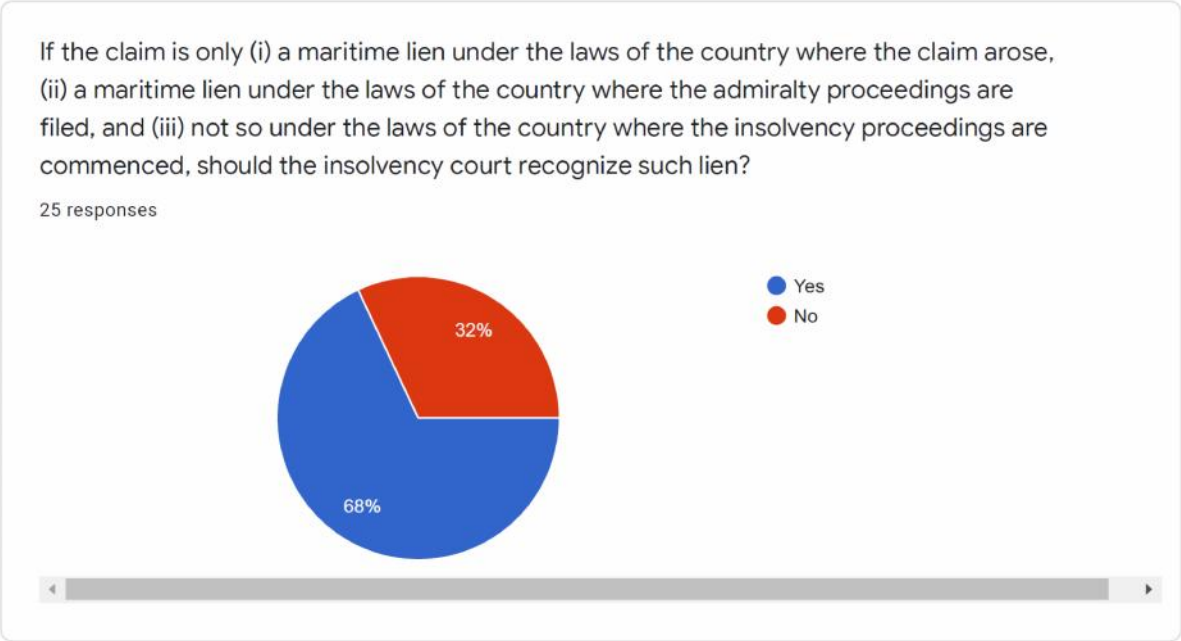
Table 16: Questionnaire Answer 12

Result	**Yes [60%] / No [40%]**
Analysis	The majority of the respondents were of the opinion that different rules should apply. This is because of the peculiar nature of maritime liens. Maritime liens are limited in number and generally uniformly accepted expect the wider coverage given in jurisdictions like the US, where claims for necessaries are also given the status of maritime liens. This affects the status of the maritime creditors and invites forum shopping. Majority of respondents in the follow up discussion emphasized the need for a uniform recognisation of maritime liens across jurisdictions.
Effect on Hypothesis	**H3 is accepted and H2 is rejected**

[Source: Self]

13. If the claim is only (i) a maritime lien under the laws of the country where the claim arose, (ii) a maritime lien under the laws of the country where the admiralty proceedings are filed, and (iii) not so under the laws of the country where the insolvency proceedings are commenced, should the insolvency court recognize such lien?

Figure 13: Questionnaire Answer 13



[Source: Self]

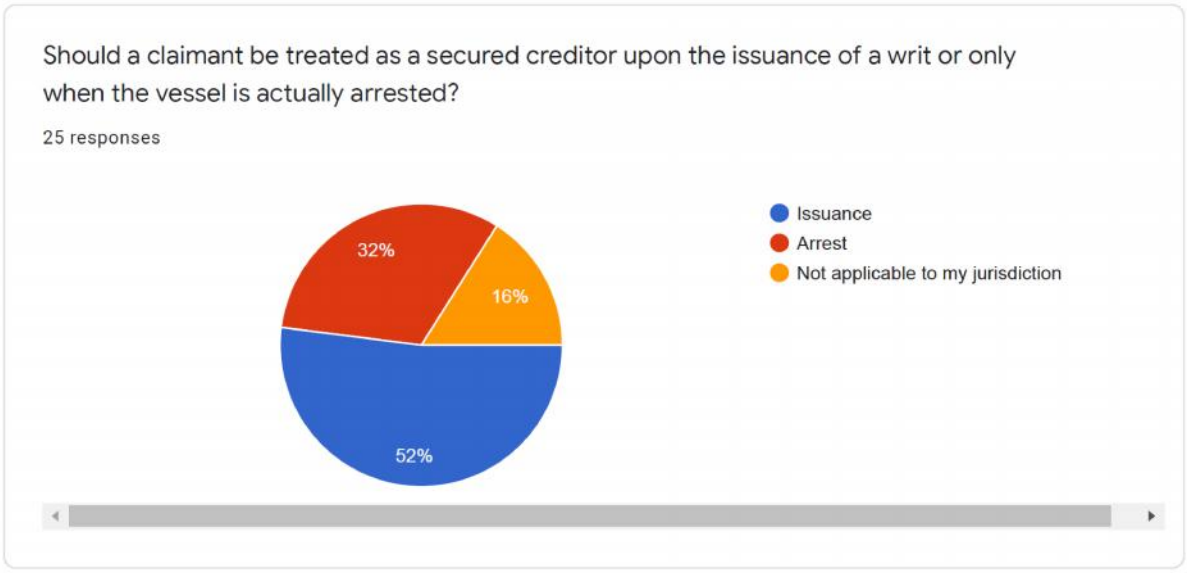
Table 17: Questionnaire Answer 13

Result	**Yes [68%] / No [32%]**
Analysis	The majority agreed with the Model Law reasoning of the "Mixed" approach to support the concept of comity and provide for a conditional stay. Given the unique nature of a maritime lien, i.e. its continuation even after change in ownership and inchoate nature, the wide recognition of such rights is justified.
Effect on Hypothesis	**H3 and H5 are accepted.**

[Source: Self]

14. Should a claimant be treated as a secured creditor upon the issuance of a writ or only when the vessel is actually arrested?

Figure 14: Questionnaire Answer 14



[Source: Self]

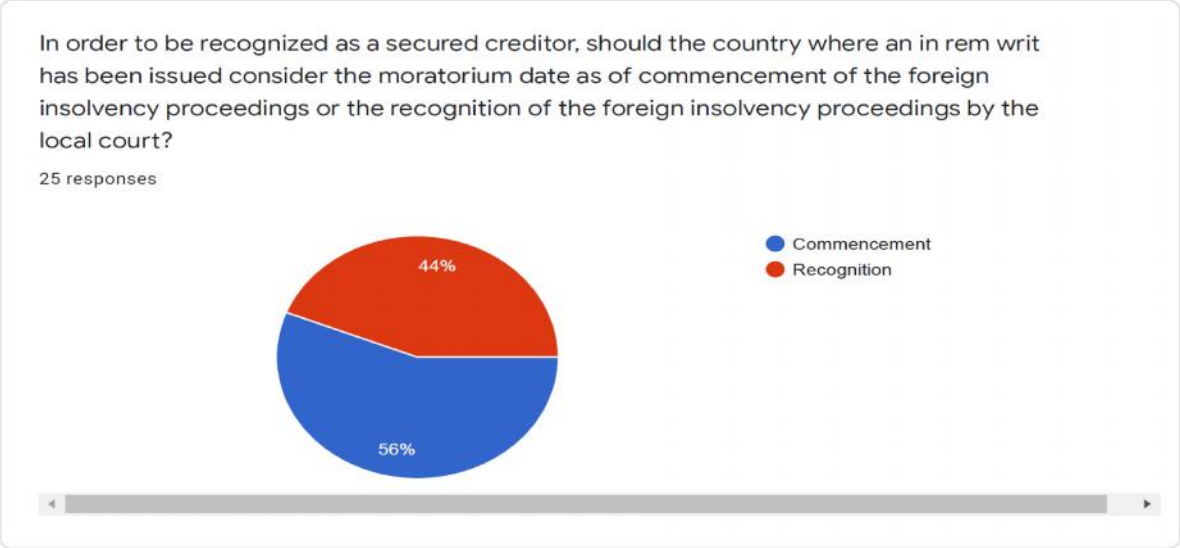
Table 18: Questionnaire Answer 14

Result	**Issuance [52%] ; Arrest [32%]; NA [16%]**
Analysis	This question was aimed at the timing of the action. Some jurisdictions like India have no concept of issuance of a writ. Therefore, this question was not universally applicable. Since the majority of the respondents were in favour of making it easier for a claimant to arrest, this response relates to H2.
Effect on Hypothesis	**H2 is rejected.**

[Source: Self]

15. In order to be recognized as a secured creditor, should the country where an *in rem* writ has been issued consider the moratorium date as of commencement of the foreign insolvency proceedings or the recognition of the foreign insolvency proceedings by the local court?

Figure 15: Questionnaire Answer 15



[Source: Self]

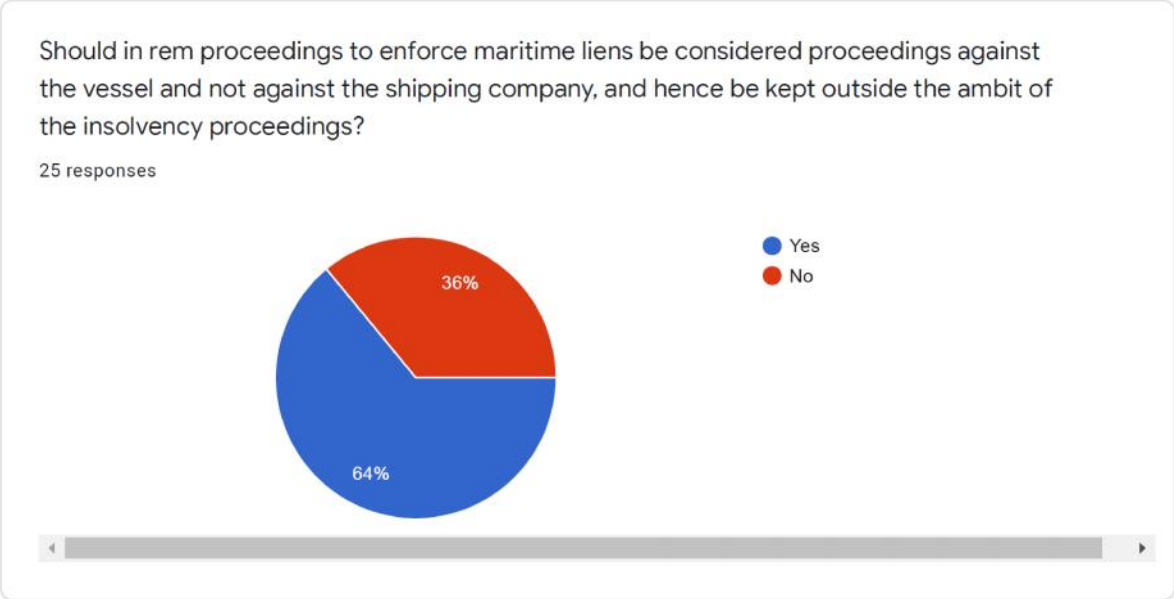
Table 19: Questionnaire Answer 15

Result	**Commencement [56%] / Recognition [44%]**
Analysis	This question was again aimed at the timing of the action and the option of arrest. As was seen in the Hanjin proceedings, it took about 2 weeks for the foreign representative to get the recognition of the foreign insolvency proceedings across various jurisdictions. The earlier commencement date of the moratorium restricts the actions against the assets of the shipping company. This gives more room for restructuring. This also restricts the time for an unsecured creditor to become a secured creditor.
Effect on Hypothesis	**H2 is accepted.**

[Source: Self]

16. Should in rem proceedings to enforce maritime liens be considered proceedings against the vessel and not against the shipping company, and hence be kept outside the ambit of the insolvency proceedings?

Figure 16: Questionnaire Answer 16



[Source: Self]

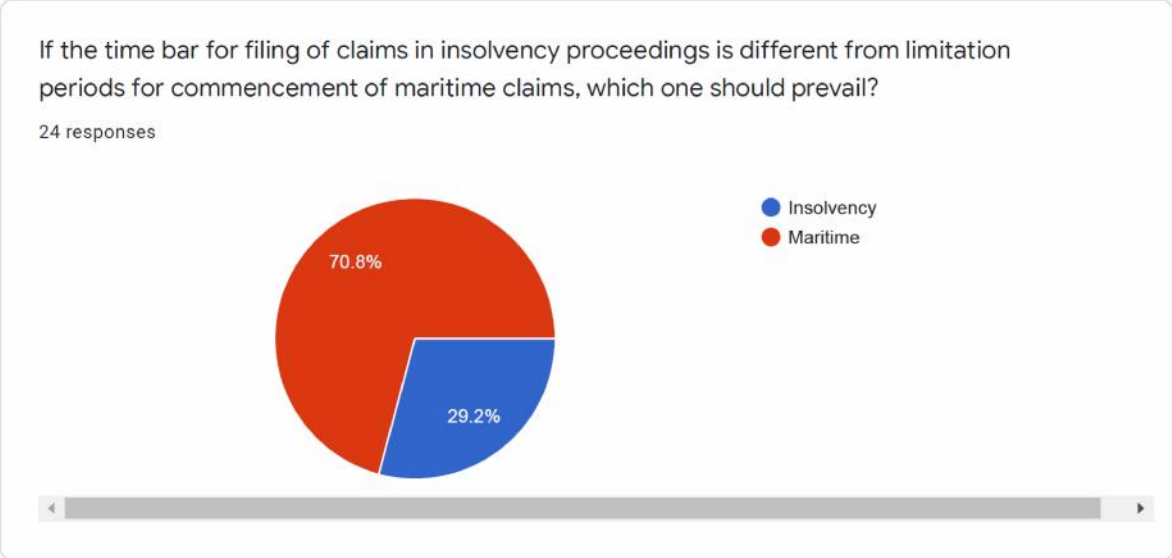
Table 20: Questionnaire Answer 16

Result	**Yes [64%] / No [36%]**
Analysis	The majority of the respondents were in favour of recognizing the unique nature of an action in rem and separating it from the shipping company. This is justified in law also as the ship has an individual legal personality.
Effect on Hypothesis	**H2 and H6 are accepted**

[Source: Self]

17. If the time bar for filing of claims in insolvency proceedings is different from limitation periods for commencement of maritime claims, which one should prevail?

Figure 17: Questionnaire Answer 17



[Source: Self]

Table 21: Questionnaire Answer 17

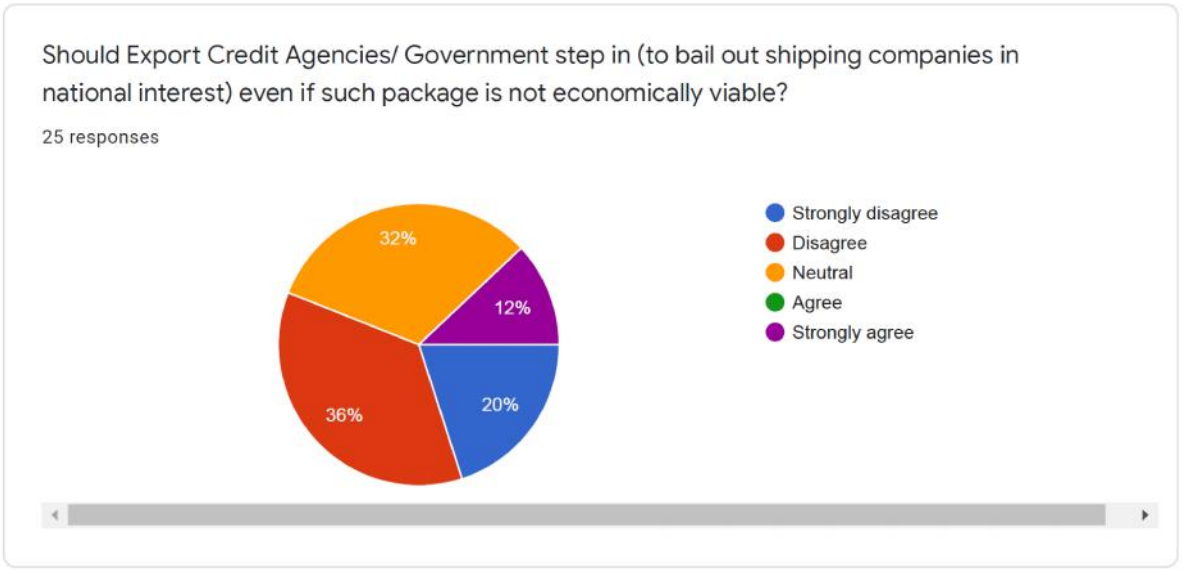
Result	**Insolvency [29.2%] / Maritime [70.8%]**
Analysis	The majority of the respondents reasoned that if the unique features of maritime law were to be read in conjunction with the general insolvency law, then even the specific limitation periods should apply. This question when discussed during the follow-up phone calls with some of the respondents in the context of H2 drew a response that a more liberal time frame to enable arrest should be given to a maritime claimant.
Effect on Hypothesis	**H2 is rejected**

[Source: Self]

B. Ship Finance

1. Should Export Credit Agencies/ Government step in to bail out shipping companies in national interest) even if such package is not economically viable?

Figure 18: Questionnaire Answer 18



[Source: Self]

Table 22: Questionnaire Answer 18

Result	**Strongly disagree [20%]; Disagree [36%]; Neutral [32%]; Agree [0%]; Strongly agree [12%]**
Analysis	A majority of the respondents believed that Government help does not address the root cause but is only a temporary measure to overcome the crisis for the time being.
Effect on Hypothesis	**H4 is rejected**

[Source: Self]

2. If you are advising a bank in the event of a shipping client facing impending insolvency, rate the following factors in order of preference you would weigh before deciding whether it is preferable to accelerate and enforce or seek to negotiate a restructuring of the loan:

Figure 19: Questionnaire Answer 19

[Source: Self]

Table 23: Questionnaire Answer 19

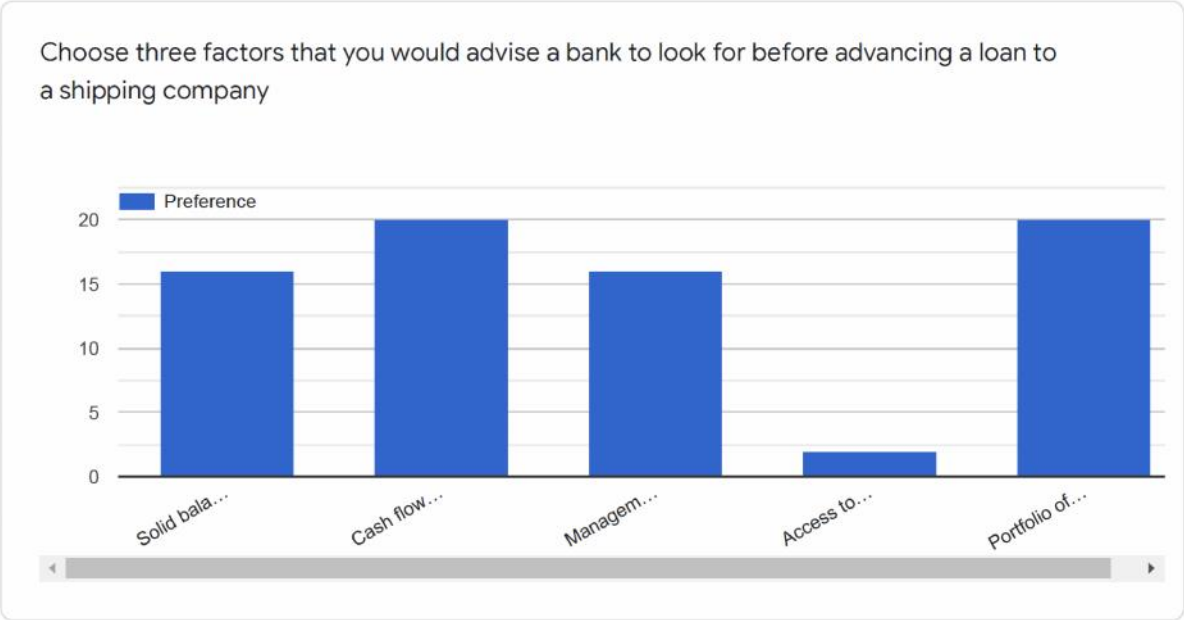
Factor	**No of Respondents**
Physical location of the ship.	**16**
The relevant jurisdiction, where the ship is located, for arrest and enforcement procedures.	**25**
Existing charter commitments and the prospects of these generating revenue.	**15**
Trade creditors with claims against the ship that may rank ahead of the mortgage in that jurisdiction.	**14**
Cost of enforcement	**7**
Prospective buyers for the ship	**4**

[Source: Self]

Effect on Hypothesis: **H1 is accepted**

3. Rate the following factors in order of preference that you would advise a bank to look for before advancing a loan to a shipping company:

Figure 20: Questionnaire Answer 20



[Source: Self]

Table 24: Questionnaire Answer 20

Factor	**No of Respondents**
Solid balance sheet ratio	**16**
Cash flow sustainability	**20**
Management	**16**
Access to alternative sources of finance	**3**
Portfolio of charter contracts (short term/long term etc), market position, quality of shippers	**20**

[Source: Self]

Effect on Hypothesis: **H1 is accepted**

4. As a bank, rate in order of preference the restructuring options that are most frequently adopted in a shipping context:

Figure 21: Questionnaire Answer 21

[Source: Self]

Table 25: Questionnaire Answer 21

Factor	**No of Respondents**
(Partial) Moratorium on principal payments	**18**
Pay-as-you-earn structures	**13**
Payment in kind structures	**3**
Covenant holidays	**9**
Tranching of loans (to facilitate fresh money)	**8**
Debt-to-equity swap	**6**
Haircut	**14**

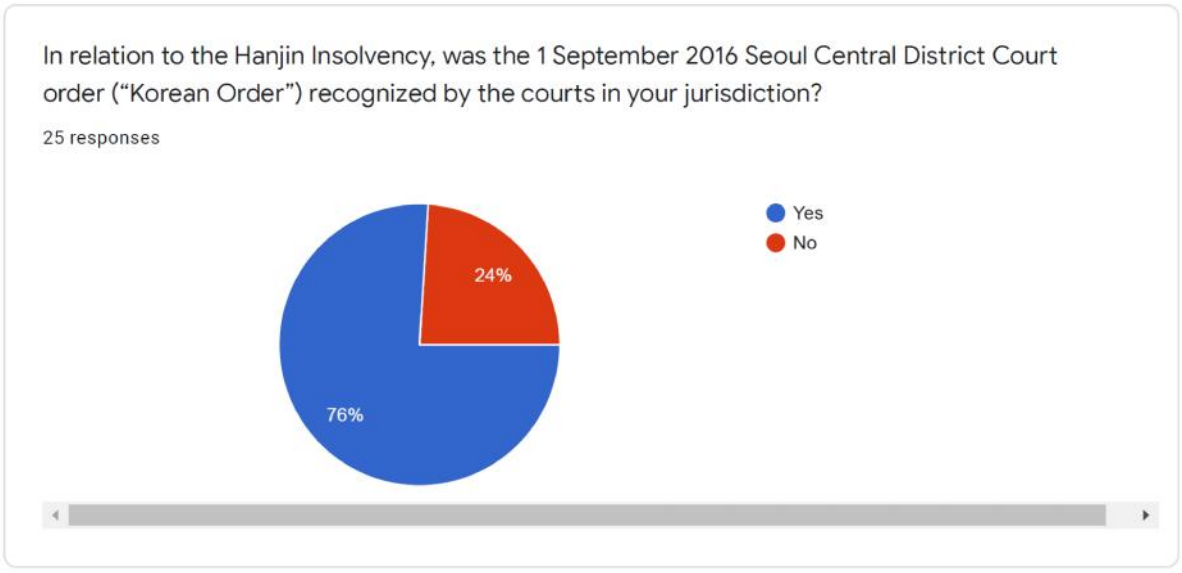
[Source: Self]

Effect on Hypothesis: **None**

C. Hanjin Insolvency

1. Was the 1 September 2016 Seoul Central District Court order ("Korean Order") recognized by the courts in your jurisdiction?

Figure 22: Questionnaire Answer 22



[Source: Self]

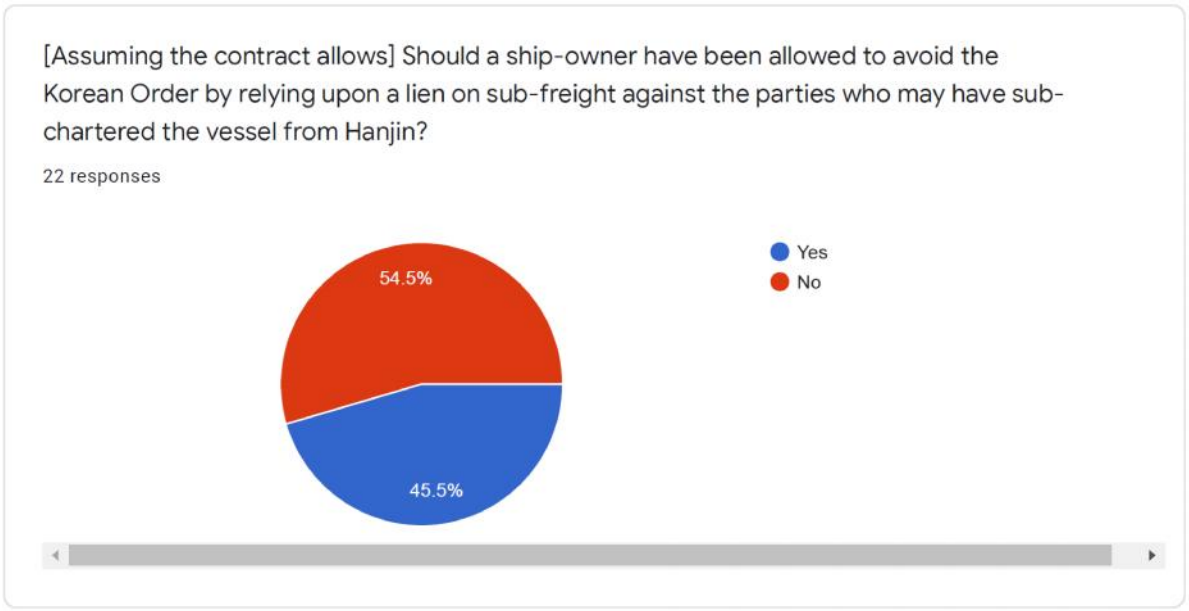
Table 26: Questionnaire Answer 22

Result	**Yes [76%]; No [24%]**
Effect on Hypothesis	**H5 is accepted**

[Source: Self]

2. [Assuming the contract allows] Should a ship-owner have been allowed to avoid the Korean Order by relying upon a lien on sub-freight against the parties who may have sub-chartered the vessel from Hanjin?

Figure 23: Questionnaire Answer 23



[Source: Self]

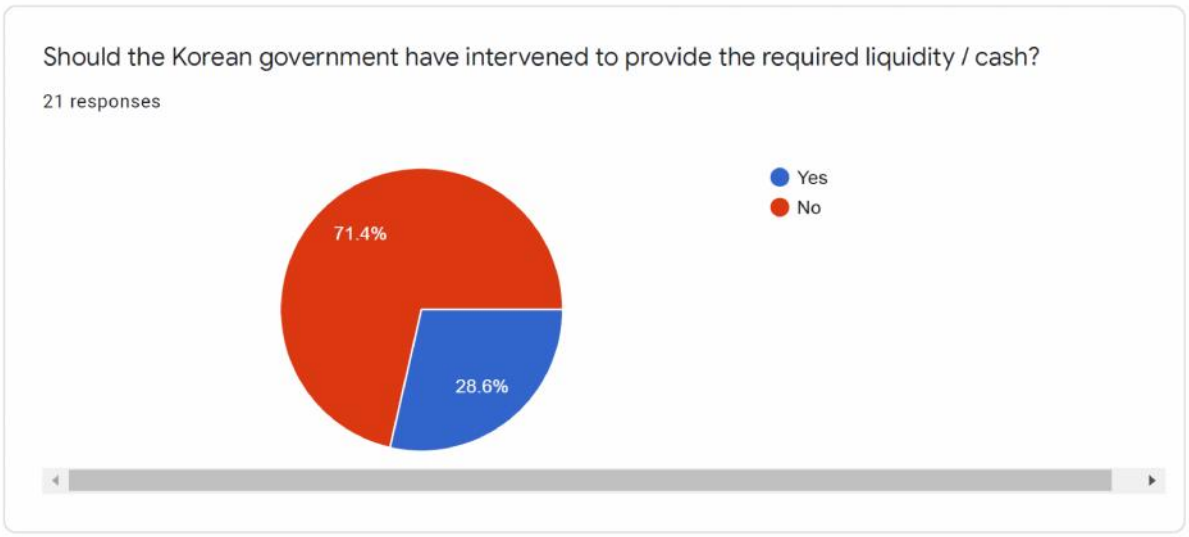
Table 27: Questionnaire Answer 23

Result	**Yes [45.5%] / No [54.5%]**
Analysis	This was another closely debated and divided response. This course of action gives the Owners of the vessel to proceed against the third parties who may have contracted with the Charterers (i.e. Hanjin). The majority were of the opinion that the circumvention of the moratorium order should not be allowed as this would impeded the restructuring process.
Effect on Hypothesis	**H6 is accepted.**

[Source: Self]

3. Should the Korean government have intervened to provide the required liquidity / cash?

Figure 24: Questionnaire Answer 24



[Source: Self]

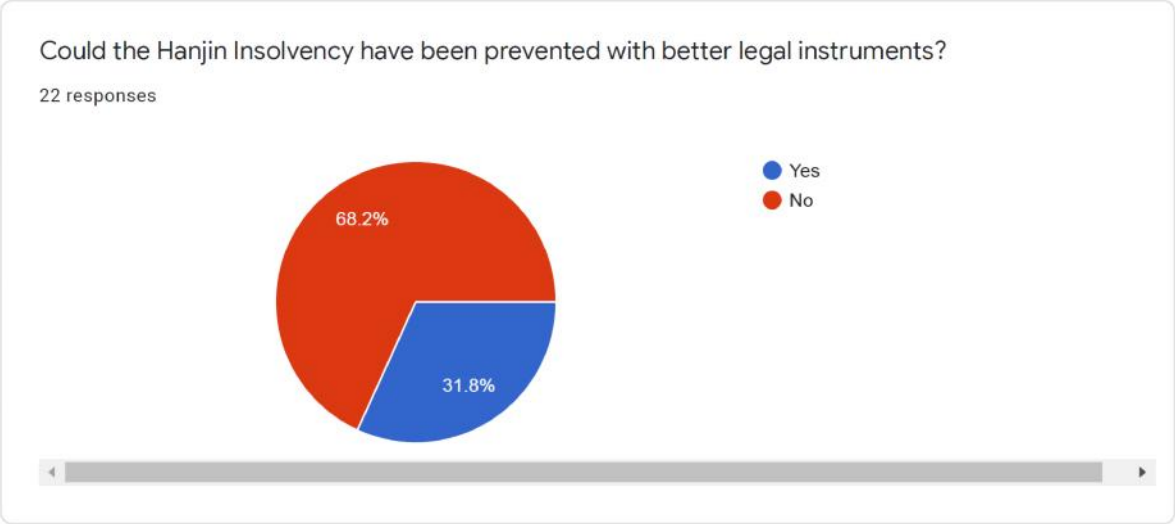
Table 28: Questionnaire Answer 24

Result	**Yes [28.6%] / No [71.4%]**
Effect on Hypothesis	**H4 is rejected.**

[Source: Self]

4. Could the Hanjin Insolvency have been prevented with better legal instruments?

Figure 25: Questionnaire Answer 25



[Source: Self]

Table 29: Questionnaire Answer 25

Result	**Yes [31.8%%] / No [68.2%]**
Analysis	This result may initially seem surprising given the objective of our study. However, it is not. Most of the respondents felt that the lack of timely response to market conditions were the main reasons for the Hanjin insolvency and the subsequent failure of the restructuring attempt. Hanjin believed it was too big to fail and would probably be bailed out by the Korean government. The legal framework, including the response of the Courts, was adequate.
Effect on Hypothesis	**None**

[Source: Self]

5.4 Summary / tabulation of the effect of the responses on the hypotheses

Table 30: Tabulation of the effect of the responses on the hypotheses

H1	The creditor bank needs to understand the core operational strategy of the shipping company.
H2	The option of arrest / commencement of an action in *rem* should be restricted.
H3	There is a need for uniform recognisation of maritime liens across jurisdictions
H4	The government should interfere to bailout a shipping company in distress.
H5	The courts should adopt a "Universalist" approach to maritime cross border insolvency
H6	The moratorium / stay order should be widely worded.

Hypothesis	**Accept**	**Reject**	**Result**
H1	*II*	-	Accepted
H2	*II*	*IIII*	Rejected
H3	*IIII*	-	Accepted
H4	-	*II*	Rejected
H5	~~*III*~~ *I*	-	Accepted
H6	*III*	*II*	Accepted

[Source: Self]

5.5 Analysis of the test hypotheses

Let us now compare the responses of the Questionnaire, results of our test hypotheses and the response of the various stakeholders in the Hanjin proceedings (as discussed in Chapter 4). We see that the results of the test hypotheses are along expected lines except in relation to H4.

1. **H1:** The creditor bank needs to understand the core operational strategy of the shipping company.
   - *This hypothesis is accepted: 2 - 0*
   - *The hypothesis result is not unexpected*.

Theoretical text and practical experience has shown that understanding the economic conditions of the shipping which are intrinsically linked to operational strategy of the shipping helps a bank predict and forecast the potential defaults. The banks can then take pre-emptive measures. As discussed under section 3.1 above, researchers like (Choi, Kim, & Han, 2018) and (Opitz, Seidel, & Szimayer, 2018) have developed an early warning index taking into account different variables such as the global economic growth rate, maritime freight, and multiple business indicators.

One of the main conditions of creditors to put in further capital was Hanjin's ability to negotiate a cut in charter rates (Dixon[5], 2016). Seaspan had, in June 2016, rejected Hanjin's request for a 30% reduction on rates linked to seven ships of 10,010 TEU taken by Hanjin for 10 years at $43,000 per vessel per day (Lewis[1a], 2016). However, it later softened its hard-line stance and agreed in late August to charter concessions "in alternative ways", saving KRW 800bn ($715m) in cash (Lewis[1a], 2016). But this came too late. The banks needed to understand, at the earliest, the operational strategy to either preempt a default or to help restructuring.

We also saw that Hanjin was planning to shift from CKYHE to THE Alliance which was to be formed in April 2017. This may have been a reason for lack of support from CKHYE during the time of crisis. This is another operational strategy that the banks needed to understand.

2. **H2**: The option of arrest / commencement of an action in rem should be restricted
    - *This hypothesis is rejected: 2 – 4*
    - *The hypothesis result is not unexpected.*

The option of arrest of a vessel is a unique and a powerful tool in the hands of any creditor. Many lawyers would advise to arrest the vessel for both legal and strategic reasons. Legal reasons are that commencement of such action makes a third party a secured creditor. For strategic reasons, the arrest by third parties having small claims may force the mortgagee bank to settle these claims to enable a smooth restructuring attempt / allow the shipping company to be going concern. Furthermore, the arrest procedure in most jurisdictions is relatively straightforward with no counter security required and low risk of a wrongful arrest. The main reasoning in favour of a restricted approach was the cost associated with the arrest of the vessel. This includes the maintenance costs which, may ultimately be recovered in priority if the vessel is judicially sold but, initially has to borne by the arresting party.

3. **H3**: There is a need for uniform recognisation of maritime liens across jurisdictions
    - *This hypothesis is accepted: 4 – 0*
    - *The hypothesis result is not unexpected*

Since reciprocal comity requires the FMP to recognize and apply the principles of a local court, there is a need for uniform recognition / application of maritime liens across jurisdictions. This

becomes crucial in the insolvency context as the position of a creditor in the order of priority is affected by the nature of such lien. For example, is a bunker supplier a maritime line holder or not? Will his claims rank ahead or behind the claims of a mortgagee bank? The position of such creditor would determine the bargaining position of a creditor in restructuring management process. Therefore, the theoretical and practical framework supports the acceptance of the hypothesis.

4. **H4:** The government should interfere to bailout a shipping company in distress
    - *This hypothesis is rejected: 0 – 2*
    - *The hypothesis result is unexpected*

This was a surprising result. The discussion with respondents in relation to this hypothesis revolved around the fact that such government intervention was only a short term solution. Injection of funds does not solve the fundamental problem. Therefore, the governments, even through ECAs, should not interfere with market forces to bail out shipping companies. Government intervention is crucial in any shipping insolvency. This is one factor which can make or break a restructuring process. The two main reasons are: (a) national Governments have large liquidity which is the most immediate need for a shipping company facing insolvency; and (b) foreign banks are unlikely to inject more capital / restructure their current loan arrangements unless additional security in the form of government backed ECAs is provided.

There are also strong reasons to oppose government intervention in such situations on the basis that such intervention distorts market forces. Inevitably, the root cause as to why the shipping company is in distress is not addressed. If the government does intervene, it may only temporarily provide the solution. However, in the long run, the company will continue to face financial difficulties.

Notwithstanding the theoretical arguments, in practice, it can be seen that government funding during a financial crisis is the key factor that will influence the success of any restructuring process. We can see this from the Hanjin experience itself. Hanjin and HMM were in a similar situation facing similar conditions. Nonetheless, HMM managed to survive with government support. Compared to HMM, Hanjin's network was far wider and better developed and despite market instabilities in the recent years, Hanjin maintained its operational and financial

capabilities well under the imposed regulatory framework, while HMM, on the other hand, struggled (Pauli & Wolf, 2017). Nonetheless, HMM realized the gravity of the situation and took immediate actions to lower its debt-to equity ratio to below 400% through self rescue measures (Pauli & Wolf, 2017). This was a regulatory requirement which entitled HMM to avail a nearly KRW 1.3 trillion government-led shipping fund (Pauli & Wolf, 2017). Hanjin was too slow to adapt and react. (Pauli & Wolf, 2017) observed that Hanjin and HMM cultivated different relationship with the Korean government. Hanjin operated on a global scale and dealt with the general industry trends rather than the Korean government itself while HMM operated on a smaller scale (Pauli & Wolf, 2017). HMM's relationship with the government made it possible to lobby the government for a bailout in order to restructure its debt, based on the maintained network of close, influential relationships (Pauli & Wolf, 2017).

The importance of government support in the shipping sector is not unique to Korea or Hanjin. Many national governments have come up with support measures to local shipping companies – for example the Danish government lent USD6.2 billion to Maersk in 2011, the German government offered payment guarantee up to 1.8 billion to Hapag-Lloyd, the French government supported CMA CGM with around USD660 million and the Chinese government reportedly has provided USD9.5 billion to COSCO and its affiliates during the period of 2012-2017 (Pauli & Wolf, 2017). However, in 2016, Korean government decided not to provide financial support to Hanjin. On the other hand, Taiwanese government decided to provide USD1.9bn credit to the Taiwanese shipping companies, Evergreen and Yang Ming after recognizing Hanjin's case as a lesson (Wackett, 2020).

5. **H5:** The courts should adopt a "Universalist" approach to maritime cross border insolvency
    - *This hypothesis was accepted: 6 – 0*
    - *The hypothesis result is not unexpected*

There is a need for a single forum to effectively deal with all assets of an insolvent company in one place. This prevents multiple proceedings and establishes uniformity. However, given the potential conflict between the rights under insolvency and maritime laws, there is also a need to adequately protect the rights of the local creditors. Therefore, what is needed is the "middle path" of modified Universalism which has indeed been adopted by courts in the Hanjin

proceedings. We see that the theoretical and practical framework supports the acceptance of the hypothesis.

The global recognition of Hanjin proceedings shows that the theory-born universalism in international insolvency law is now established in practice and only the size of Hanjin prevented a quicker and more orderly procedure from the beginning (Goretzlehner, 2019, p. 145).

The recognition and the granting of relief were important for Hanjin in two aspects: First, the ships were able to deliver their cargo and thus pursue their business operations. Second, Hanjin's fleet of container ships was "*not exposed to a piecemeal ship arrest procedure, but the fleet was kept together under the supervision of the South Korean administrator*" (Goretzlehner, 2019, p. 145). Even though the business and financial restructuring did not work out in the end, the orderly insolvency procedure was achieved with the worldwide barring of ship-arrest proceedings. At the same time, in line with the approach of reciprocal comity, settlements of the insolvency administrator with maritime creditors of the ships acknowledged the priority of claims secured by maritime liens and saved the ships from arrest procedures (Goretzlehner, 2019, p. 145).

6. **H6:** The moratorium / stay order should be widely worded
    - *This hypothesis was accepted (albeit closely): 3 – 2*
    - *The hypothesis result is not unexpected*

There are strong arguments for both sides. The respondents who wanted the stay order to be widely worded had the effectiveness of the proposed restructuring in mind. With an efficient and widely worded order (which would protect the vessels which were not only owned but also chartered by the shipping company) would facilitate the rehabilitation attempts. On the other hand, the proponents of a more restricted order wanted to protect the interest of the creditors. Such creditors were shippers, bunker suppliers, terminal operators, etc. The lawyers representing such clients were of the opinion that a stay should only come into force once the claims of the creditors had been secured.

We have seen that Hanjin not only owned its own vessels but had also chartered a significant part of its fleet from other owners ("Owners"). Most of these charters were on standard form

time charter-parties. This meant that such Owners were looking at the implications of the Hanjin insolvency under English law.

On the assumption that the standard provisions of a time charterparty applied, many Owners were advised that where the bill of lading contract is with the Owners, the right to freight is vested in those Owners and that the shipper/bill of lading holder will not obtain a good discharge by paying Charterers unless the bill provides by express terms or by incorporation that payment may be so made (Thomas & Richmond, 2016).

The consequences of this were twofold. First, it meant that to the extent that the Charterers (i.e. Hanjin) had not paid freight or hire due to the Owners, then the Owners may maintain their claim against shippers/bill of lading holders (although they may have to account for any sums recovered above that owing to them under the relevant charterparty with Hanjin) (Thomas & Richmond, 2016). The second consequence was that the shipper/bill of lading holder may be exposed to paying twice. To that extent, there was the risk (as with the recent collapse of OW Bunkers) that entirely innocent parties will end up facing claims from two parties (Owners and Hanjin) and in the end having to satisfy both (Thomas & Richmond, 2016).

The feasibility of this approach was discussed in the Questionnaire and the follow up interviews. The Owners would have tried to avoid the moratorium by arguing they were entitled to a lien on sub-freights against the parties which had chartered the vessels from Hanjin. There was a divided opinion on whether such an argument would succeed with 45.5% saying Yes – i.e. the Owners should be allowed to avoid the Korean rehabilitation order by relying upon a lien on sub-freight against the parties who may have sub-chartered the vessel from Hanjin and 54.5% saying No – such an argument would not succeed.

Even though the Owners were going after parties other than Hanjin, the domino effect would have been that such third parties were going to look to Hanjin in turn to protect their position. The courts across jurisdictions, probably learning from their past experience, played a vital role in controlling such panic by extending the orders made in the Hanjin insolvency in several respects including a prohibition on any steps to enforce any mortgage, charge or lien or other security over the company's property and a blanket prohibition on any legal process (defined to include arbitrations) against Hanjin or its property without the permission of the court.

5.6 Application to the current situation

As a part of step three of the PPF Model, we will now study if the lessons learnt from the Hanjin insolvency and the discussion in this paper is being implemented in practice. In March 2020, ratings agency Moody's warned of another Hanjin moment for shipping as it downgraded the whole industry for the first time in three years from "stable" to "negative" and estimated that ship-owners' net earnings could fall between 6% and 10% in 2020 across the board (Dixon[6], 2020).

Let us take the example of Singapore based Pacific International Lines (PIL) to see the shipping industry has learned the lessons from the Hanjin experience. PIL is the world's 10th largest container line and operates 111 container ships (66 owned and 45 chartered) totaling 383,671 TEU (Wallis, 2020). So strong were the rumours of an impending insolvency that the company had to issue an official statement on 14 April 2020 to "*clarify that these rumours are totally false and the information and content derived there from are unfounded*" (PIL, 2020). Nonetheless, PIL has been facing conditions similar to what Hanjin faced in 2016. A brief review of the steps taken by PIL shows that many of the pre-emptive measures discussed in this paper are being attempted. Some of these include:

a) Agreement with its 15 main financial lenders (that cover 97.6% of its debt) to defer repayment until 31 December 2020. A formal standstill, preventing lenders from taking enforcement actions, has also been agreed until then (Corbett, 2020).
b) Entered into an exclusivity agreement with an arm of Singapore state-backed Temasek Holdings over a potential investment (Ang I. , 2020).
c) Sale of 6 vessels – four 12,000 TEU vessels to Seaspan for $367m, and two to Wan Hai Lines for $186.8m (Dixon[7], 2020).
d) Invited offers for its 17-storey office building located at 140 Cecil Street in the heart of Singapore's business district (Corbett, 2020).
e) Pulled out of the transpacific market (Dixon[8], 2020).
f) Sold its South Pacific subsidiary, Pacific Direct Line, to Australia's Neptune Pacific Line (Wallis, 2020).

It would be also relevant to study the actions of the national governments in the current scenario:

a) As discussed above, Singapore state-backed Temasek Holdings is injecting funds in PIL.
b) CMA CGM secured a €1.05 billion loan from a consortium of banks comprising BNP Paribas, HSBC and Societe Generale which has been guaranteed by the French Government. (France, 2020)
c) Evergreen and Yang Ming have held talks with Taiwanese government for a $T30bn ($1bn) state-aid package during the COVID-19 pandemic. (Shen, 2020)
d) HMM received USD 600 million in April 2020 from the Korea government-backed entities. It has received more than USD5 billion over the past two years to buy ultra-large (24000 TEU) container ships that will double its capacity. (HSN, 2020). It has also been reported that KDB and KOBC plan to provide further funds as a part of the over-all South Korean pledge of $1bn package to aid the country's shipping industry impacted by the COVID-19 crisis. (Liang, 2020)
e) It has been reported that even the Danish government has been helping the maritime sector out. (Maclister, 2020)
f) However, a spokesperson of Hapag-Lloyd was quoted as saying "*We will not look for government support as we are pretty confident that we will manage to get through this crisis on our own*". (Hakirevic, 2020)

It can be seen that the current government response is in line with our analysis. Most national governments have recognized the need for providing state aid to enable shipping companies over-come the financial crisis.

One of the reasons of the collapse of shipping companies that we discussed in section 3.1 was that "reactive" strategies may not be the "best" strategies for the shipping companies. The shipping company ought to play to its strengths and stick to its own long term plan. We can see this happening in the current situation with different shipping companies adopting different (and often conflicting) strategies to overcome the crisis. The Taiwanese carrier Wan Hai has reduced its slot capacity by 14% by re-delivering chartered vessels, (as mentioned above) PIL has been forced to sell six vessels, reducing its capacity by 10.2% and Maersk removed 236,000 TEU across 55 ships, reducing its share of total global capacity from 17.8% to 16.6%. (Marle, 2020). However, HMM has continued on its expansion plans and taken delivery of multiple 24000 TEU vessels (Lewis[2], 2020). It may well be the case that the black-swan event of COVID-19 has

forced HMM on this path as the orders for these mega-vessels were given at least 3 years ago. HMM would need to arrange plan on the deployment of these vessels. Given what happened with Hanjin, it is likely that counterparties will engage with HMM only if they have confidence that expansion plans are backed by Korean government support. This again underscores the importance of the role of the national governments.

6 Conclusion and Recommendations

The purpose of this study was to establish steps that the key stakeholders in the cross-border insolvency/ restructuring of a shipping company can take, to make the process more efficient in terms of time, cost and effort, so as to facilitate the shipping company continuing as a going concern.

Research questions were formulated to assist with identifying these steps and the answers to the research questions were established through an analysis of extant theory and qualitative practical data collected through the Questionnaire. This analysis was tested against a set of hypotheses to study any aberrations between theory and practice. The conclusions can be said to have been derived with a reasonable degree of certainty.

The answer to the MRQ has been first presented in the form of a checklist followed by a graphical representation. This graphical representation is a summary of the research representing a situation where a shipping company has filed for protection but is trying to restructure and continue as a going concern. The answers to the SRQs follow. The chapter concludes with the main findings and suggestions for issues of further research.

6.1 Answer to the main research question

What steps can be taken to make cross-border maritime insolvency management process more effective?

The key stakeholders should collaborate and take the following actions at the outset of the restructuring management process:

A. *Shipping Company*

1. Initiate and swiftly apply for recognition of FMP (through a foreign representative) across jurisdictions.

2. Identify key "safe base ports" in major trading areas – for example, Singapore in South-East Asia, Rotterdam in Europe, Houston in the United States etc where specific protection is accorded from ship arrest so that the existing cargo on the fleet may be discharged.
3. Give insights on market conditions to other stakeholders in the restructuring process – including trading areas and employment commitments of the mortgaged vessel(s).
4. Negotiate: (a) with ship-owners to cut ship charter rates, ideally in the range of 25-30%; (b) standstill agreements with third-party creditors; and (c) new terms for repayment of shipping bonds. To achieve this, the shipping company should seek the backing of the lead creditor bank and/or the relevant government.
5. Provide specific input on potential exit from unfavorable trade routes; identify blank sailings.
6. Collaborate with alliance partners – incentivize by offering sale of vessels at discounted prices / sale of / stake in terminals etc.
7. Be honest about trade debts to lead creditors – especially about maritime liens (if any).
8. Allow generation of cash through partial sale of excess capacity – subject to the potential conflict with vessel(s) being a security. Be open to scrapping of excess capacity, where sale is not feasible or economically viable.
9. Be open to management change and dilution of control – most probably through a debt to equity swap.
10. Maintain good relations with the national Government.
11. Identify real estate which can be sold to generate liquidity at a short notice.

B. *Lead creditor bank*

1. Give notices of default highlighting the relevant covenants and EODs under the loan agreement.
2. Attempt to introduce additional covenants and security – especially with ECAs / national Government support.
3. Attempt forced refinancing – either at par or at discount.
4. Have dedicated personnel tracking market conditions (business cycle) and specifically the freight market which would assist in creating a business plan.

5. In the loan facilities, attempt (a) debt to equity swap; (b) “pay-as you-earn” by extending the expiry date of the loan; (c) to reduce the monthly installments and wait for the market to recover (based on projections of the market conditions).
6. Ascertain mortgaged vessel’s trade debts – especially potential claims with priority over bank’s claims (such as maritime liens if possible).
7. Ensure charge or other priority on, all or part, of the future charter hire, if not already assigned.
8. Arrest the vessel / commence enforcement of collateral as a last resort only but in the meanwhile, identify the most favourable jurisdictions; calculate the projected costs of arrest in each jurisdiction – including legal fees, crew sign-off and repatriation expenses, maintenance and agency fees, insurance costs.
9. Change the ship managers and/or the crew if doubts of collusion with the shipping company resulting in un-cooperative behavior.

C. Government

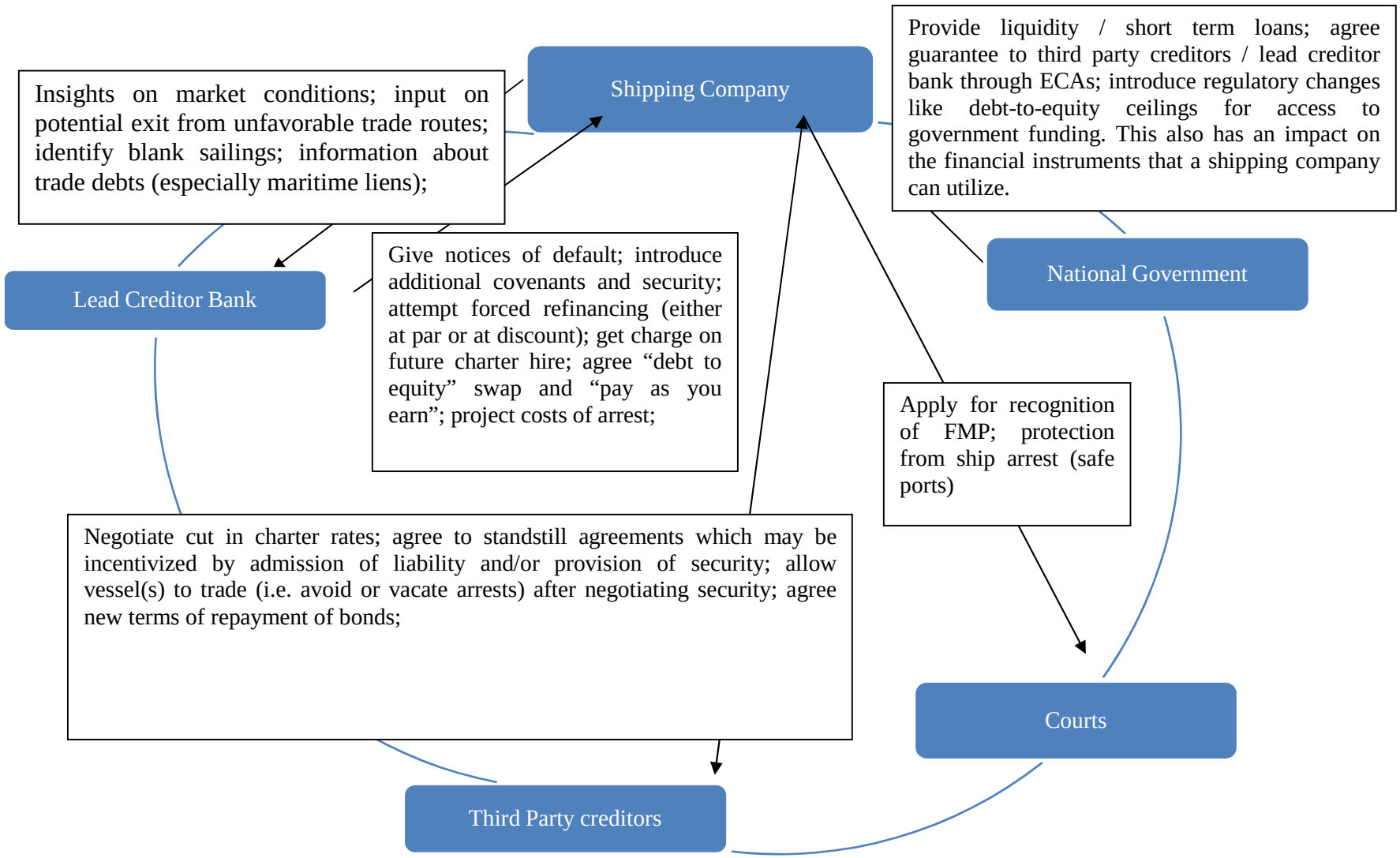
1. Assess impact of the insolvency on the overall economy – especially the supply chain and the maritime cluster.
2. Be open to offering guarantees to the lead creditor bank / ship-owners.
3. Provide short term liquidity.
4. Try a merger to save competing local entities where economically viable – introduction of a national mega carrier.
5. Introduce regulatory / legal regime changes: for example revision of debt-to-equity ceilings for access to government financial assistance. This also has a bearing on the financial instruments that a shipping company may utilize.

D. Third party creditor

1. Be open to temporary stand-still agreements with safeguards such as security (where possible) and/or extension of time to bring legal proceedings.

2. Agree temporary reduction of charter rates with periodic recovery spread over a period of time.
3. Allow vessel(s) to trade (i.e. avoid or vacate arrests) after negotiating security / admission of liability/ consent decree with the lead bank and/or shipping company.
4. Assist to maintain business continuity.

The following graphical representation / action plan is a summary of the research representing a situation where the shipping company has filed for protection but is trying to restructure and continue as a going concern through negotiations between the key stakeholders:


Shipping Company
Insights on market conditions; input on potential exit from unfavorable trade routes; identify blank sailings; information about trade debts (especially maritime liens);
Provide liquidity / short term loans; agree guarantee to third party creditors / lead creditor bank through ECAs; introduce regulatory changes like debt-to-equity ceilings for access to government funding. This also has an impact on the financial instruments that a shipping company can utilize.
Lead Creditor Bank
Give notices of default; introduce additional covenants and security; attempt forced refinancing (either at par or at discount); get charge on future charter hire; agree "debt to equity" swap and "pay as you earn"; project costs of arrest;
National Government
Apply for recognition of FMP; protection from ship arrest (safe ports)
Negotiate cut in charter rates; agree to standstill agreements which may be incentivized by admission of liability and/or provision of security; allow vessel(s) to trade (i.e. avoid or vacate arrests) after negotiating security; agree new terms of repayment of bonds;
Courts
Third Party creditors

6.2 Answers to sub research questions

Sub research questions

a. **How have the unique economic features of the shipping industry influenced the ship finance structure in the past decade**?

Excess operational capacity leads to instability in freight rates. This leads to financial instability and a liquidity crunch. The shipping industry is highly capital intensive and leveraged. The banks typically lend capital through loan agreements. Since the crisis in 2008, the charter rates for ships have fallen because of low volume of world trade. The low charter rates made operating most of the ships unprofitable and in combination with banks' demand for higher securities for their loan (as the value of the vessels dropped accordingly and could not bear the loan securities required by the financing banks) many shipping companies defaulted (Goretzlehner, 2019, p. 2). Accordingly, risk management has become a central consideration of every investment decision by banks (Giannakoulis, 2016, p. 94). To manage such risks, banks prefer to finance through a standard loan or credit facility with stringent covenants. Such finance is often backed by a mortgage on the vessel and/or by a guarantee given by an ECA.

b. What are the rights (and obligations) which are created for different players under such finance?

Banks become secured creditors through mortgages and can choose to accelerate the underlying loans and/or enforce the collateral. They also have the right to arrest the vessel(s) through an action *in rem* under maritime law.

Third party creditors may become maritime lien holders (i.e. rank ahead of a mortgagee bank in the order of priority), or secured creditors (upon the issuance of a writ in certain jurisdictions), or remain unsecured creditors. This depends upon the jurisdiction in which proceedings are brought and the law governing the underlying contract. Like banks, they have the right to arrest the vessel(s) through an action *in rem* under maritime law.

The government / ECAs often provide guarantees for the loans extended by foreign banks to shipping companies.

c. What issues of conflict arise between maritime law and cross-border insolvency law?

Cross-border insolvency law seeks to centralize all assets of the debtor in a single forum so that these may be distributed in a simple manner for the benefit of all creditors. Maritime law, on the other hand, contemplates a multiplicity of proceedings in multiple *fora*, which allows maritime creditors to obtain security for their claims by arresting the ship that is connected with their claims in any jurisdiction where she may be found. The rights of a creditor under maritime law before a local court may conflict with the rights (and obligations) of the shipping company under insolvency law of a foreign court.

d. How can the competing rights under maritime and insolvency laws be reconciled so that the cross-border maritime insolvency management process can be made more effective?

The competing rights may be reconciled by adopting the "middle path" based on the idea of reciprocal comity. According to this approach, rules and law of the main insolvency proceedings apply. However, such main insolvency proceedings have to acknowledge the rights of the creditors under the ancillary local proceedings where a stay has been obtained. We have seen that time is of the essence in a cross-border maritime insolvency management process. To ensure the process is time efficient, the local courts across jurisdictions should swiftly recognize the FMP. They should provide for a wide initial protection in the moratorium order (for example, by a wide definition of "assets" to include chartered vessels) to facilitate the attempt at restructuring. The local courts should provide adequate protection to creditors respecting existing rights under local law. The main insolvency court should respect the rights of the creditors under the local law. The arrest of the vessels should be restrained / vacated / modified to enable trading of vessels subject to safeguards. There is a need for a uniform recognition / treatment of maritime liens across jurisdictions. The third party creditors need to enter into standstill agreements in exchange of concessions like admission of liability and/or extension of time to commence proceedings.

6.3 Main Conclusions

There are several conclusions that can be drawn from this study of the competing rights and obligations of the stakeholders in insolvency / restructuring proceedings of a shipping company and the optimal positions they should take.

We have concentrated on a situation where the shipping company has already filed for protection before a court and is trying to restructure and continue as a going concern. Nonetheless, some of the findings are useful for guidance in the time period even before a shipping company files for protection.

The research and findings in this paper can serve as guidance for different stakeholders in identifying the key issues should be addressed at the outset when engaging in maritime restructuring negotiations. This would give a starting point which can lead to specific issues being developed, which would of course depend upon the individual circumstances. It can also assist in timely strategic decision making. The emphasis has been on identifying issues which would enable the shipping company to continue as a going concern.

The shipping company needs to concentrate on re-negotiating charter rates and entering into standstill agreements with third party creditors. Why would the third-party creditors agree to this? It may be in their interests to agree, where adequate security is provided. Another incentive for third parties to agree this may be if the shipping company admits liability (to pay) or agrees to an extension to time to bring legal proceedings (in case the claim is disputed) as this would lead to potential saving of legal costs.

The option of arrest, even though a powerful tool, is a double edged sword. On one hand it provides protection to a creditor but also has associated costs involved which may make this remedy not economically viable in the long run. Furthermore, such recourse will almost certainly prevent the shipping company from continuing as a going concern thereby rendering any restructuring attempt useless.

The courts should adopt the middle path whereby all proceedings should be brought before a central insolvency court. The claims brought before the local courts across jurisdictions should also be brought before such insolvency court, but only after adequate protection is given to the

creditors. Adequate protection should include recognition of rights that would have been available to such creditors before the local courts.

A key finding of this study is the role of national government in the restructuring process. This is because (i) of the liquidity they can provide, and (ii) the state-backed guarantee that typically lead creditors would require before (re)negotiating loan terms and/or injecting further capital.

6.4 Future Research

This research develops a new model to understand a phenomenon and develop an action plan based on theoretical and practical data. In terms of cross border maritime insolvency, it builds the foundation upon which further study may be conducted based on specific stakeholders. For example, a more comprehensive review of typical loan agreements extended by banks may be undertaken. A detailed review of the economic conditions affecting the shipping cycles may also be undertaken to further develop indicators which are likely to lead to liquidity crisis for a shipping company, and consequently, a default on the loans. This will assist in credit risk management. An interesting further analysis would be the conditions under which the national government should intervene to bail out a shipping company facing insolvency.

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Appendix

Questionnaire

A. Cross Border Maritime Insolvency

1. Name
2. Do you wish your responses to be kept confidential?
3. Do you feel there is a conflict between the principles of maritime law and principles of insolvency law?
4. Have you experienced difficulties as a consequence of this conflict?
5. Should cross-border maritime insolvency law differ from cross-border general insolvency law?
6. Should domestic maritime insolvency law differ from domestic general insolvency law?
7. Should cross-border maritime insolvency law adopt a Territorial, a Universalist approach or a Mixed approach?
8. Since a shipping company does not really have a "home country", is adopting a Universalist approach in cross border maritime insolvency proceedings an impediment?
9. Should recognition of a foreign main proceeding (FMP) automatically stay any existing action against the assets of the shipping company, including its vessels?
10. Should a court's stay / moratorium order be applicable to all the vessels owned by the shipping company or even extend to vessels time-chartered by the shipping company?
11. Should a court's stay / moratorium order against a demise-charterer company extend to the other vessels demise chartered by it?
12. Should a court's stay / moratorium order against an *in personam* debtor (i.e. the erstwhile ship owning company) extend to the maritime lien holders against the ship after it has been sold?
13. Should different stay/ moratorium rules apply in case of maritime claims and maritime liens?
14. If the claim is only (i) a maritime lien under the laws of the country where the claim arose, (ii) a maritime lien under the laws of the country where the admiralty proceedings are filed, and (iii) not so under the laws of the country where the insolvency proceedings are commenced, should the insolvency court recognize such lien?
15. Should a claimant be treated as a secured creditor upon the issuance of a writ or only when the vessel is actually arrested?
16. Should a secured creditor be allowed to continue the suit notwithstanding the insolvency court's stay/ moratorium order?
17. In order to be recognized as a secured creditor, should the country where an *in rem* writ has been issued consider the moratorium date as of commencement of the foreign insolvency proceedings or the recognition of the foreign insolvency proceedings by the local court?
18. Should in rem proceedings to enforce maritime liens be considered proceedings against the vessel and not against the shipping company, and hence be kept outside the ambit of the insolvency proceedings?
19. If the time bar for filing of claims in insolvency proceedings is different from limitation periods for commencement of maritime claims, which one should prevail?

B. Ship Finance

1. Should Export Credit Agencies/ Government step in to bail out shipping companies in national interest) even if such package is not economically viable?
2. If you are advising a bank in the event of a shipping client facing impending insolvency, rate the following factors in order of preference you would weigh before deciding whether it is preferable to accelerate and enforce or seek to negotiate a restructuring of the loan:

Factor	Rank
Physical location of the ship.	
The relevant jurisdiction, where the ship is located, for arrest and enforcement procedures.	
Existing charter commitments and the prospects of these generating revenue.	
Trade creditors with claims against the ship that may rank ahead of the mortgage in that jurisdiction.	
Cost of enforcement	
Prospective buyers for the ship	

3. Rate the following factors in order of preference that you would advise a bank to look for before advancing a loan to a shipping company:

Factor	Rank
Solid balance sheet ratio	
Cash flow sustainability	
Management	
Access to alternative sources of finance	
Portfolio of charter contracts (short term/long term etc), market position, quality of shippers	

4. As a bank, rate in order of preference the restructuring options that are most frequently adopted in a shipping context:

Factor	Rank
(Partial) Moratorium on principal payments	
Pay-as-you-earn structures	
Payment in kind structures	
Covenant holidays	
Tranching of loans (to facilitate fresh money)	
Debt-to-equity swap	
Haircut	

C. <u>Hanjin Insolvency</u>

1. Was the 1 September 2016 Seoul Central District Court order ("Korean Order") recognized by the courts in your jurisdiction?
2. [Assuming the contract allows] Should a ship-owner have been allowed to avoid the Korean Order by relying upon a lien on sub-freight against the parties who may have sub-chartered the vessel from Hanjin?
3. Should the Korean government have intervened to provide the required liquidity / cash?
4. If you were advising a secured creditor, give two conditions/ protection orders that you would require before agreeing not to arrest a Hanjin-owned vessel (to facilitate the restructuring).
5. If you were advising the mortgagee bank to a Hanjin-owned vessel, which is the most viable financial instrument(s)/ restructuring option you would have recommended?
6. Could the Hanjin Insolvency have been prevented with better legal instruments?
7. What is the main lesson that can be learnt from the Hanjin Insolvency?
8. Any suggestions on the topics that the researcher should include in his thesis?