

BULLETIN

AVOIDING THE ADVERSE IMPACT OF INSOLVENCY ORDERS ON THE ENFORCEMENT OF SHIP MORTGAGES OR OTHER EXERCISES OF RIGHTS IN REM

SEPTEMBER 2016

INSOLVENCY ORDERS OFTEN HINDER MORTGAGEES' OR OTHER SECURED CREDITORS' ENFORCEMENTS. RECOGNIZING THE PROBLEM, THE BELGIAN GOVERNMENT INITIATED A CHANGE OF THE CODE OF INTERNATIONAL PRIVATE LAW IN ORDER TO ALLOW THE ENFORCEMENT OF MORTGAGES AND OTHER RIGHTS *IN REM* ON ANY ASSET IN BELGIUM AS IF THERE WAS NO FOREIGN INSOLVENCY PROCEEDING.

ISSUE

When a mortgagee attempts to enforce a ship mortgage, or when another secured creditor attempts to exercise a right *in rem* on any asset, the debtor is often protected by an insolvency order. Such order typically bars individual creditors from enforcements, either in the view of debtor's restructuring (Chapter 11 type insolvency), or its judicial liquidation. Many legislations prohibit foreclosures in the event of a Chapter 11 type insolvency. And, in the event of a judicial liquidation only the judicial liquidator, not the mortgagee, will control the realization of the mortgaged asset, slowing down and reducing the ultimate recovery.

EU INSOLVENCY REGULATION

The EU Insolvency Regulation¹ does avoid this type of problems by providing in its article 5 that an insolvency order in one EU member state shall not hinder the holder of a right *in rem* to exercise its rights in another EU member state.

DOMESTIC LAWS

If however the insolvency has not been opened in a EU country, the aforementioned EU

provision will be ineffective and domestic laws may give full effect to foreign insolvency orders, including a stay of the execution against debtor's assets sought by individual creditors.

BELGIAN CODE OF INTERNATIONAL PRIVATE LAW

The Belgian Code of International Private Law gave full effect to a foreign insolvency order in Belgium.² Recognizing the adverse impact thereof on ship mortgage enforcement the Belgian Government requested undersigned to prepare the text of a statutory amendment that was adopted by the legislature³. As a result, article 119 §2, 1° of the Belgian Code of International Law was amended so that a foreign insolvency order shall not affect the individual exercise of a right *in rem* on any asset in Belgium, whether movable or not, tangible or not.

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Goemans, De Scheemaecker Advocaten is an independent law firm established at Antwerp where Europe's second largest port is located.

Goemans, De Scheemaecker Advocaten's legal practice focuses on the resolution of disputes and the drafting of contracts and other instruments of trade and finance, both domestic and international, with an emphasis on international sale, leasing, shipping, transport and logistic activities, financing and securities, insurance, liabilities and recovery of secured and unsecured claims.

Should client have a question beyond the scope of firm's expertise then, client will be referred at no charge and without consideration to a lawyer of another law firm who is a distinguished practitioner in that field.

Goemans, De Scheemaecker Advocaten's members are licensed to appear in all Belgian Courts except the Cour de Cassation, and in most courts of other countries of the European Union and in the Courts of the European Community. They will however only appear in the courts of other countries of the European Union to argue on issues of Belgian law, if language skills permit and with the assistance of a local lawyer.

Goemans, De Scheemaecker Advocaten has many informal contacts with outstanding foreign law firms able to assist clients abroad. Goemans, De Scheemaecker Advocaten chooses and recommends those law firms in full independence.

Warning: This bulletin is not a legal opinion and does not replace it. It should not induce a particular business decision. This bulletin reflects, much summarized, an update on a particular item, but it is necessary to submit the facts envisioned to a legal opinion reviewing the relevant legal sources in order to ascertain the legal effects sought by a certain decision or conduct can be achieved.

Endnotes to front page text

¹ Council Regulation (EC) N° 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ L* 160, 30 June 2000, page 1.

² Code of International Private Law, Act of 16 July 2004, *Mon. b.* 27 July 2004, article 121.

³ Act of 25 April 2014, *Mon. b.* 14 May 2014, article 114.

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