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## Chapter 12

# RENEGOTIATING SHIPPING CONTRACTS IN TURBULENT ECONOMIC TIMES<sup>1</sup>

*Prof Jason Chuah*

## ABSTRACT

*This chapter considers the legal circumstances impacting on the feasibility of the relevant parties coming together to renegotiate their shipping contracts – notably large scale contracts such as charterparties – in times of economic hardship. The imperatives of insolvency law and shipping law are not always the same. Insolvency law is pivoted on a state imposed belief that corporate assets should be protected at times of insolvency. This work attempts to prove that shipping relationships and realities do not always render the continuation of a shipping contractual relationship worth preserving and so shows and tests the tension between insolvency law and party autonomy in that regard.*

It could not have escaped the notice of anyone interested in the maritime sector that the last few years have been quite tumultuous for the industry. We have seen a good number of very high profile corporate insolvencies which impacted heavily on the shipping world – including Hanjin, OW Bunkers, Daiichi Chuo Kisen, Copenship, Daebo International Shipping Co., Winland Ocean Shipping Corp., Shagang Shipping, Varun Resources, Deiulemar, Seadrill Ltd, Harvey Gulf International Marine, and it is inevitable that more would follow. A major corporate collapse in the shipping world have hugely negative effects on not only other economic entities in the supply chain, but also for the domestic, regional and more localised economies. Research has also shown that such corporate failures have a deleterious impact on the maritime labour economy.<sup>2</sup> Against that backdrop too is the introduction by a good number of jurisdictions of reforms to insolvency law influenced largely by the belief that insolvency law should be pro-rescue and thus existing beneficial contracts should be preserved where possible. There is an emerging cultural belief thus that contracts should be renegotiated.

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<sup>1</sup> A version of this paper was presented at the UNICTRAL-City University Hong Kong Maritime Law Symposium (November 2017); I am grateful to the delegates for their very helpful contributions and comments on my paper. I would also wish to acknowledge the suggestions made by the anonymous reviewers.

<sup>2</sup> See Lane Tony (2000): *The Global Seafarers' Labour Market: Problems & Solutions*, The Seafarers' International Research Centre - University of Wales, Cardiff, 9, 11-15; also country specific (Romania) research in Barsan, E., 2006. *Social Aspects of the Seafarers' Integration on the Maritime Jobs Market*. In *Internat. Conf. "E COMM LINE* (pp. 125-136) available at <http://iamu-edu.org/wp-content/uploads/2014/06/barsan.pdf>

This chapter considers the legal circumstances impacting on the feasibility of the relevant parties coming together to renegotiate their shipping contracts – notably large scale contracts such as charterparties. Although the relevant legal principles are applicable to a wide range of commercial relationships, there are several factors which make the large scale contracts especially noteworthy. First, these contracts are likely to be high value and often arise of a commercial relationship sustained and built over time. Second, the sector is financed differently to other sectors – for example, the use of reserve based finance means that a shipper or cargo interest will be considered to be in breach of their covenants to their banks if they have substantial exposures caused by uneconomic shipping contracts and likewise for shipowners whose financing is dependent on income stream, uneconomic conditions can indeed be prejudicial to continued financing. Thirdly, there is a presumption of equal bargaining positions between parties to such large scale contracts. Last but not least, the threat of insolvency is not localised in shipping – shipping is peripatetic and thus, any financial hardship will carry not only the threat of “foreign” insolvency processes and ship arrests. These factors need to be placed against a context of current insolvency law reform and policy developments.

This work is not concerned with the law relating to renegotiations of contracts *per se*<sup>3</sup> but with the extent to which the success of charterparty renegotiations is framed and influenced by insolvency rules. Some discussion about the commercial imperatives against the legal and insolvency backdrop will also be necessary to show the complications in renegotiation endeavours. There is much rhetoric in insolvency reform and policy making concerning the need to preserve contractual relationships including large scale contracts. There is increasing emphasis in insolvency law reforms on preserving value by encouraging renegotiations. Moreover, it is indeed available in some civil law jurisdictions the remedies of judicial adaptation and managed renegotiations when economic hardship besets the contracting parties. This chapter demonstrates that despite this perceived call to save the contract, renegotiations of shipping contracts (whether compelled or not contractually or judicially) are somewhat caught in vortex of legal complications and uncertainties – both because of the uncomfortable relationship between contract law and insolvency law, and the tensions caused by cross border insolvency factors. This chapter also attempts to examine what commercial and procedural constraints might hold back the success of renegotiations in a shipping, notably charterparty, context. It tries to challenge the belief that contracts can be unmade or remade as the parties see fit, in times of economic turbulence and insolvency.

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<sup>3</sup> A matter of which there is a large body of literature.

From a methodological point of view, this work will use English legal principles as a starting premise, given the pervasive use of English law in shipping contracts but will adopt an internationalist and comparative law angle when evaluating those principles. Indeed, there is a comparative law issue as to whether civilian systems are more deft at facilitating renegotiations, given the fact that there may be legal provisions for judicial adaptation and compelled renegotiations<sup>4</sup>. A wider theoretical question is posed – namely how the relationship between charterer and shipowner be conceptualised when their commercial relationship is shaken by hard times.

As regards scope, the work focuses on shipping contracts paying specific attention to those contracts in shipping which might justifiably be termed long term, large scale and/or relational<sup>5</sup>. Generally speaking, charterparties and volume contracts spring immediately to mind. The reason for this focus is primarily because small scale and less impactful contracts, such as minor bill of lading contracts, are less likely steer the principal participants (i.e. owners, shippers) in the shipping relationship to renegotiations. Also such contracts are less likely to make provision for insolvency as a contingency, expecting the cargo interests to seek insurance protection.

This paper is divided into four parts. Part 1 considers the insolvency law context – what is impact of the insolvency law regime on the motivation to renegotiate and consequently, the likelihood of success in the renegotiation exercise. Part 2 addresses the trite proposition that insolvency does not bring an end to the contract automatically – in the light of recent case law on insolvency constituting anticipatory breach not only as regards executory contracts, but also executed contracts, that proposition needs revisiting. If the insolvency event potentially brings an end to the contracting relationship, the probability for renegotiations would diminish. A comparison is made with ipso facto clauses – these are clauses which provide for the termination of the contract following an insolvency event. Part 3 considers how renegotiations which take place during times of economic hardship are clearly open to subsequent challenges on the basis that consent had been extracted under economic duress. Part 4 takes the recent case of *The OSX 3* (OGX Petroleo E Gas SA, (aka Nordic Trustee ASA v OGX Petroleo E Gas SA) [2016] EWHC 25 (Ch); [2016] Bus. L.R. 121) as a case study to show how despite well intentioned legal systems to save the contract in times of hardship, it is also vital to bear in mind that shipping is

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<sup>4</sup> See generally C Pédamon & J Chuah, *Hardship in Transnational Commercial Contract - A Critique of Legal, Judicial and Contractual Remedies* (Paris Legal Publishing, 2013), Chapters 3 and 4.

<sup>5</sup> There is a large amount of literature on relational contracts; it is not the plan of this work to consider the idea of relational contracts but simply to take as a given that there are such contracts in the shipping sector which are “relational” in the manner described by Macneil (see I Macneil, "Contracts: Adjustment of long-term economic relations under classical, neoclassical, and relational contract law." *Nw. UL Rev.* 72 (1977): 854; also I.R. Macneil, and D. Campbell. *The relational theory of contract: selected works of Ian MacNeil* (Sweet & Maxwell, 2001.)

international and as a result will be subject to cross border insolvency legal and procedural constraints.

## Part 1

Under insolvency law, an executory contract<sup>6</sup> is not normally terminated as a result of one party's insolvency (unless frustration or impossibility is successfully pleaded). However liquidators and receivers might not be altogether enthusiastic about continuing with performance. The liquidators may decide unilaterally to disclaim an onerous contract pursuant to s.178(3) IA 1986 if the contract is 'unprofitable' and the disclaimer is in the interest of the creditors on a whole. There is no time limit on the liquidator to exercise the right of disclaimer, but the innocent party may ask for a clear determination within a 28-day period. liquidators are empowered to disclaim the contract if it is "onerous". Hence greater incentive (pressure) on the other party to renegotiate? Under what circumstances would a shipping contract be considered onerous? The so-called business judgment rule – the US courts have taken the view that unless it looks like a whim or reckless, the liquidator's judgment would not be called into question. From an English law point of view (*Re SSSL Realisation* (2007)), the test is founded on notions of good faith and honesty. A contract is unprofitable if it imposes on the company continuing financial obligations or liabilities which may be regarded as detrimental to the creditors. Before it is treated as unprofitable, *it must give rise to prospective liabilities*. Financial disadvantage alone is not enough – one must focus on the nature and cause of the disadvantage. Also the contract is not unprofitable merely because a better bargain can be had elsewhere. Other relevant factors of consideration include the type of financing the shipping company has

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<sup>6</sup> An executory contract might broadly be taken to mean a contract which has not yet been fully performed. However, some jurisdictions are more inclined to taking a conceptual approach to the definition of the term than others. In the US, for example, case law seems to be divided between the right approach or test to identify what constitutes executory contracts in insolvency. Some courts prefer the so-called material breach test, whilst others opt for the functional test. The former test defines an executory contract as an agreement where "the obligations of both the bankruptcy and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other". On the other hand, the functional test works "backward from an examination of the purposes to be accomplished by rejection, and if they have already been accomplished then the contract cannot be executory". (see V Countryman, Executory License Agreements in Bankruptcy, 57 Minn. L. Rev. 439, 460 (1973)). In English law, the approach is fundamentally far more pragmatic than its American cousin and little provision is made about what it means by executory. It is generally considered in English legal writings that an executory contract is one that has not yet been completely performed by either party, in accordance with its terms. (see S Williston, The Risk of Loss after an Executory Contract of Sale in the Common Law, Harvard Law Review, Vol. 9, No. 2 (May 25, 1895), 106)

entered into – reserve based financing (for example in the tanker sector) potentially makes the charterparty or large scale shipping contracts more onerous<sup>7</sup>.

As to whether the threat of the liquidators' seeking to disclaim the charterparty would induce renegotiations necessarily also depends on the commercial and practical factors.

Using a time charter as an example, assume that the owners begin winding up and the liquidators then threaten to disclaim the charterparty. What would the commercial circumstances under which the charterers agree to an increase in the hire rate? Clearly, market rate becomes key – the charterers would not agree to an increase if the market rate is lower. Obviously there may be other considerations such as convenience, suitability of vessel, third party factors, reputation and time.

However, the renegotiations may yet fail if the parties are unable to agree to the matter of control and ship management. Given the economic hardship the owners/liquidators find themselves, it is difficult to see how the liquidators would be prepared or able to meet the various operational costs of the vessel or to do so without causing a great deal of disruption and inconvenience to the charterer. A matter of some significance in modern shipping is ship management – who will be the managers? The existing ship management company may or may not come onboard – they too would be concerned about whether their service fees would be settled in the event of the renegotiated charter further failing. They may then seek various assurances from both the liquidators and charterers.

Hence, from charterer's standpoint, it might be less troublesome simply to accept the termination and charter another vessel and claim against the liquidators. Their position, in insolvency law, may or may not be worse off than other unsecured creditors.

Thirdly, it is worth reminding ourselves that s 178(6) of the UK Insolvency Act 1986 provides that:

“any person sustaining loss or damage in consequence of the operation of a disclaimer under this section is deemed a creditor of the company to the

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<sup>7</sup> Although this sort of asset based lending can help shipping companies overcome the cyclical challenges of the industry, asset based lending also allows the lender take prompt control of the asset and any receivables if the borrowing base falls below the agreed limit which could be to the debtor's disadvantage. For distressed shipping companies, lenders operating in asset based lending can help by providing recapitalisation, turnaround and debtor-in-possession financing, since the companies will have large asset value in the vessels. (US Office of the Comptroller of Currency, "Asset-Based Lending." (Washington, 2014) at <https://www.ots.treas.gov/publications/publications-by-type/comptrollers-handbook/asset-based-lending/pub-ch-asset-based-lending.pdf>. However, from the liquidator's perspective, carrying on with a shipping contract which is underpinned by asset based financing whereby the lender exerts much control and intervention could well be perceived as onerous.

extent of the loss or damage and accordingly may prove for the loss or damage in the winding up.”

Other jurisdictions will have comparably similar provisions<sup>8</sup>. Thus, following a disclaimer, the innocent party may claim damages, just as in repudiation. It might thus be asked whether the innocent party, as an unsecured creditor, be better off than renegotiating a different rate? Where the insolvency leads to non-payment, it is not uncommon for liquidators to claim various defences and excuses to the non-payment or partial payment (which of course is not accord and satisfaction of the debt). That does naturally give rise to some degree of uncertainty.

The other scenario would be that the insolvency is taken as evidence of an intention by the party concerned not to perform their part of the bargain when it falls due. That might be thus deemed to be an anticipatory breach. Under such circumstances too, whilst it is unpredictable whether the innocent party may or may not be better off, disclaiming leads to a more commercially certain outcome than leaving the innocent party to rely on the economic hardship encountered by the other party as an anticipatory breach. The dicta of Popplewell J in the recent English case of *Geden Operations Ltd v Dry Bulk Handy Holdings Inc, The Bulk Uruguay* [2014] 2 All ER (Comm) 196 ("The Bulk Uruguay") (at [18]) may also be usefully noted:

... Save for possibilities which are so remote that in practice they can be ignored, what is required is inevitability. It is not sufficient if something is done which makes future performance unlikely, even very unlikely, still less that it renders performance uncertain. That is why renunciation is often a more favoured basis for invoking the doctrine of anticipatory breach.

It is however not always clear whether insolvency constitutes an anticipatory breach as regards executed contracts, namely that under the contract payments are due but before the due date, the debtor becomes insolvent. Is the insolvency an anticipatory breach of the executed contract? Part 2 addresses this matter.

## Part 2

A matter rarely considered in the literature on charterparties is whether and to what extent a charterparty or similar shipping contract is an executory contract for the purposes of the insolvency regime (of the applicable law). It is suggested that this omission is largely influenced by the fact that commentators have largely assumed that shipping contracts could always be renegotiated where the circumstances are right and hence, there is little need to delve into the legal niceties of whether the shipping contract is actually executory or not. It is argued that this perception

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<sup>8</sup> See generally J Chuah & E Vaccari, *Treatment of Executory Contracts in Insolvency Law: A Comparative Study* (Edward Elgar, 2019).



misses the importance of the law relating to anticipatory breach which this Part will address. This author concedes that, whilst the issue should not be overplayed given commercial realities, it is undeniable that all yet to performed charterparties or volume contracts are classed as executory contracts when either party becomes insolvent. However, where the contract (charterparty) had already been performed but payment of freight or hire had not yet fallen due, that contract would likely to be considered an executed contract. It is therefore useful to ask, as lawyers, whether one party's insolvency or impecuniosity would be characterised as an anticipatory breach for both executed and executory shipping contracts.

In a good number of common law jurisdictions, such as the US<sup>9</sup> and Canada<sup>10</sup>, anticipatory breaches could only apply to executory contracts (namely where both parties have yet to perform their obligations). Executed contracts where one party has performed fully their obligations but the other party's obligations have not yet fallen due – it is understandable why some commentators consider it difficult to reconcile the nature of anticipatory breaches with executed contracts. Indeed, as far as the US is concerned, in *Brown Paper Mill Co v Irvin*<sup>11</sup>, the US Court of Appeal for the 8th Circuit ruled that anticipatory breach may not arise in executed contracts where the only contractual obligation left was the defendant's promise to make payment in instalments at a future date. In that case, a broker had fully completed his obligations under the contract was expecting to receive payment in instalments for his brokerage commission from the buyer. When the defendant repudiated the agreement by denying the existence of any contractual obligation owed to the plaintiff for his services, the plaintiff sued. The US position appears to be founded on the basis of the old English authority on anticipatory breach – *Hochster v De la Tour*<sup>12</sup>. It was held there that in the case of mutually dependent duties yet to be performed, the innocent party should be given an immediate action otherwise he would have had to perform all the duties precedent to the "guilty" party's duty in order to guarantee his own right to sue. The reasoning that follows is thus that if the innocent party has already performed all his obligations under the contract, the rationale of the doctrine of anticipatory breach no longer prevails.

In England, the matter is not considered routinely although relevant case law seems to suggest that anticipatory breaches might be applicable to both executory and executed contracts.<sup>13</sup> In *Moschi v Lep Air Services Ltd* and others, the debtor failed

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<sup>9</sup> See *Pitts v Wetzell* 498 S W 2d 27 (Tex Civ App Austin, 1973); *LeTarte v W Side Dev* 855 A 2d 505 (N H, 2004); D A Wiesner & J Klotchman, "Anticipatory Breach and the Unilateral Contract: A Decade of the Status Quo?" (1982) 8 U Dayton L Rev 61

<sup>10</sup> *Melanson v Dominion of Canada General Insurance Co* [1934] 2 D.L.R. 459

<sup>11</sup> 146 F 2d 232 (8th Cir 1944)

<sup>12</sup> (1853) 2 El & Bl 678, 118 ER 922

<sup>13</sup> See *Moschi v Lep Air Services Ltd* and others [1973] AC 331; *Synge v Synge* [1894] QB 466 for instance.

to pay the required instalments of a loan to a creditor who had completed its obligation under a contract by releasing the goods previously held under a lien. When the creditor released the goods, the only remaining duties are the ones on the debtor (to pay the creditor) and on the debtor's surety. The contract became thus [partially] executed. Following the debtor's failure to pay the instalment (others have not yet fallen due), the creditor sued the surety on the guarantee. The House of Lords allowed the creditor to do thus and there was no debate as whether the partial execution of the contract raised any difficulties around the creditor's right to accept the "anticipatory breach".

Crucially, Lord Simon dismissed the surety's argument that it had merely "guaranteed the later payments, not the immediate damages"<sup>14</sup>. His Lordship held that the guarantor's argument was impossible to reconcile with *Hochster v De la Tour*, that if a promisor under a contract, even before the time for its performance evinces an intention not to perform it, the promisee may treat this intention as an immediate breach of contract and bring his action accordingly:

"In the instant case, therefore, it was accepted that the respondents could, on 22 December, treat the company's conduct as a refusal to perform the executory part of the contract, and sue the company at once for damages for breach of contract, notwithstanding that the company might notionally have changed its mind before the time for performance had arrived and decided to comply with its executory obligations. The measure of damages in such an action would be the totality of the outstanding debt with a discount for accelerated payment: *cf Frost v Knight*. *It would be very strange and hardly workable if the promisee had to wait until the time for the promisor's performance had arrived before having his remedy against the surety.*" (emphasis added)

According to Lord Simon, while the action for immediate damages would succeed, the proper measure of damages "would be such net sum with an appropriate discount for accelerated payment". Such a discount was necessary to prevent the claimant from receiving more than what he was entitled to under the contract by discounting the award of damages. In plain, as far as the judge was concerned, the fact that the contract had become executed was no bar to the doctrine of anticipatory breach but will be considered in awarding damages.

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<sup>14</sup> At 355

Academic opinion in the common law world is divided, as perhaps is to be expected.<sup>15</sup>

The dilemma is perhaps best illustrated in a case. In the recent case of *The STX Mumbai*<sup>16</sup>, the Singapore Court of Appeal held that the common law doctrine of anticipatory breach could be invoked regardless of whether a contract is executory or executed. The court went on to state that although insolvency does not always necessarily constitute an anticipatory breach, under certain circumstances, it could.

The case concerned a bunker supply contract whereby three days before the agreed payment date, the bunkers suppliers demanded immediate payment, upon hearing the news that a company, STX Pan Ocean, which appeared to be the ship owners' controlling entity had filed for bankruptcy in South Korea and being concerned that that owners would thus default on payment. Payment was not made at the requested date and the claimants obtained an arrest

When no payment was received, the claimant commenced *in rem* proceedings to arrest the ship in Singapore claiming that the defendant had committed an anticipatory breach of contract – namely, the owner's conduct evinced a clear intention to renounce the contract (by either not complying with the claimant's letter of demand or because it was financially impossible for the defendant to do so). The Singapore court found that the bunker contract in question was an executed contract because supply had already been made and the outstanding obligation was the duty to pay on the agreed date. It went on controversially to allow the warrant of arrest to be issued on the basis that an anticipatory breach could be committed in respect of the executed bunker contract.

The Singapore Court of Appeal reasoned that the "traditional view" which was based on the premise that there was an implied promise not to prevent the innocent party from performing their part of the contract (in our case, an implied promise from the owners not to hinder the supplier from delivering the bunker to the owners), was not one which worked well in the unique set of facts involving bunker supplies. After all, the court considered that in bunker supply contracts, since the bunker supplier had already fulfilled their part of the contract at the very outset there was in reality nothing more in the arrangement that the other party should "promise" not to interfere with. The implied promise reasoning is thus seriously

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<sup>15</sup> See Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties" (1924) 22 Michigan L Rev 329; also Comment, Anticipatory Repudiation: Anachronistic Limitations, 1959 Duke L.J. 165; S.M. Waddams, *The Law of Contracts* (Canada Law Book Inc., 6th ed, 2010), at 463; Stoljar, "Some Problems of Anticipatory Breach" (1974) 9 Melbourne Univ L Rev 355 for arguments in support for an extension of the doctrine to executed contracts. See Dawson, "Metaphors and Anticipatory Breach of Contract" [1981] CLJ 83 for an explanation of the rationale of a limited approach.

<sup>16</sup> [2015] SGCA 35; [2016] 1 Lloyd's Rep. 157

limited. It might be suggested that the same rationale could well apply to more conventional shipping contracts – especially those in relation to a one off supply obligation such as a voyage charterparty or a contract of affreightment contained in a bill of lading. For volume contracts and time charters, the position depends on whether one party has been able to fulfil the entirety of their undertaking.

The court too what might perhaps be characterised as a more pragmatic approach – in the circumstances, if the defendant has evinced a clear intention that it will not perform its obligations which have not become due regardless of whether the other party had fully performed their obligations or not, that, in interest of fairness and justice, should be taken as a breach. The court held that it would not fair to leave an innocent party who has already performed its contractual obligations in a worse position than one who has not yet performed but is prepared and willing to do so. The arrest warrant offered the “innocent party” that level of protection.

As to the issue of insolvency as an anticipatory breach, again the court relied on the premise that bunker contracts are special. The court observed that in general commercial matters, a liquidator might elect to adopt a contract on the basis that it would be beneficial to the insolvent company’s interests. However, in bunker supply contracts the court’s conclusion was that such contracts are not likely to be adopted by liquidators because the debtor had already had the full benefit of the services. For the liquidators to settle the debt could potentially lead to the liquidator failing in their duty to treat all creditors fairly. Much depends, the court stressed, on the factual circumstances as to whether the contract had become impossible to perform, and thus, whether an anticipatory breach had been committed.

There are two propositions for consideration. The first is that the court appeared to place a significant degree on the finding that bunker contracts are special – that is explicable on the basis that insolvency per se is not always a breach, anticipatory or otherwise. The court had to justify its conclusion that in that case the insolvency, not of the actual contracting party, but its controlling entity, was tantamount to evidence of refusal or failure to perform. The second follows on from the first – it raises the question as to whether for more ordinary shipping contracts (notably those for freight services) would be dealt with differently. Much rests on the commercial and practical question as to whether the liquidators are likely to adopt the contract in the event of insolvency. More about this to follow.

It might be thus be said, if the *STX Mumbai* represents good law, that whilst there is some clarity as to whether anticipatory breach applies to both executory and executed contracts, it causes potential interpretation problems for business and lawyers because it is always fact dependent whether the insolvency of one party (and in *The STX Mumbai* case, even the insolvency of the controlling company of the

group) constitutes anticipatory breach. Evaluating the evidence and factual circumstances to determine whether such a situation arises is, to put it mildly, starkly challenging. It is opined that unless the facts are highly persuasive, one should not depart from the general proposition that insolvency is not an anticipatory breach per se and that a contract does not become impossible to perform simply because insolvency had occurred.

From an owner's point of view, it is understandable why they would wish to resist the claim that they had committed an anticipatory breach. No business would wish to be put under commercial pressure when it is the parent company that is being made insolvent, rather than themselves. The line of credit might be vital – a sudden termination thereof could be devastating.

It has been suggested that “if possibly there was an express term in the Contract providing for termination of credit in the event of insolvency, including that of the parent”<sup>17</sup>, the bunker suppliers might not have had to go through an expensive litigation. This brings us perhaps neatly to the question of ipso facto clauses. It seems quite clear that there is a common view amongst shipping lawyers in common law jurisdictions to see such clauses (ipso facto clauses, credit termination clauses, acceleration clauses) as an efficient solution to the impact of insolvency on executory contracts (and possibly executed contracts with an executory obligation due to be performed by one party<sup>18</sup>). Ipso facto clauses come in different forms – some with a wider impact than others. For example, an ipso facto clause which provides for the termination of the contract simply upon the appointment of administrators can produce hugely negative consequences – they “can severely constrain the ability of a business to continue trading during restructure” and can “reduce the scope for a successful restructure or prevent the sale of the business as a ‘going concern’”.<sup>19</sup>

Ipsa facto clauses are not common in shipping contracts and charterparties. Indeed, as the Singapore court noted, acceleration clauses were not found in the bunker supply contract concerned – which was expressed on standard forms commonly used in the industry. The court seemed to be of the view that had there been an acceleration clause, the problem could have been resolved differently and with better clarity. Indeed, there was an acceleration clause in the bunker supply contract

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<sup>17</sup> See judgment by the court at first instance [2014] SGHC 122 at <http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/15624-the-ldquo-stx-mumbai-rdquo-2014-sghc-122> (Ang J); repeated by the Court of Appeal without comment; and see too Rajah & Tann, Client Update (Sep 2015) accessible at [https://eoasis.rajahtann.com/eOASIS/lu/pdf/2015-09-CA-Anticipatory-Insolvency\(1\).pdf](https://eoasis.rajahtann.com/eOASIS/lu/pdf/2015-09-CA-Anticipatory-Insolvency(1).pdf) (Rajah & Tann were the firm representing the bunker suppliers).

<sup>18</sup> As in *The STX Mumbai*.

<sup>19</sup> See the Australian Commonwealth, Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75*, (Mr Peter Harris AO, Chairperson) Canberra, 30 September 2015, at 25

involving another of STX Pan Ocean's ships, The New Ambition which was lawfully arrested in Seattle, USA on the basis of the same news story about STX Pan Ocean's financial difficulties. The arrest was not challenged because the acceleration clause was quite clear. The clause there stipulated that all invoices become immediately payable in the event of "a change in the financial circumstances of the buyer that might reasonably jeopardise their ability to pay."<sup>20</sup>

We have also seen ipso facto clauses in maritime trade contracts such as the GAFTA forms. The GAFTA CIF form clause 26 is one such stipulation. Labelled "Insolvency clauses" it provides that the contract of sale will be closed out following an "insolvency event". This raises the time honoured problem of how the carriage terms are to be linked or not as the case may be to the sale contract.

The picture is not consistent as to whether ipso facto clauses are becoming more or less commonplace. Lawyers, it appears to this author, are not always convinced about their usefulness. It should not be ignored that the presence of an ipso facto clause can be a double edged sword – whilst it could provide for certainty of outcome following an insolvency, it could also bind the hands of liquidators attempting to find value in the failed company's existing contracts.

As far as the law is concerned, generally, under English law ipso facto clauses are valid but not so under US law. That said, they must not breach the anti-deprivation principle (*Belmont Park Investments*<sup>21</sup>). According to Mellish LJ in *Re Jeavons, ex parte Mackay*<sup>22</sup> "a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws." Similarly, Wood VC had earlier asserted: "the law is too clearly settled to admit of a shadow of doubt that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors."<sup>23</sup> Excepting the proviso, English law has hitherto been generally relaxed about ipso facto clauses.

However, research has shown that ipso facto clauses could very well frustrate attempts to restructure a distressed company, and often they do. Current proposed reforms in corporate insolvency law in the UK have thus considered the banning of

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<sup>20</sup> See para 9 of the STX Mumbai High Court judgment [2014] SGHC 122

<sup>21</sup> [2011] UKSC 38

<sup>22</sup> (1873) LR 8 Ch App 643

<sup>23</sup> *Whitmore v Mason* (1861) 2 J&H 204

ipso facto clauses to enable the company's contracts to survive the insolvency event<sup>24</sup>.

A 2013 UK survey found that in 41% of cases key trade suppliers withdrew their supply during formal insolvency and 49% of key trade suppliers demanded "ransom payments" or attempted to renegotiate contract terms as a condition of continuing supply in trading insolvencies<sup>25</sup>. Hence, the proposal that businesses should be allowed to indicate that certain goods/services are essential and could not therefore be terminated on the basis of insolvency<sup>26</sup>. The trustee should consider whether:

- the continued provision of a supply will be essential to the successful rescue of the business and its ongoing viability;
- an alternative supply can be found within a reasonable time frame at a reasonable cost;
- the business will still be able to meet its payments as they fall due; and
- the supplier can objectively justify the refusal to supply.

Also, the reform has proposed a moratorium of up to three months, whereby creditors are not allowed to take any action against the company. Despite much consultation, the general industry response remained lukewarm but not negative. Be that as it may, the matter has probably slipped off the government's agenda given the imbroglio that is Brexit.

Jurisdictions like Australia have already restricted the use of ipso facto clauses which until recently were enforceable as regards executory contracts<sup>27</sup>. In 2017 legislation was introduced to provide, inter alia, for:

- Company directors given a safe harbour from civil liability for insolvent trading when they are attempting to restructure the company.

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<sup>24</sup> Policy Unit, The UK Insolvency Service "A Review of the Corporate Insolvency Framework" (May 2016) at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/525523/A\\_Review\\_of\\_the\\_Corporate\\_Insolvency\\_Framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf)

<sup>25</sup> R3 and ComRes: Association of Business Recovery Professionals Membership Survey, August 2013, *Termination Clauses* at [https://www.r3.org.uk/media/documents/policy/research\\_reports/R3\\_Membership\\_Survey\\_Termination\\_Clauses\\_09\\_August\\_2013.pdf](https://www.r3.org.uk/media/documents/policy/research_reports/R3_Membership_Survey_Termination_Clauses_09_August_2013.pdf)

<sup>26</sup> Policy Unit, The UK Insolvency Service "A Review of the Corporate Insolvency Framework" (May 2016) at paras 8.7-8.9 at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/525523/A\\_Review\\_of\\_the\\_Corporate\\_Insolvency\\_Framework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf)

<sup>27</sup> It may be suggested that they could equally apply to executed contracts with one party yet to perform their part of the bargain such as the STX Mumbai. The question is one of construction - if the clause is drafted with sufficient clarity, the fact that there is optimal freedom of contract as regards such clauses means that they could apply to any executory obligations in an executed contract.

- Provided that the course of action taken is reasonably likely to lead to a better outcome (than administration, liquidation, a scheme or receivership) for the company and its creditors.
- A new restriction on the ability to enforce ipso facto clauses where a scheme is being proposed to avoid winding up or an administrator is appointed. The restriction does not apply to certain excluded contracts. Aircraft leases are excluded but interestingly not charterparties; also no distinction is made between the different types of charterparties. That may be relevant in that some (such as voyage charters) are more of a one off type supply contract, whilst others are more enduring such as time charters. That means ipso facto clauses in charterparties cannot be invoked when a company goes into receivership or administration. It should additionally be observed that the restriction on ipso facto clauses would not apply to liquidation. In the case of liquidation, ipso facto clauses continue to be enforceable as long as the terms are clear.

The restriction placed on the enforceability of ipso facto clauses is to ensure that the contracts do not end simply because of an insolvency event – that would enable the company to continue to trade if needed. It could also encourage renegotiations by keeping the agreement alive for the time being and the knowledge that the company is in a state of insolvency could then promote collaboration and cooperation to prevent or reduce economic waste<sup>28</sup>. More generally, the operation of ipso facto clauses has attracted criticism for reducing the scope for a successful restructure, preventing the sale of businesses as a going concern and reducing or eliminating returns in liquidation due to the destruction of value held in the company's contractual arrangements.<sup>29</sup>

A possible criticism of the reform is that the new system will entail greater and lengthier court involvement leading to more uncertainty. The STX Mumbai case is a good example – the absence of an ipso facto (or acceleration) clause meant that the arrest could be challenged, unlike *The New Ambition*, another of STX Pan Ocean's ships, whose arrest in Seattle was facilitated by the acceleration clause in the bunker supply contract in question there.

In the US, s 541(c) of the Bankruptcy Code provides that an interest of the debtor (the bankrupt company or person) in property becomes "property of the estate," meaning

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<sup>28</sup> Economic waste is likely to follow with the automatic termination of the contract in the event of insolvency.

<sup>29</sup> Renfrey & Carter, *Insolvency law reform – stay on enforcement of ipso facto clauses*

(Sep 2017) at <https://www.jws.com.au/en/acumen/item/1005-insolvency-law-reform-stay-on-enforcement-of-ipso-facto-clauses> See also Australian Commonwealth, Productivity Commission 2015, *Business Set-up, Transfer and Closure, Final Report 75*, (Mr Peter Harris AO, Chairperson) Canberra, 30 September 2015



that the debtor does not lose the property or contract right, despite a provision in an agreement:

“that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor’s interest in property.”

That means a clause that terminates a contract because of the "insolvency" or "financial condition" of the debtor, or due to the filing of a bankruptcy case, will be unenforceable once a bankruptcy case has been filed.

A second Bankruptcy Code provision, s 365(e)(1), governs ipso facto clauses in executory contracts:

“Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under this title; or (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.”

It seems to follow strictly thus that ipso facto clauses in executory contracts are not enforceable, unlike under English or Australian law. In the US, it is inadvisable to rely on ipso facto clauses to protect one’s commercial interest. Instead, the supplier may wish to adopt a provision which makes non-payment (and define what is meant by non-payment as we see in the *New Ambition* case<sup>30</sup>) a basis for default and sets a very short cure period and prescribes specifically for termination as a remedy for the default. It would also enable the contract to be terminated therefore before any bankruptcy filing. Such a clause should be valid because it avoids the provision for automatic termination. We clearly see such a provision in the *New Ambition*.

The subject of ipso facto clauses and their legal treatment across the globe is haphazard showing how problematic it is for the shipping world to adopt ipso facto

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<sup>30</sup> See above at p.

type clauses, given the truly international nature of shipping. A quick survey<sup>31</sup> of the different countries with a known shipping industry is as follows:

Greek law – ipso facto clauses were permitted until 2015 but now prohibited, subject to exceptions made for personal services contracts, financial contracts, employment contracts and interestingly, contracts for the sale of goods whereby the seller retains ownership in the goods through a retention of title clause or other devices<sup>32</sup>.

UAE –The position on ipso facto clauses is silent under the Dubai International Financial Centre (DIFC) Insolvency Law<sup>33</sup> and Insolvency Regulation<sup>34</sup>, and under the Insolvency Regulations of the Abu Dhabi Global Market (ABGM), another international financial centre in the UAE. The rest of the UAE is governed by a new insolvency law<sup>35</sup> under which ipso facto clauses are prohibited. That is to be expected since the new law was very much shaped after Chapter 11 of the US Bankruptcy Code. The new law states that *ipso facto* clauses are void upon the commencement of restructuring procedures and, under certain circumstances, also void upon the commencement of liquidation. However this lack of consistency means that businesses that prefer a creditor-friendly regime can establish in the DIFC or the ADGM, whereas the businesses that prefer a debtor-friendly regime can establish anywhere else in the UAE.<sup>36</sup>

The Peoples Republic of China (PRC) – the usefulness of ipso facto clauses to executory contracts is limited given the limited jurisprudence on the subject.<sup>37</sup> On the one hand, art 93 of the PRC Contract Law stipulates that “[t]he parties may agree upon conditions under which either party may terminate the contract. Upon satisfaction of the conditions, the party who has the right to terminate may terminate the contract”, making it thus in theory possible for the incorporation of an ipso facto clause. However, art 96 requires notice of termination based on that condition to be given and the other party may resist by instituting arbitration or judicial proceedings. It is thus arguable that automatic termination in the strict sense of the term is not possible.

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<sup>31</sup> For a detailed analysis of how ipso facto clauses are provided for in a cross country context, see J. Chuah & E. Vaccari, *Treatment of Executory Contracts in Insolvency Law: A Comparative Study* (Edward Elgar, 2019)

<sup>32</sup> Arts 31 and 34, Greek Bankruptcy Code (Law 3588/2007)

<sup>33</sup> Insolvency Law, DIFC Law No. 3 of 2009

<sup>34</sup> DIFC Insolvency Regulation (1 Oct, 2008)

<sup>35</sup> Federal Decree Law No. 9 of 2016 on Bankruptcy which came into effect on 29 December 2016.

<sup>36</sup> C Chamorro-Courtland, “Treatment of Executory Contracts in Insolvency Law: the United Arab Emirates” in J. Chuah and E. Vaccari (supra n. )

<sup>37</sup> Y Long & R Parry, “Treatment of Executory Contracts in Insolvency Law: the People’s Republic of China” in J. Chuah and E. Vaccari (supra n. )

Japan – legislation silent on executory contracts and ipso facto clauses but such clauses not permitted in a number of judicial cases.<sup>38</sup>

France – depends on terms of the clause; banned if the trigger is the commencement of insolvency proceedings though.<sup>39</sup>

The Netherlands – ipso facto clauses are permitted generally as contractual freedom is recognised as a corner stone in insolvency proceedings<sup>40</sup> but such clauses might run foul of general principles in Dutch law on abuse of right<sup>41</sup> and, good faith and fair dealing<sup>42</sup>. It has thus been suggested that the counterparty cannot invoke a termination clause if the contract is essential for the business as a going concern.<sup>43</sup>

Singapore – the position at present is similar to that in English law; a review of the insolvency and rescue legislation in 2013<sup>44</sup> concluded that it was probably imprudent to follow the US in banning ipso facto clauses preferring a market led approach. The dilemma for the Singapore government was that on the one hand, it was keen to promote the country as an international centre for restructuring (and thereby would be minded to prohibit the use of ipso facto clauses)<sup>45</sup>, as a small country it also did not wish to be an outlier in the common law world.

Denmark – an important maritime jurisdiction in Europe is Denmark; there ipso facto clauses are in theory not unlawful but unenforceable because they effectively cut down the discretionary powers of the administrators. Consequently, an administrator is fully entitled to assume a pre-existing contract despite the presence of an ipso facto clause.<sup>46</sup> Reforms introduced in 2011 emphasise the need to facilitate restructuring and renegotiation of contracts<sup>47</sup>.

Brazil – an emerging maritime country; interestingly many contracts in Brazil will contain an ipso facto clause<sup>48</sup>; like many countries, the application of such clauses depends on general principles of law and contractual interpretation of the terms.

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<sup>38</sup> C Jin & S Steele, "Treatment of Executory Contracts in Insolvency Law: Japan" in J. Chuah and E. Vaccari (supra n. )

<sup>39</sup> E Ghio, "Treatment of Executory Contracts in Insolvency Law: France" in J. Chuah and E. Vaccari (supra n. )

<sup>40</sup> See the BabyXL case reported at HR 13 May 2005, *NJ* 2005, 406; *JOR* 2005/222; AA 2005, 938

<sup>41</sup> Art 3:13, Dutch Civil Code

<sup>42</sup> Art 6:248 (2) Dutch Civil Code; see too Van der Hel q.q./Edon case reported in HR 16 October 1998, and the Megapool case reported in *LJN* ZC2741, *NJ* 1998, 896 (*Van der Hel q.q./Edon*); HR 12 April 2013, *NJ* 2013/224; *JOR* 2013/193

<sup>43</sup> M.P. Verdonk and R.J. de Weijts, "Treatment of Executory Contracts in Insolvency Law: The Netherlands" in J. Chuah and E. Vaccari (supra n. )

<sup>44</sup> Report of the Insolvency Law Review Committee (Singapore 2013)

<sup>45</sup> B Wang, "Treatment of Executory Contracts in Insolvency Law: Japan" in J. Chuah and E. Vaccari (supra n. )

<sup>46</sup> Report from *Konkursrådet* (Betænkning nr. 606/1971 om konkurs og tvangsakkord) p. 121

<sup>47</sup> L *Langkjaer* "Treatment of Executory Contracts in Insolvency Law: Denmark" in J. Chuah and E. Vaccari (supra n. )

<sup>48</sup> F Satiro, "Treatment of Executory Contracts in Insolvency Law: Denmark" in J. Chuah and E. Vaccari (supra n. )

Also, like a good number of jurisdictions, the government is considering further reform to the law including a proposal to prohibit ipso facto clauses.

### *Shipping contracts and ipso facto clauses*

As regards charterparties and other large scale contracts, ipso facto clauses are not common and their usefulness has not been examined in academic literature. It is outside the scope of this paper to explore fully those reasons but it might be hypothesised that immediate termination is not preferred because it limits the parties' liberty to renegotiate rates and other conditions. Market conditions may be such that an automatic termination may not be in the interest of the party who is not insolvent. Moreover, given the transnational nature of charterparties and other shipping contracts, it would not be prudent to insert a clause which may not be recognised by some of the more important shipping jurisdictions.

In a rare shipping case concerning an ipso facto clause, *Fibria Celulose S/A v Pan Ocean Co. Ltd*<sup>49</sup> it is clear that the matter of foreign law is indeed a very challenging one. In that case, Pan Ocean, a Korean shipping company, and Fibria, a Brazilian producer of wood pulp, had entered into a long-term contract of affreightment governed by English law. That contract contained a clause which gave Fibria the right to terminate in various circumstances, including upon the occurrence of an insolvency event (the "Termination Clause"). By June 2013, Pan Ocean had become cash-flow insolvent, and presented a petition to the Korean courts to begin a process, broadly equivalent to administration, known as rehabilitation.

Fibria promptly sought to exercise their right under the termination clause. Pan Ocean contended that the [ipso facto] clause was unlawful under Korean law which provides that the administrator of a distressed company has the right to elect whether to continue or cancel certain types of contract. Clearly if enforced the clause would interfere with the exercise of that right.

Pan Ocean's administrator sought, and was granted, an Order from the English Courts recognising the rehabilitation proceedings as foreign main proceedings under the UK's Cross Border Insolvency Regulation 2006 ("CBIR")<sup>50</sup>. Article 21(1)(g) of

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<sup>49</sup> [2014] EWHC 2124 (Ch)

<sup>50</sup> The Cross Border Insolvency Regulations 2006 (implementing the Model Law adopted by the United Nations Commission on International Trade Law) (the "CBIR"). There is no need for reciprocity (which means, for example, that the UK will recognise qualifying insolvency proceedings in Mongolia, say, even if Mongolia has not itself adopted the Model Law). That said, the EU Recast Regulation on Insolvency Proceedings (2015/848) will apply if the other country in question is an EU Member State. Like the EU Regulation, the CBIR do not apply to certain types of entities including credit institutions, insurance companies etc. The Model Law has, to date, been adopted in well over 40 states including the following maritime jurisdictions – Australia, the USA, the UK, Greece, Japan, Republic of Korea, Singapore and South Africa. For a full list of the signatory states, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)

Schedule 1 to the CBIR provides that where a court recognises foreign insolvency proceedings (for e.g. the Korean rehabilitation process), it may grant “any appropriate relief”<sup>51</sup>. The English court held that while the words “any appropriate relief” were very expansive, they should not be construed literally, and could not be interpreted to mean that the Court had the power to apply the law of a foreign country. Moreover, the contract was governed by English law and subject to English jurisdiction. As such the court held that it will not stop a party from exercising its rights under an English law contract where foreign insolvency proceedings have been commenced, notwithstanding that those insolvency proceedings are recognised under the Cross-Border Insolvency Regulations (“CBIR”). It is worth noting that Morgan J held (in relation to a claim relief under sub paragraph 1(g) “additional relief” to restrain a counterparty from terminating a contract relying on an “ipso facto” clause) that effectively the court could do so only if this was a type of relief available under UK domestic insolvency law, thereby taking a “modified universalism” approach to Article 21<sup>52</sup>.

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<sup>51</sup> Article 21 provides: 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—

(a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;

(b) staying execution against the debtor’s assets to the extent it has not been stayed under paragraph 1(b) of article 20;

(c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;

(e) entrusting the administration or realisation of all or part of the debtor’s assets located in Great Britain to the foreign representative or another person designated by the court;

(f) extending relief granted under paragraph 1 of article 19; and

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor’s assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

<sup>52</sup> Then principle of modified universalism is generally assumed to have its genesis in a common law case, *In Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. In that case, Lord Hoffmann stated, at para 30, “The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution.” And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 16 His Lordship said, speaking for the Privy Council : “The English common law has traditionally taken

Another potential problem for those officers of the company seeking to renegotiate the charterparty is whether they might run foul of the law on wrongful trading whilst insolvent (s 214 IA 1986). Current reforms in Australia for example are seeking to create a safe harbour for directors trying to reorganise their company's trading relationships.<sup>53</sup>

#### *Shipping and "no oral modification" clauses*

An common occurrence in service contracts, including those for the provision of shipping services, shipbuilding and port services, is the incorporation of a "no oral modification" (NOM) clause. Such clauses provide, in general, that any modification of the pre-existing contract must be in writing and/or satisfy various formalities. Most countries recognise these stipulations as being commercially sensible and would enforce them<sup>54</sup>. Indeed, art 2.1.18 UNIDROIT Principles of International Commercial Contracts, 4th ed (2016) provides that

"A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct."

The English cases on the matter are less clear. In *United Bank Ltd v Masood Asif*<sup>55</sup>, the Court of Appeal held that any oral variation of the terms would not have legal effect, where there is a NOM clause present. The Court of Appeal considered the point again in *World Online Telecom Ltd v I-Way*<sup>56</sup>, and this time it recognised that the law is not settled<sup>57</sup>, and held that the parties should be allowed to unmake or remake the private deal that they have entered into. An oral variation of the original agreement was thus acceptable and consistent with the principle of party autonomy.

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the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated." It is important thus to be remembered that it is a principle of cooperation. It does not advocate interference with local laws which would fly in the face of the principle of territorial sovereignty.

<sup>53</sup> *Supra* n.

<sup>54</sup> Part 2 of the United States Uniform Commercial Code introduced a general requirement of writing for contracts of sale above a specified value, coupled with a conditional provision giving effect to No Oral Modification clauses: see sections 2-201, 2-209. In Australia, see *Liebe v Molloy* (1906) 4 CLR 347 (High Court); *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439, 447 et seq; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1. In Canada, see *Shelanu Inc v Print Three Franchising Corp*n (2003) 226 DLR (4th) 577, para 54 per Weiler JA, citing *Colautti Construction Ltd v City of Ottawa* (1984) 9 DLR (4th) 265 (CA) per Cory JA.

<sup>55</sup> [2000] EWCA Civ 465

<sup>56</sup> [2002] EWCA Civ 413

<sup>57</sup> Per Sedley LJ at para 12

In *Globe Motors Inc v TRW Lucas Variety Electric Steering Limited*<sup>58</sup>, the Court of Appeal noted in obiter that such a clause did not prevent the contract from being varied by the conduct of the parties. The matter recently came before the UK Supreme Court, *Rock Advertising Limited v MWB Business Exchange Centres Limited*<sup>59</sup>. It held, disagreeing with some of the Court of Appeal's decisions above, that a NOM clause should be enforced and an oral variation of the terms would not be acceptable. The proposition is subject to the English principle of promissory estoppel – namely that if one party had acted in reliance on the oral variation to their detriment, then the other party would be estopped from denying the effect of the variation. In *Rock Advertising*, the facts did not give rise to an estoppel.

Juxtaposing the emerging law to the current discussion on contractual clauses limiting the effect of renegotiation, it has to be said that the English court is consistent with enforcing written agreements as they are expressed. In both *ipso facto* clauses and NOM clauses, the court is prepared to give them their face value effect. In the case of NOM clauses, following *Rock Advertising*, any variation must be made in writing. That of course does not mean that renegotiations are prevented; simply that the renegotiation must conform to the agreed form.<sup>60</sup>

The question in all of this is whether there is an inconsistency between this principle and the widely accepted principle that the contract (variation), in English law, can be made without adherence to any particular form. The same is true of many other jurisdictions; art 1.2 of the UNIDROIT Principles of International Commercial Contracts for instance provides that “nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form”.

From a renegotiation standpoint, although at times of serious financial hardship when time is critical and urgent, if there is a NOM clause in the contract, it is vital that the parties observe the sanctity of the clause and should not presume that such a clause could simply be remade or unmade orally.

### Part 3

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<sup>58</sup> [2016] EWCA Civ 396; see too *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm), where Gloster LJ said: “I incline to the view that there can be an oral variation in such circumstances, notwithstanding a clause requiring written modifications, where the evidence on the balance of probabilities establishes such variation was indeed concluded.” (at para 273).

<sup>59</sup> [2018] UKSC 24

<sup>60</sup> Lord Briggs in his separate judgment (but concurring with the majority) held that a NOM clause could be varied orally if express reference was made to it in the oral agreement. The majority was more blunt in holding that the NOM could not be varied orally at all.

The insolvency and pre-insolvency scenarios show how renegotiations might well be short of being voluntary. However, the law on economic duress is difficult to assert in large commercial cases. It is useful to remind ourselves the fundamentals - *Pao On v Lau Yiu Long*<sup>61</sup> requires that:

- economic pressure which amounts to compulsion of will
- the threat must be illegitimate but need not be an unlawful threat
- causation must be shown.

This chapter does not seek to explore the full remit of the law on economic duress generally but posits it in the context of renegotiating shipping contracts in the face of insolvency. Crucially, there is a challenge in principle – on the one hand, insolvency policy is changing to encourage parties to maintain value in contracts through renegotiations but it is entirely foreseeable that the renegotiations would be impacted on by the law on economic duress given the commercial exigencies. This chapter argues that the law on economic duress in a such renegotiation context is not sufficiently certain to provide a strong and stable basis for renegotiations. Fears of the law on economic duress to wreck the renegotiated deal are palpable and could deter the parties for successful renegotiations.

Returning thus to the general principles of law, we begin with an assessment of the meaning of illegitimate pressure. In a commercial shipping context, the *Cenk Kaptanoglu*<sup>62</sup> is useful reference point. In that case, P had chartered a vessel to T and in breach of that contract, chartered the same ship to D. P assured T that they will pay compensation and help them find another ship. T had relied on those assurances. At the last minute, P found a ship for T but negotiated down the discount (from USD8 to USD2 pmt). If T did not agree, they would have no ship to satisfy their sale contract. The judge found that there was illegitimate pressure – the owners had manoeuvred the charterers into the position they were in, following the breach, in order to drive a hard bargain. The charterers had no realistic practical alternative but to submit to the pressure and they did protest at the time. As a matter of principle at least, that duress can still exist even if the threat involved is one of lawful action, provided always that the pressure exerted is illegitimate in itself. The question is not whether conduct is lawful as such, but whether it is morally or socially acceptable. Common law judges sometimes appear to be willing to act as “the arbiters of social evaluation”<sup>63</sup>. The court took the view that as the initial repudiation was unlawful, that had tainted all of the owners’ subsequent actions.

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<sup>61</sup> [1979] UKPC 17

<sup>62</sup> *Progress Bulk Carriers Limited v Tube City IMS LLC (The “Cenk Kaptanoglu”)* [2012] EWHC 273 (Comm)

<sup>63</sup> *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714.



This exposure to “social evaluation” is difficult to square in highly commercial cases – the open ended nature of the expression of principle makes its application to real life factual situations starkly unclear<sup>64</sup>.

The urgency of the economic situation is not always pivotal. A case in point is the *Svitzer v Z Energy*<sup>65</sup>, a summary judgment case from New Zealand. The *Rena* ran aground in the Bay of Plenty, NZ. Could not be refloated if her cargo of 1,700 tonnes of heavy fuel oil and 200 tonnes of marine diesel oil is not discharged.

*Svitzer* (the salvors) sought the urgent hire of a bunker tanker onto which to pump that fuel. The *MV Awanuia* was the only suitable vessel in NZ. Seafuels (owners) and Z had entered into a long term charter. Z agreed to the release.

- The ensuing charterparty stated:
  - Fuel taken off the *Rena* to become the property of Z
  - Salvors to compensate Z for NZD150,000 a week plus direct costs
  - The charter rate was between NZD187,000 and NZD200,00, plus tax per diem
  - S agreed under protest

The charter lasted 43 days and the invoice was NZ\$8.8 million plus NZ\$60,000 in costs; part payment was made with NZ\$2.9 million remained outstanding. S argued that the charterparty was unenforceable because

- The oil ownership clause is illegal since S did not own the fuel oil carried by the *Rena*
- The contract was inequitable – the rates were excessive

S also argued that the terms of the charterparty should be annulled or modified under Article 7 of the International Convention on Salvage on the basis that it was entered into under influence of danger and that its terms were inequitable.

Arguments were rejected by the New Zealand High Court:

- No duress because the owners did not cause the duress; the fact that the sea and weather conditions caused the salvors to panic was irrelevant

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<sup>64</sup> See also A Phang, *Whither Economic Duress? Reflections on Two Recent Cases* [1990] MLR 107

<sup>65</sup> [2014] Lloyd's Rep. Plus 19

- The charterparty in this context was not a salvage contract and the admiralty court's jurisdiction to consider manifest disadvantage and unconscionability was not applicable
- Whether the Convention applied, that was a question of law which is unsettled and must therefore proceed to trial. Summary judgment was not appropriate.
- Z Energy should not be made a party to the litigation.

This might be contrasted against *The Atlantic Baron*<sup>66</sup> where the shipyard had insisted on an uplift of 10% on the purchase price because of currency fluctuations. The agreement by the buyer to pay was held to have been procured through unlawful economic duress but *the right to set aside was lost through delay and affirmation*. Must the economic duress be the overwhelming or predominant cause of the relevant conduct by the victim or is it sufficient that but for the economic duress the relevant conduct would not have occurred? The latter test is clearly a lower hurdle and that is the approach adopted by the Courts but in commercial transactions, the threshold for finding operative duress is nevertheless very high.

A situation of duress could also arise when a related third party is in financial hardship or has become insolvent. In *The Alev*<sup>67</sup>, The claimant shipowners had time chartered their vessel to third parties who declared themselves bankrupt. Only part of the hire had been paid. The claimants then attempted to minimise their losses by renegotiating with the various bill of lading holders. The claimants did so despite being legally obliged to carry the cargo as freight had already been prepaid. The defendant, a holder of a bill of lading, agreed, under protest, to pay port expenses and discharge costs, waive any claims against the claimants and undertake not to arrest or detain the vessel. The issue was whether that agreement was enforceable. The court held in favour of the defendant finding there to be the presence of economic duress. The judge, Hobhouse J, found that the defendant had no choice but to agree to those harsh terms. However, equally important is whether a remedy might be had – in that case, the defendant had arrested the ship in Muscat and the question was whether the claimant should be given an injunction from proceeding in England to try and stop the defendant. It is especially noteworthy that duress should not simply be seen as a matter of principle but a prudent court would also consider properly what practical remedies or solutions might be available in the light of the duress induced renegotiated deal.

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<sup>66</sup> *North Ocean Shipping v Hyundai Construction (The Atlantic Baron)* [1979] QB 705

<sup>67</sup> *Vantage Navigation Corporation v Suhail and Sad Bahwan Building Materials LLC (The Alev)* [1989] 1 Lloyd's Rep. 138

Another important aspect of the common law approach is that legal counsels usually also tend to raise not only the defence of economic duress to defeat a renegotiated deal but also the defence of lack of good consideration. In *The Atlas Express*<sup>68</sup>, a case concerning a carriage contract, the carrier had made an error in estimating the cost of carrying the goods. The customer refused to pay the higher rate proposed by the carrier. The carrier threatened not to carry the goods at all. The customer would suffer huge financial loss if the goods were not delivered. They agreed to the renegotiated agreement but subsequently refused to pay, alleging duress and the lack of sufficient consideration. They argued that as the carrier was already contractually bound to deliver the goods (since a unilateral mistake as to the actual cost was irrelevant), there was no consideration provided to merit the promise (from the customer) to pay more. That argument, as most common law lawyers would know, is based on an old case, *Stilk v Myrick*.<sup>69</sup> Although the law has gradually evolved to provide for various exceptions to the rule especially in a commercial context<sup>70</sup>, the principle remains valid. In *The Atlas Express*, Tucker J held that the renegotiated price could be set aside on the basis of lack of sufficient consideration.

As far as English case law is concerned, both planks of principle – economic duress and lack of consideration – usually go together<sup>71</sup>. The combined effect may seriously undermine the success of renegotiations. Expressions of both principles have loose ends and blurred edges, and rely largely on the judicial conservatism of the English courts to provide stability to renegotiated agreements on commercial terms. It is argued thus that for the emerging insolvency reform to work in the case of commercial contracts, such as charterparties and other shipping contracts, it is not entirely secure to rely on judicial conservatism in the light of the fact that judges also need to act as “arbiter of social evaluation”.

*Be that as it may*, although in general contract law as discussed above, the courts have made it clear that a threat to break a contract is likely to be a vital factor of consideration (*Kolmar Group AG v Traxpo Enterprises*<sup>72</sup>) but in the case of impending insolvency, where the liquidators have the statutory right to disclaim an

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<sup>68</sup> *Atlas Express Ltd v Kafco* [1989] 1 All ER 138

<sup>69</sup> [1809] EWHC KB J58, 170 ER 1168.

<sup>70</sup> See *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 which decided that where the new promise actually produces “practical benefits” to the other party, then there would be good consideration. See too the more controversial case of *MWB v Rock Advertising* [2016] EWCA Civ 553 where the promise to pay a lesser sum than agreed was held to be good consideration.

<sup>71</sup> Other than *The Atlas Express* (supra n.) where consideration was judicially examined in the light of the claim of economic duress, we also see similar deliberations in *Vantage Navigation Corporation v Suhail and Sad Bahwan Building Materials LLC (The Alev)* [1989] 1 Lloyd’s Rep. 138 and *The Atlantic Baron* (supra n.). In *The Alev*, for example, Hobhouse J found that consideration was only “technically” present, whilst in *The Atlantic Baron*, Mocatta J held that there was consideration furnished despite the fact that he arrived at this conclusion “not without some doubt”.

<sup>72</sup> [2010] EWHC (Comm) 113

onerous contract or where there is an ipso facto clause which might be invoked by either party as stipulated, any cancellation rights are properly provided for and thus cannot be challenged as an unlawful threat. However, those acceleration provisions do not offer much support for renegotiations. Indeed, they provide for the accelerated termination of the contract. The problematic issue is whether if the renegotiation exercise proceeds (assuming that no cancellation rights, statutory or contractual, are being exercised), the question of duress has dissipated. Can it be argued that there is no more threat of breaking a contract because the contract could be disclaimed under s 178(3) IA 1986 or terminated under an ipso facto clause.

Taking first the matter of s 178(3) IA, it should not be forgotten that the liquidators must exercise their powers in good faith and sound business sense. Where these are not present, the pressure which is being exerted on the other party could nevertheless be construed as economic duress. It is relevant whether the claimant had a “real choice” or “realistic alternative” and could, if it had wished, equally well have resisted the pressure and, for example, pursued practical and effective legal redress.<sup>73</sup>

As to the exercise of an ipso facto clause, here it is first important to interpret the ipso facto provision properly – not all ipso facto clauses are created equal. Some will allow the supplier to cancel, others the customer and yet others, an automatic termination. The former two classes of ipso facto clauses will nevertheless permit the interaction with the law on economic duress and possibly, the law on sufficiency of consideration. The automatic termination clause would of course bring the contract to an end as soon as an insolvency event occurs.

Outside the scope of English law, other legal systems may be more accommodating as to what constitutes “economic duress” – further exposing the prospect of renegotiations to risk of failure. Note for example the PRC Contract Law. The PRC is a useful reference point not only because it has the third largest fleet by deadweight tonnage and the highest number of vessels<sup>74</sup> but, more crucially, its fleet is also carrying goods produced in the PRC for the rest of the world and raw commodities produced elsewhere to the PRC. Article 54 of the PRC Contract Law provides that:

“Either party has the right to request a people's court or an arbitration institution to alter or rescind any of the following contracts:

(1) any contract which is made under substantial misunderstanding; or

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<sup>73</sup> Kolmar Group AG v Traxpo Enterprises (ibid )

<sup>74</sup> With 5 206 vessels and 165 429 859 in deadweight tonnage. (Source: UNCTAD Report 2017 at [unctad.org/en/PublicationChapters/rmt2017ch2\\_en.pdf](http://unctad.org/en/PublicationChapters/rmt2017ch2_en.pdf) )

(2) any contract the making of which lacks fairness.

Where a party makes the other party enter into a contract against its true will by means of deceit, coercion or taking advantage of its difficulties, the injured party has the right to request a people's court or an arbitration institution to alter or rescind the contract.” (emphasis added).

Although jurisprudence is somewhat limited, it seems entirely open that “taking advantage of its difficulties” could be given a loose meaning despite increasing efforts from the PRC maritime judiciary to take cognisance of commercial realities largely because of the pervasiveness of the nebulous principle of good faith in PRC jurisprudence<sup>75</sup>.

Similarly, article 4.108 Principles of European Contract Law (PECL) cites this example of threats – “C has agreed to build a ship for D at a fixed price. Because of currency fluctuations, which affect various subcontracts, C will lose a great deal if the contract price is not changed and it threatens not to deliver unless D agrees to pay 10% extra. D will suffer serious harm if the contract is not performed. D pays the extra sum demanded by C. D may recover the extra sum paid.”

The success of renegotiations depends on how the law on duress is constructed and applied in other jurisdictions – even if the varied contract is subject to English law, given the cross border nature of shipping contracts, performance or the manner of performance of the renegotiated contract might be challenged as being contrary to the public policy of the place of performance or the place where legal proceedings are taken (lex fori) to scupper the contract.

#### Part 4

It has already been alluded above that there are significant challenges where foreign law or jurisdiction is engaged. A contract renegotiated prior to insolvency but under difficult economic times, may come into spotlight when the company is actually made insolvent in a foreign jurisdiction. This Part addresses the cross border insolvency dimension – judicial support for foreign reorganization or restructuring plans and its impact on the parties’ renegotiations.

A useful case study is the recent case of *Re OGX Petróleo e Gás SA Nordic Trustee A.S.A. v Ogx Petroleo E Gas S.A.*<sup>76</sup> This was one of those few reported cases in

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<sup>75</sup> See Leonhard, C. (2009). A Legal Chameleon: An Examination of the Doctrine of Good Faith in Chinese and American Contract Law. *Conn. J. Int'l L.*, 25, 305

<sup>76</sup> [2016] EWHC 25 (Ch)

England and elsewhere where a charterparty had been renegotiated because of economic hardship. Charter rate was renegotiated between O and N following O's judicial reorganisation by the Brazilian court. Under art 49, Brazilian bankruptcy law, "all claims existing on the date of the petition are subject to the judicial reorganisation, even if not yet due". The renegotiated agreement provided that N is not to be treated as "plan creditors" and included a London arbitration clause.

O continue to have financial difficulties – they struggled to make payment under the second charter. They applied successfully to the Brazilian court to reduce the hire rate – this is a power that the Brazilian court has as a result of the judicial reorganisation. However, on appeal the owners succeeded in arguing that the renegotiated agreement meant that they were not to be treated as plan creditors and the court had no jurisdiction over their agreement. In the meantime, the owners brought an arbitration claim against O but O applied to the English High Court for an order recognising the Brazilian Plan as a foreign main proceeding so as to take advantage of the automatic stay of proceedings (under the UK Cross-Border Insolvency Regulations 2006 (which adopts the UNCITRAL Model Law on Cross-Border Insolvency)). The application succeeded before Mann J but it was subsequently rejected by Snowden J because O had failed to disclose the fact that under Brazilian law (art 49 of the Bankruptcy Law) N was not to be treated as plan creditors and the judicial reorganisation plan had no effect on them. That failure to make full and frank disclosure was an abuse of process.

By article 20(6) of the Model Law, it is possible for a court to modify, extend or terminate any stay which would come into force on recognition. Snowden J appeared to have concluded that that power was available not just on an application made after recognition of a foreign proceeding, but was also in play at the hearing of a recognition application. On that basis, the judge ruled that when applying for recognition of foreign main proceedings it is important to address not merely the criteria for recognition, but also any relevant matters in relation to the automatic stay which would follow upon recognition. Any such matters going to the court's discretion to vary the stay ought to be drawn to the court's attention on a without notice application for recognition.

The court was also particularly concerned that the primary purpose in seeking recognition under the Model Law was to obtain a stay of the arbitration. However, N was not a plan creditor, and so therefore did not fall to be considered *pari passu* with O's other creditors. In those circumstances, the application for recognition was abusive. It had nothing to do with protecting the *pari passu* principle but merely to frustrate N's contractual rights.

This case shows the extent recognition of foreign main proceedings had been used to stymie the effect of the renegotiated charterparty. Although justice has been finally served by the English court, it is regrettable that recognition of foreign proceedings applications under art 20 UNCITRAL Model Law might be used mala fides. Thus, another risk for renegotiations.

## Conclusion

What this chapter has attempted to prove is that although renegotiations (which is often seen as an offshoot of reorganisations) are increasingly being promoted in insolvency law reform, as regards large scale shipping contracts, the likelihood of successful renegotiations is very much limited. Those factors impacting on the chances of success naturally include commercial and practical matters, but, the legal context is not always conducive either. In the examples elucidated above, the tension between sanctity of contract (in the enforcement of ipso facto clauses) and intervention to revise and adapt the original contract to meet the economic hardship that is insolvency is all too clear. Often that tension is borne out in conflicts involving different jurisdictions. Cross border insolvency law tries to provide for judicial support and international cooperation for reorganisations and the implementation of insolvency laws on asset preservation but can sometimes interfere with the successful outworking of a renegotiation. There are clearly no quick and easy solutions; a quest for a single paradigm is bound to fail.

This paper has a notable research aim – namely, to map the legal terrain and identify the points of tension for renegotiations in economically hard times, and to show that despite the rhetoric of a rescue culture, insolvency law (and proposed reforms) do not cope well with shipping contracts and charterparties where volumes are large and management of the contract following a renegotiated deal is more troublesome than perceived at first blush.