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TROUBLED WATERS:
EMAS AND EZRA HOLDINGS CHAPTER 11 BANKRUPTCY – DEALING WITH THE FALLOUT

The latest victims of the prolonged downturn in the offshore, marine and oil and gas sectors, Singapore-based Ezra Holdings and EMAS, have sought Chapter 11 protection with the US bankruptcy courts. Whilst it is as yet unclear whether these companies will "go under", this briefing sets out the latest events and key issues affecting operators who may find themselves dealing with counterparties in similar insolvency proceedings and financial difficulties.

Background

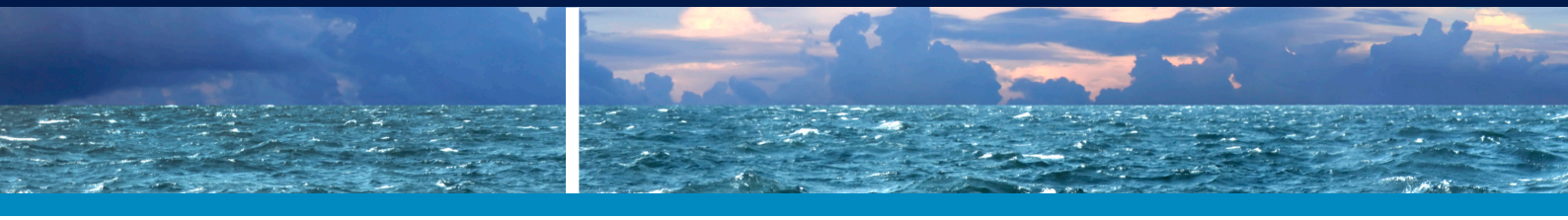
Offshore service provider, Emas Chiyoda Subsea (EMAS), filed for Chapter 11 protection with the Southern District of Texas Bankruptcy Court on 27 February 2017. Almost three weeks later, Singapore-based Ezra Holdings (Ezra), which owns a 40% share of EMAS, filed for Chapter 11 protection in New York.

According to the court filings, Ezra's 20 largest creditors are owed about US$600 million. In an announcement to the Singapore Stock Exchange (SGX) on 19 March 2017, Ezra said that the Chapter 11 filing was intended to *"optimise the scope and extent of the restructuring options available and to protect the interests of all stakeholders of the company".*

As part of its restructuring, EMAS is reportedly seeking termination of five charterparties, including the 25,000 GT pipe-layer *LEWEK CHAMPION*, which is currently under arrest in China, as well as the *LEWEK EXPRESS*. These contracts are reportedly worth over US$300 million in remaining charter hire payments, and according to the US Court papers, there would be little benefit to the estate in keeping these charters alive.

Is this a new era of Singapore debt restructuring?

On 1 March 2017, the Singapore High Court granted a stay order, mirroring the US Chapter 11 protection, and protecting EMAS and its five Singapore-incorporated subsidiaries from litigation in Singapore. The Singapore Court's order is unusual in that such protection is generally only



granted if a company applies for judicial management in Singapore or enters into a scheme of arrangement. This move has been heralded by some as signalling Singapore's ambitions to become a centre for international debt restructuring, and it is likely a similar order will now be granted to Ezra and its subsidiaries.

Who will be affected from such a fallout? What issues will parties contracted with Ezra/EMAS and other insolvent parties need to address?

A diverse range of trading partners will be affected. The following parties that have contracted with Ezra, EMAS and/or its subsidiaries, (or are in charters with other companies in financial difficulty) will face a range of issues:

1. Charters and termination of a contract with an insolvent counterparty

One immediate concern for owners who have chartered vessels to companies in financial difficulty will be the non-payment of hire. Unlike other types of offshore contracts, many charterparties on industry standard terms do not incorporate an express right of termination upon insolvency. As a matter of English law, the fact that charterers are or may become insolvent is unlikely, in and of itself, to amount to a repudiation entitling owners to terminate – unless it is possible to demonstrate that charterers are unwilling or unable to continue to perform the charter, or have committed a breach which is so serious it can be considered as 'repudiatory'.

Whilst owners may not be able to immediately treat a charterers' poor financial status as repudiatory, they may be able to rely on their contractual rights of withdrawal for non-payment of hire. In deciding whether withdraw their vessels, owners will need to consider the possibility that EMAS's administrators may decide to adopt/affirm the charterparties in an attempt to rescue charterers' business as a going concern. If the charterparties are adopted/affirmed, hire payments may be elevated to 'preferential debts', and may be paid in full.

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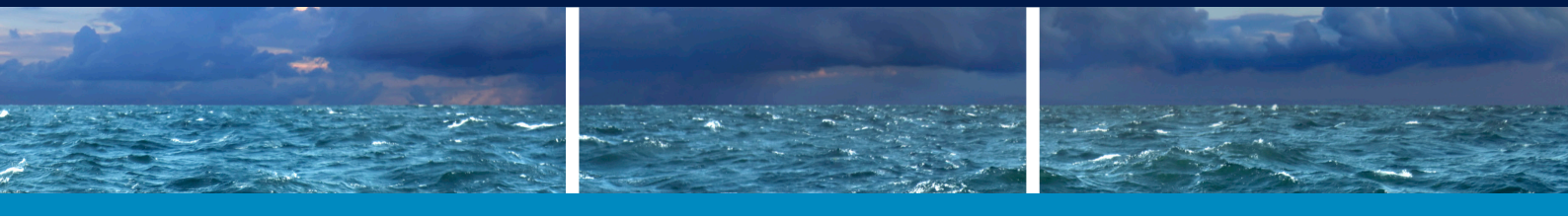
Owners in such circumstances may also wish to consider whether to withdraw the vessels from the charter service as soon as possible, in order to try and minimise their exposure. This would likely be the quickest way to re-charter the vessels into profitable employment, but would effectively crystallise a (usually unsecured) claim against charterers' estate for unpaid hire. Should charterers subsequently enter liquidation, owners may only make a fractional recovery in respect of their claims. Also, by exercising a contractual right of withdrawal, owners would not normally be entitled to claim damages for loss of bargain for the remaining balance of the charter period following termination.

Owners would also need to consider their responsibilities for demobilisation of any of charterers' equipment, and delivery of cargo, on board the vessel at the time of termination/withdrawal.

In other types of offshore contracts, in addition to any express rights of termination in the event of insolvency (which are more commonly included than in charters), any provisions giving rights of termination for "material breaches", should also be considered.

2. Suppliers

Maritime suppliers and other service providers, may also have claims for unpaid sums for supplies and/or services ordered by EMAS/Ezra to their chartered vessels. Affected parties may include bunker suppliers, suppliers of other 'necessaries', pilotage services, and ship repair service providers. In



some jurisdictions, bunker suppliers for example, may have claims directly against the vessel for unpaid supplies and services contracted by charterers, creating duplicity of liability in some circumstances.

3. Unsecured creditors

These are uncertain times for creditors of marine and offshore companies in financial difficulty. With regards to EMAS and Ezra, until the position in the US becomes clearer, it will be doubtful whether EMAS and/or Ezra have the ability to continue trading. In the meantime, unsecured creditors may wish to consider the following options:

- Proof of Debt claims – if/when a winding up order is made, creditors will likely be required to file a Proof of Debt claim with the liquidators. This is sometimes required within a relatively short time-frame. Creditors should therefore take this opportunity to account and document all debts to ensure that their Proof of Debt has the best possible chance of being approved by the liquidators.
- Mutual set off – creditors may also wish to consider the 'self-help' remedy of mutual set off. In certain circumstances, this entitles creditors to set-off mutual debts, i.e. debts owed to and by an insolvent company. Creditors who wish to consider this should obtain legal advice.
- Voidable transactions – creditors should also be wary of potentially voidable transactions. These are transactions which can be set aside by the Court if it unfairly distributes assets and/or is to the detriment of other creditors.

Conclusion

At this stage, it is unclear whether the Chapter 11 procedure will be successful, and whether EMAS and/or EZRA will ultimately be able to avoid liquidation. The situation should become clearer in the forthcoming weeks.

Parties who find themselves dealing with a contractual counterparty in financial difficulty need to act swiftly to protect their position, and to have the best chances of minimising losses and maximising chances of recovery. This is the position in Singapore, particularly now that the Singapore court appears to be taking a more pro-active approach to protect insolvent companies.

HFW Singapore in alliance with AsiaLegal LLC will be pleased to advise further on any issues arising.

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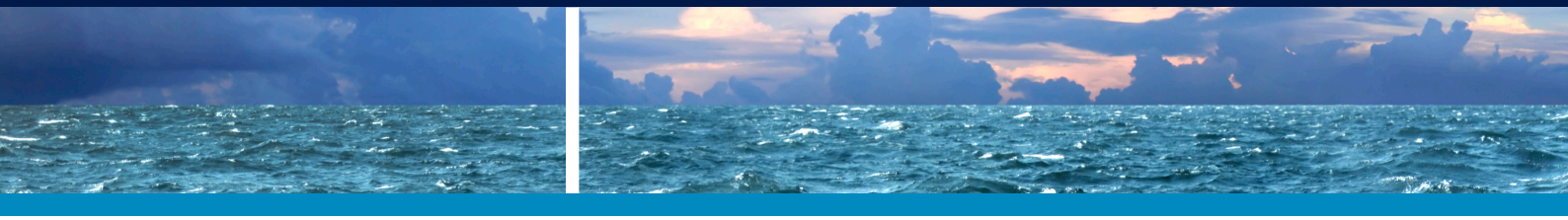

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