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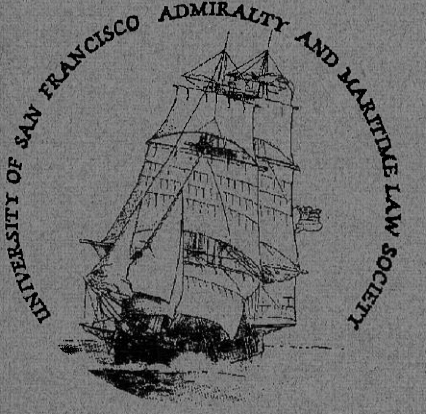

Culture Clash: The Intersection of Maritime Law and the United States Bankruptcy Code

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I. INTRODUCTION

Due primarily to maritime laws' recognition of the transitory nature of ships, shipping bankruptcies give rise to unique legal and practical issues. This article summarizes basic issues that are frequently presented in bankruptcies of shipping companies under the United States Bankruptcy Code[1] (the "Code" or the "Bankruptcy Code") with an emphasis on the rights of secured creditors in maritime bankruptcies.

II. BANKRUPTCY AND ADMIRALTY LAW—BASIC DIFFERENCES AND ISSUES

A. Differing Objectives

U.S. bankruptcy laws, set forth in the Bankruptcy Code, have objectives that are, in many respects, inconsistent with the objectives of maritime law. The fundamental principles of U.S. bankruptcy laws are: (a) to give the debtor a breathing spell and the opportunity for a fresh start, and (b) to ensure the equitable treatment of creditors.[2] The Code favors reorganization over liquidation and, in most instances, management remains in control of the debtor, its operations and assets for the duration of a reorganization proceeding.

In contrast, maritime law, because ships are mobile and a party's security can literally sail away, is creditor-oriented, generally permitting aggressive individual creditor remedies. From a policy point of view, maritime law is intended to encourage international shipping, trade and finance by enabling efficient recourse against defaulting parties to address

1. 11 U.S.C. §§ 101-1532 (2012).

2. Universal Oil Ltd. v. Allfirst Bank (*In re* Millennium Seacarriers, Inc.), 419 F.3d 83, 92, 2005 AMC 1987 (2d Cir. 2005); Slay Warehousing Co. v. Modern Boats, Inc. (*In re* Modern Boats, Inc.), 775 F.2d 619, 620, 1987 AMC 509 (5th Cir. 1985).

the issues created by shipping's moving targets. It is easy to see, therefore, how admiralty law and the Code can clash.

B. Creditor Enforcement

Under admiralty law, creditors possessing liens are generally able with cause to arrest or attach vessels or other property of a maritime debtor, actions expressly prohibited under the Bankruptcy Code once a bankruptcy proceeding is commenced. When a debtor commences a bankruptcy case under chapter 11 (or 7)[3] of the Bankruptcy Code, the Code's automatic stay prevents creditors from taking steps to enforce their debts without first obtaining bankruptcy court authorization.[4]

C. Asset Recovery

The Bankruptcy Code permits debtors to recover assets seized by or transferred to creditors, as well as obtain the nonconsensual release of liens granted or obtained, near the bankruptcy filing date.[5] In the time leading up to the bankruptcy filing, the ability of a debtor to recover assets or obtain the release of liens received by creditors discourages creditors from racing to the courthouse or taking other action that could worsen the debtor's financial position or disadvantage other, less aggressive creditors. In contrast, admiralty law rewards creditors for aggressive enforcement of their debts against the debtor.

Example: A creditor holds a valid maritime lien against debtor/shipowner in connection with Debtor's failure to pay for repairs which are regarded under admiralty law as necessaries.[6] Providers of necessaries have rights *in rem* against the vessel they provided the necessaries to, and can seek to have a court arrest the debtor's vessel, have

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3. Most filings are under chapter 11, the reorganization chapter under the Bankruptcy Code; chapter 7 is the liquidation chapter.

4. *See* 11 U.S.C. § 362(a)(3) (2012) (If the shipping debtor does not have sufficient contacts with the U.S. to successfully seek chapter 11 relief, it may file an insolvency proceeding in a foreign jurisdiction and seek ancillary relief in the U.S. under chapter 15 and obtain certain injunctive protections that resemble the automatic stay); 11 U.S.C. § 1520(a) (2012).

5. *See, e.g.*, 11 USC §§ 362, 542, 544, 547, 548, 549 (2012).

6. *See* Commercial Instruments and Maritime Liens Act (CIMLA), 46 U.S.C. § 31342 (a)(1) (2012); Barwil ASCA v. M/V SAVA, 44 F. Supp. 2d 484, 487, 1999 AMC 2408 (E.D.N.Y. 1999) ("The term 'necessaries' includes repairs, supplies, towage and the use of a dry dock or marine railway, and has been interpreted broadly to include any goods and services 'reasonably needed' in a ship's business for a vessel's continued operation.").

the sold at auction and satisfy its lien from the sale proceeds (or coerce the debtor into payment).[7] However, if debtor commences a U.S. bankruptcy proceeding, the Bankruptcy Code requires the immediate halt of the arrest proceedings or, if the arrest had not yet begun, the arrest would not be permitted without prior bankruptcy court authorization.[8]

D. Jurisdiction Over Admiralty Law Issues

Bankruptcy courts have broad jurisdiction to consider claims against and relating to a debtor and its assets.[9] Depending on the degree to which a dispute or claim arising under admiralty law is related to a given bankruptcy proceeding, the bankruptcy court may determine the issue or decide that it should defer to another court or tribunal.[10]

For instance, a bankruptcy court will give consideration to applicable admiralty law in determining the validity and priority of any claims (including lien claims) with respect to the debtor's vessels, and the distribution of the sale proceeds to lien creditors, but generally would not yield jurisdiction to an admiralty court to determine such issues. In order for a bankruptcy court to abstain from hearing a given dispute, the proceedings must typically hinge on substantive non-bankruptcy issues of law and have only the most tangential connection to the bankruptcy case (e.g., an insurance dispute).[11]

1. Management continues to operate the business, subject to certain constraints

In a typical chapter 11 case, the management of the debtor stays in possession of the company's assets and in control of its operations.[12]

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7. *See* 11 U.S.C. § 31342 (2012); FED. R. CIV. P. SUPP. AMC RULE C.

8. As discussed *infra* at Section II.B., the result in the example may change (as a practical, if not legal, matter) if the arrest is outside U.S. territory and the creditor is not subject to U.S. jurisdiction or does not fear the U.S. Court because it has few or no U.S. assets that would be at risk for violating the Bankruptcy Code.

9. 28 U.S.C. § 157 (2012).

10. *See* 11 U.S.C. §§ 105, 362(d) (2012) (permitting a bankruptcy court to limit the automatic stay to permit litigation to continue in another forum).

11. *See In re* Sonnax Indus., Inc., 907 F.2d 1280, 1286 (2d Cir. 1990) (articulating twelve potentially relevant factors in deciding whether to permit litigation to continue in another forum, including the "lack of any connection with or inference with the bankruptcy case").

12. 7 COLLIER ON BANKRUPTCY ¶ 1104.02[1], at 1104-6 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (noting that "[n]ormally in chapter 11 cases, the debtor remains in

However, where there is evidence of fraud or gross mismanagement, the bankruptcy court may appoint a trustee to operate the business and displace existing management.[13] Although, this is unusual and requires a high degree of proof of fraud or mismanagement.[14]

During the chapter 11 case, all post-petition (*i.e.*, after the bankruptcy filing) debts arising from the normal operation of the business must be paid either in cash or on whatever credit terms the creditors voluntarily agree to provide.[15] However, prepetition debts may only be paid after a plan of reorganization is confirmed and becomes effective.[16]

During the first 120 days after the bankruptcy filing, only the debtor can propose a plan of reorganization (and it has until 180 days to solicit acceptances of that plan).[17] The debtor's exclusive period to propose a plan may be extended for up to 18 months after the filing date if the debtor

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possession of its assets and continues to operate its business as it restructures or sells and attempts to formulate a reorganization plan").

13. *See* 11 U.S.C. § 1104 (2012).

14. 7 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1104.02[3][b][i], at 1104-9 (noting that "the appointment of a trustee in a chapter 11 case is an extraordinary remedy" and that "there is a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee or a significant postpetition change in the debtor's management.").

15. 11 U.S.C. § 1129(a)(9) (2012); 7 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 1129.02[9][a], at 1129-43 (stating that section 1129(a)(9) requires that administrative expense claims must be paid in cash on the effective date, unless "the holder of a particular claim agrees to different treatment.").

16. *See* 11 U.S.C. § 362(a) (2012) (staying all actions to collect on pre-petition debts); 11 U.S.C. § 1129 (2012) (providing for payment of pre-petition debt). Under certain limited circumstances, a debtor may receive court permission to pay prepetition debts to "critical vendors"; *See In re* Tropical Sportswear Int'l Corp., 320 B.R. 15, 17 (Bankr. M.D. Fla. 2005) (noting that a court "will exercise its authority pursuant to sections 105 and 363 of the Bankruptcy Code to issue orders providing for the payment of pre-petition amounts to critical vendors only if an evidentiary record establishes that: (i) the payments are necessary to the reorganization process; (ii) a sound business justification exists in that the critical vendor(s) refuse to continue to do business with the debtor absent being afforded critical vendor status; and (iii) the disfavored creditors are at least as well off as they would have been had the critical vendor order not been entered."); *In re* Ionosphere Clubs, Inc., 98 B.R. 174, 175-77 (Bankr. S.D.N.Y. 1989) ("A bankruptcy court's use of its equitable powers to 'authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept.").

17. 11 U.S.C. § 1121(b)-(c)(3) (2012); *In re* Borders Grp., Inc., 460 B.R. 818, 821 (Bankr. S.D.N.Y. 2011) ("The Bankruptcy Code grants a debtor the exclusive right to file a plan during the first 120 days after the order granting relief. . . . If [] a debtor proposes a plan within the 120 day exclusive period, the debtor has a period of 180 days after the commencement of the case to obtain acceptances of such plan.").

shows the court it is making progress towards negotiating a plan with creditors.[18] The exclusive period is usually extended in 60, 90 or 120-day increments. Once the debtor files a plan, it typically takes several months for it to be confirmed (*i.e.*, approved by the court).

While in bankruptcy, the debtor cannot sell its assets outside the ordinary course of business or borrow money without notice to its creditors and the bankruptcy court's approval.

2. The automatic stay stops collection/enforcement efforts

The filing of a chapter 11 petition leads to the immediate imposition of the Code's automatic stay.[19] The automatic stay operates to stay or halt all collection efforts, all attempts to perfect or enforce liens and all pending litigation against the debtor, including the commencement or continuation of any action to foreclose a lien or mortgage.[20] As a result of the automatic stay, prepetition debts are frozen during the pendency of the case and are paid only at the time a confirmed chapter 11 plan becomes effective. Violation of the automatic stay can lead to the imposition of costs and sanctions against the creditor-violator.[21]

3. Modifying the automatic stay/adequate protection

A secured creditor may seek a bankruptcy court order modifying the automatic stay to permit it to foreclose on its collateral (vessels, usually) or directing the debtor to provide the secured creditor with adequate protection of its collateral. If a secured creditor can demonstrate that the debtor has no equity in the collateral and the debtor cannot prove it has reasonable prospects for reorganization, the stay should be lifted to allow enforcement of the creditor's contractual remedies.[22] However, bankruptcy courts are generally reluctant to grant stay relief early in a bankruptcy case and generally can be expected to give a debtor some period of time (a breathing spell) to formulate a reorganization strategy and demonstrate

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18. *Id.* § 1121(d).

19. 11 U.S.C. § 362(a) (2012).

20. *Id.*

21. *Id.* § 362(h) (stating that an individual harmed by a willful automatic stay violation is entitled to collect damages); *see also* Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1189 (9th Cir. 2003) (finding that violations of the automatic stay can be treated as contempt, and sanctions may be imposed to address such conduct under section 105(a) of the Bankruptcy Code).

22. *Id.* § 362(d)(2).

there is some prospect of reorganization. Nevertheless, assuming the stay is lifted, the secured creditor can then precede with its contractual enforcement remedies outside of the bankruptcy process.

Alternatively, the secured creditor can ask the court to order the adequate protection of its collateral during the pendency of the case.[23] If the court determines that the creditor's collateral is decreasing in value during the bankruptcy case, the secured creditor should be protected against that diminution while it does not have access to its collateral.[24] Adequate protection can include periodic cash payments reflective of the diminution in value (often in the form of payment of post-petition interest, fees and costs to the secured creditor) and/or a commitment to properly maintain the asset and provide regular reports to the secured creditor.[25] It can also be a replacement lien on an unencumbered asset.[26] A secured creditor concerned about diminution in value should seek court approval expeditiously as adequate protection is only available from the date the secured creditor files a motion with the court.[27]

Where the secured creditor is oversecured (value of collateral exceeds claim amount), an adequate protection grant is unlikely, as the equity cushion is viewed as sufficient protection of the secured creditor's position.[28] A secured creditor should monitor the value of its collateral at all times to ensure it is protected against downward valuation fluctuations during the pendency of the bankruptcy case.

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23. 11 U.S.C. §§ 362(d)(1), 361 (2012).

24. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 370 (1988) (holding that if a secured creditor's collateral is decreasing in value, the secured creditor is entitled to adequate protection in the amount of the decline).

25. 11 U.S.C. § 361.

26. *Id.* § 361(2).

27. *See, e.g.*, *In re* Metromedia Fiber Network, Inc., 290 B.R. 487 (Bankr. S.D.N.Y. 2003); *In re* Farmer, 257 B.R. 556, 561 (Bankr. D. Mont. 2000); *In re* Best Prods. Co., Inc., 138 B.R. 155 (Bankr. S.D.N.Y.), *aff'd*, 149 B.R. 346 (S.D.N.Y. 1992); *In re* Waverly Textile Processing, Inc., 214 B.R. 476 (Bankr. E.D. Va. 1997); *In re* Walter, 199 B.R. 390 (Bankr. C.D. Ill. 1996); *In re* Cason, 190 B.R. 917 (Bankr. N.D. Ala. 1995); *In re* Dynaco Corp., 162 B.R. 389 (Bankr. D.N.H. 1993); *In re* Barrett, 149 B.R. 494 (Bankr. N.D. Ohio 1993); Matter of Cont'l Airlines, Inc., 146 B.R. 536 (Bankr. D. Del. 1992), *subsequently aff'd sub nom. In re* Cont'l Airlines, 91 F.3d 553 (3d Cir. 1996).

28. Wilmington Trust Co. v. AMR Corp. (*In re* AMR Corp.), 490 B.R. 470, 478 (S.D.N.Y. 2013) ("It is well-settled that the existence of an equity cushion can be sufficient, in and of itself, to constitute adequate protection.").

4. Debtor's use of cash collateral/debtor in possession financing

Cash collateral

Chapter 11 debtors typically require some form of financing to continue operations while in bankruptcy (to pay for professionals and the professionals for an official creditors committee). The debtor cannot use cash or receivables that are a creditor's collateral ("cash collateral") without the creditor's consent or bankruptcy court approval.[29]

Where a secured creditor has a perfected lien on the cash proceeds of its collateral, including any income or earnings of the debtor's assets, any receivables or cash proceeds on hand at the time the bankruptcy petition is filed constitute cash collateral.[30] A debtor cannot use cash collateral unless the secured creditor consents or the bankruptcy court, after a hearing, authorizes such use over the secured creditor's objection.[31] To authorize the use of cash collateral over the secured creditor's objection, the bankruptcy court must find that the creditor's interest in the cash collateral, that the debtor seeks to use (*i.e.*, consume), is adequately protected.[32] Typically, the debtor will offer to creditors, with a lien on cash collateral, a replacement lien on newly acquired cash and receivables from its post-petition operations (assets newly-created during the bankruptcy case are generally not subject to the secured creditor's pre-bankruptcy lien (notwithstanding after-acquired property clauses)).[33] Creditors frequently negotiate the use of cash collateral through an approved budget designed to limit its use to the maintenance of secured assets and minimal or necessary business operations. Often, as a price for the use of cash collateral on a consensual basis, the secured creditor will negotiate certain additional benefits, as well (such as waiver of claims and defenses, agreement to the validity and priority of the lender's liens and security interests, although the

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29. 11 U.S.C. § 363(c)(2) (2012).

30. *Id.* § 363(a).

31. *Id.* § 363(c). All creditors who hold liens on the subject assets have a protectable interest, *i.e.*, senior and junior lienors, and must consent or have their interests protected. Intercreditor agreements between seniors/juniors often have provision for these issues.

32. *Id.* § 363(e); Sec. Leasing Partners, LP v. ProAlert, LLC (*In re* ProAlert, LLC), 314 B.R. 436, 442 (B.A.P. 9th Cir. 2004) (noting that a court can authorize the use of cash collateral only if the secured creditor is adequately protected).

33. For instance, once cash collateral is used say, to buy inventory, the new inventory is not within the secured creditor's lien (notwithstanding an after-acquired property clause in the security documents), unless it was agreed to or granted as part of adequate protection.

extent of such benefits varies from case to case and negotiation to negotiation).

Because the use of cash collateral dissipates such collateral (pre-petition inventory, receivables and their proceeds), adequate protection is typically provided in the form of replacement liens on post-filing inventory, receivables and their proceeds. If the collateral on which the replacement liens are granted has less value than or greater risk than the collateral used, putting the secured creditor at risk, adequate protection may also include cash payments sufficient to compensate for a decrease in such value.

DIP financing

In addition to, or instead of, cash collateral, the debtor typically will seek debtor-in-possession financing ("DIP") from existing or new lenders. Generally, a DIP lender will obtain a lien on all of the assets of the debtor subject to existing liens.[34] However, in certain limited circumstances, the debtor will seek to prime its prepetition secured lenders to provide senior security to a new lender. To do so, the debtor must demonstrate that the existing secured lenders are adequately protected (*i.e.,* their lieu position (value) will not be harmed by the granting of a senior lien).[35] Generally, without the existing secured creditors' consent, it is very difficult, although not impossible, to obtain this sort of financing.

E. Creditors Becoming Subject to the Bankruptcy Court's Jurisdiction

Shipping creditors that file claims in a U.S. bankruptcy case are deemed to consent to the equitable jurisdiction of the bankruptcy court, to adjudicate or even extinguish those claims.[36] One U.S. appellate court decision[37] indicates that, even where a ship arrest occurred outside the U.S., when shipping lienholders submit their claims in the bankruptcy proceeding, they consent to the bankruptcy court's jurisdiction, and the bankruptcy court may order the sale of vessels free and clear of such liens,

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34. *See* 11 U.S.C. § 364(c) (2012).

35. *See id.* § 364(d)(1); *In re* Del. & Hudson Ry. Co., 124 B.R. 169, 176 (Bankr. D. Del. 1991) (noting that a DIP lender is only entitled to priming liens if "there is adequate protection of the interest of the party already holding a lien on the encumbered property").

36. *See* Cent. Vt. Pub. Serv. Corp. v. Herbert, 341 F.3d 186, 191 (2d Cir. 2003) ("[B]y filing the proof of claim, the creditor consents to the bankruptcy court's broad equitable jurisdiction.").

37. Universal Oil Ltd. v. Allfirst Bank (*In re* Millennium Seacarriers, Inc.), 419 F.3d 83, 2005 AMC 1987 (2d Cir. 2005).

albeit with the liens attaching to the proceeds of the sale and distribution thereof to be determined by the bankruptcy court.[38] Even so, for the reorganized debtor or purchasers of the debtor's assets relying on a bankruptcy court's order, the risk remains that foreign courts may not recognize that certain maritime liens have been extinguished by a U.S. bankruptcy court sale of a vessel as opposed to a sale conducted by a U.S. admiralty court. Admiralty court sales, unlike bankruptcy court sales, are generally recognized world-wide as cleansing a ship of liens.[39]

F. U.S. Commercial Liens

U.S. commercial law requires transparency with regard to liens on a debtor's property. Security interests therefore must be recorded in order to be effective against other creditors. Generally, the first creditors to record evidence of their security interests against the property of the debtor enjoy the primary right to payment from the proceeds of such property—a "first in time, first in right" system.[40] This system makes it easy for bankruptcy courts to make determinations as to the nature, extent, validity and priority of liens. This is very different from maritime law.

G. Ship Mortgages and Maritime Liens

In the U.S., preferred ship mortgages, which are a creature of federal statutory law, are also recorded under a first in time, first in right system[41]; thus, they are easy for bankruptcy courts to address. Maritime liens, on the other hand, are "secret liens" that arise by operation of law and do not need to be recorded.[42] Historically, maritime liens, which may arise, among other things, in connection with the provision of necessaries to a vessel (crew wages, repairs, towage, maintenance, etc.), need not be recorded. This is because of the inherently transitory and international nature of the

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38. This removes any "control"/leverage enjoyed by the lienholder and, with the bankruptcy court determining the validity and priority of liens, places the lienholders at risk to the extent that the bankruptcy court takes an unfavorable view of their liens.

39. 46 U.S.C. § 31326(a) (2012).

40. *See* U.C.C. § 9-322 (2011); Lawrence Kalevitch, *Setoff and Bankruptcy*, 41 CLEV. ST. L. REV. 599, 604 n.13 (1993) (noting that "[o]ne priority principle from state law stands out: First in time is first in right.").

41. 46 U.S.C. § 31322 (2012).

42. 46 U.S.C. §31343 (2012); United States v. ZP CHANDON, 889 F.2d 233, 237, 1990 AMC 316 (9th Cir. 1989); Bermuda Exp., N.V. v. M/V LITSA (Ex. LAURIE U), 872 F.2d 554, 560, 1989 AMC 1537 (3d Cir. 1989).

shipping industry and the lack of a unified international recording system for such liens.[43] Furthermore, such secret liens are often prioritized in the opposite manner of typical U.S. commercial liens—a "last in time, first in right" basis—whereby the last creditor to obtain a maritime lien against the property of the debtor will be the first to be paid in respect of that property.[44]

Consequently, it is possible that an unrecorded maritime lien can be recognized as valid, and senior to all other liens, and be unknown to all creditors except the creditor holding the lien and the debtor. The lack of transparency of maritime liens creates a host of problems in a bankruptcy proceeding. For example, bankruptcy courts may have trouble giving notice with respect to the proceedings giving rise to due process concerns, and creditors may find themselves unable to properly evaluate their rights with regard to the property of the debtor or accurately determine their priority relative to other creditors. Admiralty rules, however, do provide notice requirements generally calculated to reach the maritime claimants in the event of a ship arrest and sale.[45] Additionally, caution must be taken by lenders negotiating post-petition financing with a maritime debtor, as unknown maritime liens may survive the bankruptcy and enjoy priority to the security interests granted to such lenders as part of the bankruptcy proceeding. As stated in one appellate court decision, "[t]hose who purchase maritime assets from a debtor's estate under the auspices of a bankruptcy proceeding take a calculated commercial risk that they have not received clean title."[46] Thus, to the extent that a secret lienor is outside the jurisdiction of the bankruptcy court, its lien may remain effective even after a judicial sale of assets. This too creates issues for a lender that finances the debtor during the bankruptcy.[47]

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43. *See* William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1902-03 (1999).

44. *ZP CHANDON*, 889 F.2d at 237; *quoting* Walsh v. Placedo Shipping Corp. of Liber. (*In re* Pac. Caribbean Shipping (U.S.A.), Inc.), 789 F.2d 1406, 1407, 1986 AMC 2308 (9th Cir. 1986).

45. FED. R. CIV. P. SUPP. AMC RULE C.

46. Universal Oil Ltd. v. Allfirst Bank (*In re* Millennium Seacarriers, Inc.), 419 F.3d 83, 103, 2005 AMC 1987 (2d Cir. 2005).

47. *See* Expert Report of James G. Dolphin, *In re* TMT Procurement Corp., No. 13-33763 (Bankr. S.D. Tex. 2015) Docket No. 1115 filed on Feb. 19, 2014 (discussing the differences between admiralty sales and bankruptcy section 363 sales and noting that unlike admiralty sales, bankruptcy 363 sales do not come with "clarity on clean title").

II. SHIPPING BANKRUPTCY PROCEEDINGS

A. Applicable Bankruptcy Law

A company organized in or with assets in the U.S. can file for protection under chapter 11 of the Bankruptcy Code.[48] Because a debtor shipping company may likely have creditors and property located around the world, the usefulness of a U.S. bankruptcy proceeding must be analyzed on a case by case basis.[49] Alternatively, a debtor may file insolvency proceedings in multiple jurisdictions, coordinated, if possible to protect its assets/vessels. For instance, a debtor may commence its main restructuring proceeding in the country where it is organized or has substantial assets and, seek to have its bankruptcy proceeding recognized by the other jurisdictions in which it has property, such as in the U.S. under chapter 15 of the Bankruptcy Code. If recognized, the recognizing court should uphold the validity of the judgments of the foreign bankruptcy court that are not contrary to its public policy and thus stay enforcement against the property of the debtor within its jurisdiction.[50]

B. Stays Under U.S. Bankruptcy Law

Immediately upon the commencement of a chapter 11 case, the Bankruptcy Code's automatic stay prohibits the arrest of any of the debtor's vessels located anywhere in the world. However, a U.S. bankruptcy court's ability to enforce the stay and its orders, in reality, is

48. 11 U.S.C. § 109 (2012). If the debtor has insubstantial U.S. assets, creditors may request that the bankruptcy court dismiss the case. However, in recent cases, bankruptcy courts determined that retainers held by U.S. attorneys and financial advisors constituted sufficient property to enable a group of affiliated debtors with no other property interests or presence in the U.S. to qualify for chapter 11 protection. *See, e.g.*, *In re* TMT Procurement Corp., No. 13-33763 (Bankr. S.D. Tex. 2015); *In re* Marco Polo Seatrade B.V., No. 11-13634 (Bankr. S.D.N.Y. 2011); *In re* Baytown Navigation Inc., No. 11-35926 (Bankr. S.D. Tex. 2012).

49. Successful chapter 11 reorganizations are indeed possible for shipping companies with transitory assets. What has been learned over the last few years is that reorganization can be a likely outcome if the chapter 11 case is coordinated, consensual financial restructuring. Shipping bankruptcies that have ended in liquidation include: *In re* TMT Procurement Corp., No. 13-33763 (Bankr. S.D. Tex. 2015); *In* re B+H Ocean Carriers, No. 12-12356 (Bankr. S.D.N.Y. 2012); *In re* Marco Polo Seatrade B.V., No. 11-13634 (Bankr. S.D.N.Y. 2011); *In re* Baytown Navigation Inc., No. 11-35926 (Bankr. S.D. Tex. 2011); while others have ended with successful reorganizations, including *In re* Genmar Holdings, Inc., No. 09-43537 (Bankr. D. Minn. 2012); *In re* Genco Shipping & Trading Limited, No. 14-11108 (Bankr. S.D.N.Y. 2014); *In re* Excel Maritime Carriers, Ltd., No. 13-23060 (Bankr. S.D.N.Y. 2013).

50. For further discussion on this topic see *infra* section III.

often practically limited to the debtor's assets within the U.S. and against foreign enforcement efforts initiated by either U.S. creditors or foreign creditors with a meaningful presence in the U.S.[51] A similar stay, at least with respect to assets within U.S. territorial jurisdiction takes effect upon the recognition by a U.S. bankruptcy court of a chapter 15 foreign main proceeding.[52]

It should be noted that while U.S. bankruptcy courts are generally willing to assert jurisdiction in order to stay actions by creditors located within its own territorial jurisdiction against property of a debtor outside of the U.S., foreign courts may not grant similar far-reaching protections or recognize the U.S. bankruptcy court's purported authority over assets or persons within the foreign court's territorial jurisdiction.[53]

Example: Debtor initiates a bankruptcy proceeding in Country A, has creditors in Country B, and owns a vessel berthed in Country C. Generally speaking, even if Country A's bankruptcy court stays actions against Debtor's property worldwide, creditors in Country B will still be able to attempt to arrest the vessel in Country C or anywhere by Country A, as those creditors and the assets are located outside of Country A and therefore may not fear any court order from Country A. Likewise, if Debtor seeks and obtains recognition of its Country A proceeding in the

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51. Creditors meaningfully subject to the U.S. bankruptcy court's jurisdiction are those that have meaningful assets in the U.S. that could be subject to enforcement of a judgment for violation of the court's order.

52. 11 U.S.C. § 1520 (2012). For further discussion see discussion *infra* Section III.

53. The case law is not yet clear on whether a chapter 15 stay applies not only with respect to assets or actions within the territorial jurisdiction of the United States, but also to preclude action against assets outside the territorial jurisdiction of the United States where the creditor is subject to personal jurisdiction in the United States. *See In re* JSC BTA Bank, 434 B.R. 334, 345 (Bankr. S.D.N.Y. 2010) (holding that the automatic stay triggered by an order recognizing a foreign main proceeding under chapter 15 does not extend extraterritorially to assets outside of the territorial jurisdiction of the United States). *But see* Sec. Investor Prot. Corp. v. Madoff Inv. Sec. LLC, 474 B.R. 76 (S.D.N.Y. 2012) (noting that the automatic stay under plenary bankruptcy cases (*i.e.,* those under chapters 7, 9, 11, 12 or 13) reaches extraterritorially where creditor is subject to the personal jurisdiction of the court.). The latter relief would seem to be at odds with the general principles of chapter 15. *See In re* JSC BTA Bank, 434 B.R. at 344-45 ("The global reach described in these chapter 11 cases has no relation to the shared jurisdictional model of a chapter 15 case that is an adjunct to a foreign proceeding. . . . By contrast, in the chapter 15 context, a bankruptcy court's jurisdiction over property of the debtor is expressly limited to property located 'within the territorial jurisdiction of the United States.' . . . In the chapter 15 context, therefore, a bankruptcy court's limited *in rem* jurisdiction requires only that the court possess the power to stay actions against a debtor that could impact property located within the United States.").

courts of Country C, creditors in Country B may still feel no fear in pursuing the Debtor's assets in Country B. Thus, Debtor can only receive full protection from enforcement actions during its bankruptcy proceeding by obtaining recognition in every country in which it has property, which may be difficult to achieve.

C. Priority and Determination of Claims

U.S. federal statutory law and the general maritime law have established a detailed ranking of priorities of various types of maritime debt.[54] Similarly, the Bankruptcy Code also provides a detailed priority ranking system.[55] Bankruptcy courts attempt to reconcile the two systems when considering maritime and non-maritime claims in the same bankruptcy proceeding.

Generally speaking, maritime lien claims, which are generally considered secured debt, are ranked higher in priority than non-lien claims and unsecured debt.[56] The expenses associated with arresting and selling a vessel rank highest among the claims with respect to such vessel.[57] Certain maritime liens, such as those resulting from crew wages or personal injury claims, are typically prioritized above preferred mortgage liens.[58] With respect to vessels flying the U.S. flag, preferred mortgage liens will rank higher in priority than maritime liens for necessaries, though maritime contract liens arising before the creation of preferred mortgage liens receive higher priority than such mortgage liens.[59] With respect to vessels

54. 46 U.S.C. § 31326 (2012).

55. 11 U.S.C. § 507 (2012).

56. 11 U.S.C. §§ 101(31), 506(a) (2012); David W. Skeen, *Liens and Liquidation: Preferences, Strong Arm Clause, Fraudulent Transfers, Equitable Subordination, Priorities and Other Limitations on Liens Claims*, 59 TUL. L. REV. 1401, 1423 (1985) ("A maritime lien is by definition a secured claim.").

57. 46 U.S.C. § 31326(b)(1) (2012). *See* Associated Metals & Minerals Corp. v. ALEXANDER'S UNITY M/V, 41 F.3d 1007, 1018, 1995 AMC 1006 (5th Cir. 1995) (noting that "services or property advanced to preserve and maintain the vessel under seizure, furnished upon authority of the court or of an officer of the court" have priority over all other liens pursuant to 46 U.S.C. 31326(b)(1)).

58. 46 U.S.C. 31301(5) (2012) (defining "preferred maritime lien" to include liens on a vessel for crew wages and arising out of a maritime tort); 46 U.S.C. 31326(b)(1) (2012). *See* United States v. ALAKAI, 815 F. Supp. 2d 948, 958, 2011 AMC 1424 (E.D. Va. 2011) (noting that "preferred maritime liens are entitled to priority over any preferred mortgages.").

59. 46 U.S.C. § 31301(5)(A) (2012) (defining a "preferred maritime lien" to include a lien on a vessel that arose "before a preferred mortgage was filed under section 31321 of this title");

flying a non-U.S. flag, which is typically the case, preferred mortgage liens will rank lower in priority than liens for necessaries furnished to the vessel in the United States.[60]

D. Executory Contracts and Unexpired Leases

1. Rejection of Executory Contracts

Under the Bankruptcy Code, a debtor has the right to assume or reject executory contracts and unexpired leases, *i.e.,* those contracts/leases under which both the debtor and the non-debtor counterparty continue to have material performance obligations.[61] Vessel charters generally have been treated as executory contracts and/or leases under the Bankruptcy Code.[62] Consequently, a debtor may decide that the terms of a charter are unfavorable and reject the charter, resulting in a claim for damages arising from the breach of the charter in favor of the non-debtor counterparty.[63] Under the Code, such a damage claim is generally treated as a claim that arose before the bankruptcy filing date (because it relates to a pre-filing agreement, and therefore can be repaid under a chapter 11 plan at merely pennies on the dollar).

Notably, generally outside of the bankruptcy context, a breach of a charter by the shipowner will result in a maritime lien in favor of the charterer.[64] As indicated above, this would typically enable the charterer to attach and arrest the vessel as security for payment. Consequently, it has been suggested by one court that a damages claim arising from the debtor's rejection of a charter in bankruptcy may constitute a maritime lien, which might be entitled to higher priority than certain other lien claims coming

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46 U.S.C. § 31326(b)(1) (2012) (stating that preferred maritime liens have priority over preferred ship mortgages); *see* Bank One, La. N.A. v. MR. DEAN M/V, 293 F.3d 830, 834, 2002 AMC 1617 (5th Cir. 2002).

60. 46 U.S.C. § 31326(b)(2) (2012).

61. 11 U.S.C. § 365(a) (2012).

62. *See, e.g.*, *In re* McLean Indus., 74 B.R. 589, 602, 1987 AMC 2833 (Bankr. S.D.N.Y. 1987); *In re* River Line, Inc., 19 B.R. 158, 162 (Bankr. M.D. Tenn. 1982); *see also In re* N. Atl. & Gulf S. S. Co., 204 F. Supp. 899, 909, 1963 AMC 871 (S.D.N.Y. 1962), *aff'd sub nom.* Schilling v. A/S D/S DANNEBROG, 320 F.2d 628, 1964 AMC 678 (2d Cir. 1963).

63. 11 U.S.C. § 365(g) (2012).

64. *See* Bank One, La. N.A. v. MR. DEAN M/V, 293 F.3d 830, 834, 2002 AMC 1617 (5th Cir. 2002) (holding that a maritime lien attaches at the commencement of a charter undertaking and is perfected when the contract is breached).

into existence after commencement of the charter and before rejection of the charter.[65]

2. Assumption and Assignment of Contracts and Leases

Alternatively, a debtor can assume a given charter, provided that the debtor cures all monetary defaults and provides adequate assurance that it will be able to continue to perform its obligations under the charter.[66] Additionally, although unusual, the debtor may assume and assign a charter, even if there is a provision prohibiting assignment in the charter, so long as the debtor can provide adequate assurance of the assignee's ability to perform under the contract.[67] In a chapter 11 case, the debtor has until the time at which its plan of reorganization is approved by the bankruptcy court to decide whether to assume or reject certain contracts.[68] However, a non-debtor party may request that the bankruptcy court compel the debtor to earlier assume or reject a given contract, but the non-debtor would have to show that delay would result in extreme hardshipto prevail on such a request.[69]

3. Recharacterization of Charters

Certain types of charters, typically bareboat charters, are used in the shipping industry in connection with sale/lease-back transactions as a means of vessel financing. If a charterer under such an arrangement files for chapter 11 protection, the bankruptcy court may be asked to evaluate

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65. Thus, lenders receiving preferred mortgage liens with respect to vessels in connection with loans to the debtor during the bankruptcy proceeding should be aware that it is possible that their own liens may receive lower priority than damage claims resulting from the debtor's rejection of a charter during bankruptcy that existed prior to the loan being made. If it is determined by a bankruptcy court that the breach of the charter arising from rejection does not result in a maritime lien, however, then the amount of damages will be treated as a general unsecured claim in the bankruptcy. It would appear that the way to fix this from the bankruptcy court's perspective, though, is (i) to provide broad notice (probably publication notice) of an intended loan to a debtor in bankruptcy, so that if a maritime lien or does not oppose the loan its lien will be deemed junior (this would, arguably, satisfy due process concerns), and (ii) to have the court's order approving the loan provide that the lien is superior to all others. The only remaining risk would be that, in a later proceeding before a foreign court, that court may not recognize the bankruptcy court's order and instead prioritize the maritime lien.

66. 11 U.S.C. § 365(b)(1) (2012).

67. *Id.* § 365(f).

68. *Id.* § 365(d)(2).

69. *Id.*

whether the charter represents a true lease or a disguised financing. If the charter is recharacterized as a financing, the bankruptcy court may deem the vessel the property of the debtor charterer, not the owner, but with the owner recast into the role of lender.[70] Under such circumstances, the charterer would be able to retain possession of the vessel without performing its obligations under the relevant charter, and claims by the ship owner against the charterer could be treated as general unsecured claims. To avoid the risk, all owners would require a protective mortgage and related filings. However, this may not be possible to do in many flag states. Thus, generally, great care must be taken in structuring vessel sale lease-back transactions to avoid the recharacterization of a bareboat charter in a charterer bankruptcy.

4. Chapter 11 Plan Treatment of Secured Claims

A chapter 11 plan must provide for the payment of a secured claim up to the value of the collateral securing the claim.[71] In other words, a chapter 11 plan splits the secured creditors' charges into two pieces: a secured claim to the extent of the collateral securing the claim; and an unsecured claim to the extent of the amount of the claim in excess of the value of the collateral.[72] When a payment plan is proposed over a secured creditor's objection, it is typically a cram-down plan. In a cram-down plan, the payment of the secured portion of the claim can be stretched out, provided that the secured lender retains its lien securing its claim, and the present value of the payment stream equals the value of the secured creditor's claim at the time of confirmation of the plan.[73] A cram-down plan sets up, typically, a contested court hearing with an evidentiary fight between the secured creditor and the debtor over: (i) collateral value (as that determines the principal amount the secured creditor is entitled to recover under the

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70. *See* Am. President Lines, Ltd. v. Lykes Bros. S.S. Co., Inc. *(In re* Lykes Bros. S.S. Co., Inc.), 196 B.R. 574, 580, 1996 AMC 1488 (Bankr. M.D. Fla. 1996).

71. 11 U.S.C. § 506(a) (2012).

72. *See* Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship, 248 B.R. 668, 682 (Bankr. D. Mass. 2000) ("If a [secured] creditor is undersecured (the security is worth less than the debt), the creditor holds an unsecured claim equal to the deficiency.").

73. 11 U.S.C. § 1129(b)(2)(A) (2012). Cram-down can be with respect to unsecured claims, as well. *Id.* § 1129(b)(2)(B). "Cram-up" plan is essentially a cram-down but where the debtor proposes to write a new loan that pays off the secured creditor's claim in full over time with interest (*i.e.*, where the secured creditor is oversecured). *See* 11 U.S.C. § 1124(2) (2012) (permitting the confirmation of a plan that reinstates defaulted debt).

plan), (ii) the appropriate cram-down rate (discount rate for present value purposes), and (iii) a feasibility fight (as to whether the debtor's projections are reasonable and support payment/success of the plan).[74]

To the extent that a secured creditor is oversecured, *i.e.*, the pledged assets are worth more than the sum of the amount owed, interest will continue to accrue during the reorganization period, and such interest must be paid at the stated contract rate (or possibly at the default rate at the time the plan is confirmed).[75] The oversecured secured creditor is also generally entitled to all reasonable fees (including attorneys' fees and expenses), costs and charges set forth in the transaction documents.[76] On the other hand, if the secured creditor is undersecured, then interest does not accrue and none of the fees, costs or charges can be demanded as part of the secured claim.[77] A creditor with an undersecured claim will generally be paid at cents on the dollar for the unsecured portion of the claim.

For the reasons set forth above, collateral valuation is very important and often hotly litigated. Once valuation is established though, other substantial fights remain in the contested case. For instance, because the Bankruptcy Code does not specify the cram-down interest rate (to ensure that the plan distributions payable over time comply with the cram-down requirements), the courts have developed and applied a variety of different calculations/tests, which often lead to expensive evidentiary hearings.[78]

At least four different approaches have emerged over the years, including (1) the formula approach, (2) the coerced loan approach, (3) the

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74. There are many other issues the parties would likely fight over, but these are the major ones.

75. 11 U.S.C. § 506(b) (2012). *Compare In re* Gen. Growth Properties, Inc., 451 B.R. 323, 328 (Bankr. S.D.N.Y. 2011) (holding that the oversecured creditors of a solvent debtor were entitled to post-petition interest on their claims at the contractual default rate), *with In re* Residential Capital, LLC, 508 B.R. 851 (Bankr. S.D.N.Y. 2014) (holding that whether oversecured creditors of insolvent debtors are entitled to default interest turns on equitable considerations).

76. *Id.* § 506(b).

77. 11 U.S.C. 502(b)(2) (2012); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd., 484 U.S. 365, 372-73 (1988) ("Since [506(b)] permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest."). Of course, anything is possible on a consensual basis, and often times are seeking to negotiate.

78. *See* Till v. SCS Credit Corp., 541 U.S. 465 (2004); *see also* C.B. Reehl & Stephen P. Milner, *Cram-Down Interest Rates: The Quest Continues*, 30 CAL. BANKR. J. 15, 19 (2009); Jason A. Pill, *UnTill the Footnote Was Written: The Effect of Till v. SCS Credit Corporation on 11 U.S.C. § 1129(B)(2)*, 26 EMORY BANKR. DEV. J. 267, 268 (2010).

presumptive contract approach, and (4) the cost-of-funds approach.[79] The formula approach requires a court to start with a riskless base interest rate, such as the national prime rate, and then adjust it to account for risks unique to the borrower or situation, typically between 1% and 3%.[80] Alternatively, under the coerced loan approach, the court sets the cram-down interest rate at the level the creditor would have obtained if it had "foreclosed [on the loan] and reinvested the proceeds in loans of equivalent duration and risk," relying on evidence from actual credit markets.[81] The presumptive contract approach requires a court to begin with the prepetition interest rate under the rebuttable presumption that it is an accurate reflection of the lending market, but allows the secured creditor or debtor-in-possession to rebut such presumption and argue a different interest rate should apply based on current market conditions or changes in the debtor-in-possession's credit risk.[82] Finally, the cost-of-funds approach requires the court to set the cram-down interest rate at the rate another lender would charge the secured creditor to borrow an amount equal to the liquidation value of its collateral.[83]

The Supreme Court has yet to rule on the appropriate method to determine the cram-down interest rate in chapter 11 plan confirmation situation. Although the Supreme Court, in a 2004 plurality opinion, endorsed the formula approach, the decision failed to produce a majority opinion and was decided in the chapter 13 context. Thus, it is of limited precedential value in chapter 11 cram-down situations.[84]

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79. Honorable Michael G. Williamson, *Determining Cram Down Interest Rates Post-Till*, SOUTHERN BANKRUPTCY LAW INSTITUTE THIRTY-FIRST ANNUAL SEMINAR ON BANKRUPTCY LAW AND RULES (April 14–16, 2005), http://sbli-inc.org/archive/2005/documents/395190.pdf; Daniel R. Wong, *Chapter 11 Bankruptcy and Cramdowns: Adopting A Contract Rate Approach,* 106 NW. U. L. REV. 1927, 1935 (2012) (discussing the various cram-down interest rates used by courts).

80. *Till*, 541 U.S. at 479-80.

81. Koopmans v. Farm Credit Servs. of Mid-Am., ACA, 102 F.3d 874, 875 (7th Cir. 1996) (discussing the coerced loan approach as one of multiple approaches to the cram-down subject).

82. Gen. Motors Acceptance Corp. v. Jones, 999 F.2d 63, 71 (3rd Cir. 1993) ("[I]f a debtor proposes a plan with a rate less than the contract rate, it would be appropriate, in the absence of a stipulation, for a bankruptcy court to require the debtor to come forward with some evidence that the creditor's current rate is less than the contract rate.").

83. *See Till*, 541 U.S. at 465 (noting that the cost of funds approach asks "what it would cost the creditor to obtain the cash equivalent of the collateral from an another source").

84. *Id.*

A court's examination of feasibility—that is, whether it is likely the debtor can satisfy its proposed obligations under the proposed plan—must be based on objective facts. In short, the debtor must establish that there will be sufficient cash flow to fund the plan and maintain operations according to the plan.[85] The court must look at the probability of actual performance of the proposed plan and may not rely on highly speculative and unduly optimistic assumptions and must base its findings of feasibility on the evidence presented, including testimony of fact witnesses and experts for supporters and objectors to the plan. Bankruptcy courts frequently consider the following factors in determining the feasibility of a plan: (i) the debtor's prior performance, (ii) the adequacy of the debtor's capital structure, (iii) the earning power of the business, (iv) economic conditions, (v) the ability of management and the probability of the continuance of the same management, and (vi) any other matter that may affect the debtor's ability to perform the plan.[86]

As evidenced above, although certainly possible, cram-down on a secured creditor is a difficult task, and ultimately turns on the facts and evidence presented.

Another important issue related to cram-down is the fact that where a secured creditor is being crammed down, that would typically mean that unsecured creditors are being wiped out, assuming the secured creditor has a blanket lien on all assets. And in that case, equity is being wiped out as well, as equity cannot retain value under the plan if unsecured creditors are not paid in full or do not consent to less favorable treatment.[87]

IV. CHAPTER 15

A. Cross-Border Insolvencies and Chapter 15

It is common for a shipping debtor to have creditors and assets in a number of jurisdictions. This presents any number of complications as separate nations have different legal regimes relating to insolvency and reorganization. Thus, it is increasingly necessary that a shipping debtor globally coordinate its insolvency proceedings to enhance the likelihood of

85. 11 U.S.C. § 1129(a)(11) (2012); *In re* Tribune Co., 464 B.R. 126, 158 (Bankr. D. Del.), *on reconsideration*, 464 B.R. 208 (Bankr. D. Del. 2011).

86. *In re* U.S. Truck Co. Inc., 800 F.2d 581, 589 (6th Cir. 1986); *In re* Trenton Ridge Investors, LLC, 461 B.R. 440, 478 (Bankr. S.D. Ohio 2011).

87. 11 U.S.C. § 1129(b)(2)(B)(ii) (2012).

a successful reorganization. The Bankruptcy Code seeks to facilitate coordinated foreign filings through chapter 15, which enables the bankruptcy court to recognize and aid foreign insolvency proceedings.[88]

B. Objectives of Chapter 15

Chapter 15 of the United States Bankruptcy Code is based on the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, which has also been adopted by many, but not all, jurisdictions where shipping insolvencies may occur.[89] The Bankruptcy Code lists the five goals of chapter 15: (1) cooperation between U.S. courts and foreign courts; (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; (4) protection and maximization of the value of the debtor's assets; and (5) facilitation of the rescue of financially troubled businesses, thereby protecting investments and preserving employment.[90]

C. Application of Chapter 15

Chapter 15 provides that if the foreign proceeding is located in the country where the debtor has the center of its main interests (generally referred to as "COMI") then the proceeding is dubbed a foreign main proceeding.[91] In contrast, a foreign non-main proceeding is a proceeding pending in a country where the debtor merely carries out transitory economic activity.[92] In determining whether the foreign proceeding sought to be recognized is taking place in the COMI, a bankruptcy court may consider the location of the debtor's headquarters, primary assets,

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88. 11 U.S.C. § 1501(a) (2012). There have been a number of shipping chapter 15 petitions filed in recent years. *See, e.g., In re* Chembulk New York, No. 12 11007 (Bankr. S.D.N.Y. filed Mar. 14, 2012); *In re* Atlas Shipping A/S, No. 09-10314 (Bankr. S.D.N.Y. filed Jan. 23, 2009); *In re* Pro-Fit Holdings Ltd., No. 08-17043 (Bankr. C.D. Cal. filed July 11, 2008); *In re* Tri-Cont'l Exch., Ltd., No. 06-22652 (Bankr. E.D. Cal. filed Sept. 11, 2006).

89. 11 U.S.C. § 1501(a); UNCITRAL, 1997–UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (last visited Oct. 3, 2014).

90. *Id.* § 1501(a).

91. 11 U.S.C. § 1502(4) (2012).

92. *Id.* § 1502(5).

managing personnel, creditors, and/or the jurisdiction whose law would apply to most disputes arising in the debtor's insolvency proceeding.[93]

Recognition of a foreign main proceeding under chapter 15 results in a certain level of automatic protection in favor of the debtor (such as a stay of actions taken by creditors with respect to property of the debtor located in the territorial jurisdiction of the United States), whereas, upon the recognition of a foreign non-main proceeding, the decision to provide the debtor with certain protections is largely left to the discretion of the court.[94]

D. Petitioning for Chapter 15 Recognition

To gain recognition under chapter 15, a foreign representative of the debtor must file a petition in a U.S. bankruptcy court seeking such recognition.[95] The petition must include evidence of the existence of the foreign main proceeding and the appointment of the foreign representative.[96] Furthermore, a petition seeking recognition of a foreign main proceeding must show that granting relief under chapter 15 would not violate U.S. public policy.[97]

E. Chapter 15 Relief and the Gap Period

Unlike chapter 11, the benefits of chapter 15 do not commence immediately upon the filing of a petition. Typically, such relief is only granted upon the actual recognition of the foreign proceeding by the bankruptcy court. The foreign representative may, and usually does, seek emergency relief during the gap period between filing date and date of recognition, including a stay of actions against the debtor's assets, the

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93. *See* Morning Mist Holdings Ltd. v. Krys (*In re* Fairfield Sentry Ltd.), 714 F.3d 127, 130 (2d Cir. 2013) ("The relevant principle . . . is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. The statute includes a presumption that the COMI is where the debtor's registered office is found. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes.").

94. *Compare* 11 U.S.C. § 1520 (2012) (effects of recognition of a foreign main proceeding), *with* 11 U.S.C. § 1521 (2012) (relief that may be granted upon recognition).

95. 11 U.S.C. §§ 1504, 1515(a) (2012).

96. 11 U.S.C. § 1515(b) (2012).

97. *See* 11 U.S.C. §§ 1515-1518 (2012); John J. Chung, *The Retrogressive Flaw of Chapter 15 of the Bankruptcy Code: A Lesson from Maritime Law*, 17 DUKE J. COMP. & INT'L L. 253, 259 (2007) (noting that the foreign representative is not required to make a showing that public policy would not be violated, rather it is up to an interested party or the court to raise public policy issues).

suspension of third parties' rights against the debtor's property, or the turnover of the debtor's property in the U.S. to the foreign representative.[98]

A bankruptcy court will grant the foreign representative such gap period protections if the representative demonstrates that the standards for a preliminary injunction are met.[99] Generally, this requires a showing by the representative, among other things, that the debtor or its property will suffer irreparable injury if the requested protections are denied.[100]

Example: The main interests of Debtor, a shipping company, are centered in Korea, where it commences its main insolvency proceeding. Because Debtor owns a vessel currently berthed in New Jersey, a foreign representative of Debtor seeks recognition of the Korean proceeding in the United States by filing a chapter 15 petition. Creditor, who has a valid maritime lien with respect to the vessel, seeks to arrest and sell the vessel. Regardless of the fact that a foreign representative of Debtor has filed a chapter 15 petition, until the Korean foreign proceeding is recognized by the bankruptcy court, Creditor may continue to pursue its rights with respect to Debtor's property, both in the U.S. and in any jurisdiction abroad where Debtor has not received a stay. However, the foreign representative may seek gap period relief by demonstrating, among other things, that permitting the arrest of its vessel will render irreparable harm upon Debtor, its assets and other creditors. If the representative meets its burden, the U.S. bankruptcy court may impose a stay barring Creditor from arresting and selling the New Jersey vessel pending its decision to recognize the Korean proceeding. Because the language of the statute permitting a stay of actions against the property of Debtor during the gap period does not have any express geographical limitation, it is uncertain whether the bankruptcy court could or would stay Creditor's actions with respect to the property of Debtor that may be located in other jurisdictions.

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98. 11 U.S.C. § 1519(a) (2012); *In re* Toft, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011).

99. *Id.* § 1519(e) ("The standards, procedures, and limitations applicable to an injunction shall apply to relief under this section").

100. *See, e.g., In re* Innua Can., Ltd., No. 09-16362, 2009 Bankr. LEXIS 994, at **8-9 (Bankr. D. N.J. March 25, 2009).

F. Effects of Recognition

If the debtor obtains recognition of its foreign main proceeding, then the bankruptcy law of its home country will typically govern the case.[101] Chapter 15 also provides certain automatic procedural protections upon the recognition of a foreign main proceeding, including but not limited to, a stay of all actions against the debtor or its property within the territorial limits of the United States, the right of the foreign representative to operate the business of the debtor, and the right to use and sell property of the debtor.[102]

Creditors are not generally prevented by this automatic relief from commencing individual actions or proceedings in a foreign country in order to preserve their claims against the debtor.[103] Creditors, of course, are free to seek permission from the bankruptcy court to pursue claims they may have despite the stay. Depending upon the level of relief granted to the representative of the foreign non-main proceeding (*i.e.*, they may not even be granted a stay, but merely the ability to examine witnesses or control the debtor's U.S. assets), creditors may be able to seek relief from any stay granted, particularly if it is necessary to protect their right to participate as creditors in the foreign main proceeding.[104]

IV. CONCLUSION

As can be seen from the foregoing, due to the clash of admiralty and bankruptcy law, maritime practitioners involved in a bankruptcy, or bankruptcy practitioners involved in a bankruptcy of a shipping company, will need to carefully review the applicable bankruptcy and maritime statutory and case law that will impact their case, and keep in mind the underlying policy differences between the two competing areas of law in order to obtain the best results for their clients.

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101. 11 U.S.C. §§ 1504, 1515(a), 1520 (2012); *see also* Jay L. Westbrook, *Universalism and Choice of Law*, 23 PENN. ST. INT'L L. REV. 625, 630 (2005) (noting that chapter 15 was designed to apply the bankruptcy law of the debtor's center of main interests).

102. 11 U.S.C. § 1520 (2012).

103. *See* discussion on whether chapter 15 applies extraterritorially *supra* note 53.

104. 11 U.S.C. § 1521 (2012).