Maritime Practice

2018 Year in Review

SEWARD & KISSEL LLP

To Our Clients & Friends

MARITIME PRACTICE — YEAR IN REVIEW 2018

2018 was another busy year for Seward & Kissel, and we are thankful for the continued support we received from our clients and friends.

The year began with a major tax legislation passed here in the U.S., the effects of which are still being ascertained, as the IRS continues to finalize regulations and issue guidance. Of particular interest to the shipowners are the GILTI tax and the modification of the deemed dividend rule. Another noteworthy regulatory development is the impending implementation of the IMO 2020 sulphur limitation regulation. As the deadline looms large, shipowners have begun to consider whether to install scrubbers and how to finance them. Across the Atlantic, British regulators' decision to cease requiring quotes from LIBOR panel banks will mean the demise of LIBOR as we know it, and the financing industry participants have begun to address this likely change.

On the transactional side, industry consolidation continued (perhaps accelerated) in 2018. Seward & Kissel was involved in many of the significant shipping M&A transactions in 2018, which often involved publicly listed companies. A public company merger can differ significantly in approach and structure, compared to a private company transaction, and appreciating those differences may be crucial in ensuring success.

On the financing side, traditional shipping banks have continued their withdrawal from the sector, but alternative lenders and several new entrants (as well as the continued leasing activities from Asia) have filled the gap. The shipping IPO market remained shut for the third consecutive year and existing public shipping stocks generally fared poorly despite improving charter rates and strengthening balance sheets in certain segments of the market. These improved balance sheets have resulted in more aggressive returns to shareholders through share buybacks, dividends and other balance sheet uses.

On the dispute resolution and regulatory side, Seward & Kissel obtained major wins and other favorable results, including a number of precedent-setting decisions in the OW Bunker cases and our representations in the Toisa bankruptcy case, all of which will provide helpful guidance for future cases. The firm also provided thought leadership on emerging issues in maritime law and counseled numerous companies in the maritime sector on international sanctions compliance in 2018.

As we look forward and ponder what 2019 will hold for us and our clients, many of the questions we asked ourselves last year still seem salient: Will traditional lenders continue their retreat from shipping? Will China's One Belt and One Road Initiative continue its expansion in shipping finance? Will private equity funds accelerate the harvest of their equity investments in shipping and will this lead to new investment and further consolidation? Will United States public equity markets recover from their recent downturn and will this lead to an improved public appetite for shipping equities? Will oil prices recover enough to bring badly needed stability to the offshore drilling and services sectors? Will new environmental requirements lead to increases in investment, scrapping, and newbuild orders? Will continuing uncertainty over Brexit affect London's position as a major shipping finance and insurance center? Will the opening of new areas for offshore drilling in the United States have any effect on the beleaguered offshore drilling and services sectors in the United States? Will populist concerns over free trade and globalization continue to affect policy, or be assuaged, and what will be the effect on international shipping?

We here at Seward & Kissel are here to help guide our clients through these tumultuous times. Our unique insight and capabilities have been honed through decades of experience and as a result of our being involved in all facets of the maritime industry, including shipping finance, public offerings and private placements, private equity investments, restructurings, litigation and bankruptcy, purchase and sale transactions, mergers and acquisitions, and from our having acted in varied capacities in each of these types of transactions. We look forward to continuing to assist our clients as the maritime industry finds its bearings and charts its course for 2019 and beyond.

The Seward & Kissel Maritime Team

Tax Reform Brings Changes

In December 2017, the Tax Cuts and Jobs Act (the "Act") was enacted. The Act made significant changes to the U.S. federal income tax system. While the Act had no changes that were directly aimed at the shipping industry, the overall changes to the U.S. federal income tax system have had some anticipated and unanticipated impact on the industry.

This article looks at the impact of those changes one year after the enactment of the Act.

Are you GILTI?

Starting in 2004 and continuing through 2017, active shipping income earned by a "controlled foreign corporation" (a foreign corporation more than 50% of the stock (by vote or value) of which is owned by "United States Shareholders") (a "CFC") was not subject to U.S. federal income tax in the hands of its U.S. shareholders until it was distributed (under the Act, undistributed and untaxed amounts accumulated by U.S. persons in a controlled foreign corporation were subject to tax at a reduced rate in 2017). Given the exemption from U.S. federal income tax available under Section 883 to CFCs, it was potentially beneficial for a foreign shipping company owned by U.S. persons to be structured as a CFC.

The new global intangible low-taxed income ("GILTI") provisions contained in the Act will reduce this benefit. Although the GILTI provisions are aimed at businesses generating substantial foreign income without the presence of significant tangible assets (e.g., technology companies), the provisions apply without regard to industry. Therefore, United States Shareholders of a CFC engaged in an active international shipping business may be subject to this tax.

For a summary of the GILTI computation, please see our October 2018 Client Alert.

A Change You Are Guaranteed to Like

One welcome development for taxpayers has been the issuance of proposed U.S. Treasury Regulations which would permit pledges of stock of, and guarantees by, foreign subsidiaries of U.S. parent corporations (the "Proposed Regulations").

The Act effectively exempted U.S. domestic corporations from U.S. federal income tax on dividends paid by their foreign subsidiaries (subject to certain holding period requirements). However, prior to the issuance of the Proposed Regulations, an investment by the foreign subsidiary in "United States property" would trigger taxable income to the U.S. parent corporation. This would be the case even though the U.S. parent could have received a distribution of assets from the foreign corporation without the imposition of U.S. federal income tax.

Prior to the issuance of the Proposed Regulations, if a foreign subsidiary were jointly and severally liable under a credit agreement with a U.S. parent corporation or the assets or stock of the foreign subsidiary were pledged as security for the obligation of a U.S. parent under a credit agreement or other debt issuance, the foreign subsidiary would be treated as making a deemed dividend distribution which would potentially be taxable to its U.S. parent.

Under the Proposed Regulations, an investment by a foreign subsidiary in United States property will be exempt from U.S. federal income tax to the same extent as a dividend distribution from the foreign subsidiary to its U.S. corporate parent would be so exempt.

As a result, a U.S. parent corporation may potentially pledge the assets or stock of its foreign subsidiaries as security for its obligations and a foreign subsidiary may guarantee those obligations without adverse U.S. federal income tax consequences. Lenders and borrowers should carefully review new and existing credit agreements and other relevant documents in light of these changes.

The Proposed Regulations are effective for taxable years beginning after the date on which the regulations are finalized. However, a taxpayer may rely on the Proposed Regulations for taxable years beginning after December 31, 2017.

Looking Forward

With divided government starting in 2019, the outlook for additional tax legislation has dimmed. However, the provisions contained in the Act will continue to keep the IRS busy issuing regulations and other guidance.

Scrubber Financing: Selecting the Right Option for Your Fleet

The debate on how to comply with the 2020 sulphur emission regulation and the accompanying sulphur cap of 0.5% has become one of the most divisive topics in the shipping industry. Shipowners are forced to grapple with the question of whether to acquire and install scrubbers or switch to more costly low sulphur fuel. For those contemplating the installation of scrubbers, a common question that arises early in the process is how to finance the high upfront cost, which is not easily passed on and can be in excess of $2 million per vessel. The following describes several ways in which owners have successfully financed the installation of scrubbers:

Increasing Existing Loans. A common and practical first step for owners wishing to finance scrubber installations is to approach their existing lenders. For owners with ample loan-to-value leeway, lenders are often willing to negotiate additional funding without impacting existing interest rates. Existing financing documents will need to be reviewed to confirm whether additional funding for the scrubber acquisition is permitted.

Bond Financing. For some owners, financing through an unsecured bond offering may be a viable solution. The benefit of bond financing is the expedient gain of capital without issuing equity or diluting current company ownership. Owners who have recently completed bond offerings may be able to seek an amendment to be able to use the proceeds for scrubber financing.

Borrowing against Unencumbered Assets. Another option is for owners to approach current or new lenders for a new loan against any unencumbered assets of the owner, including equipment or vessels where the original financing has been repaid. This, of course, is not always a workable solution as it requires owners to have a sufficient amount of collateral free and clear of liens and acceptable to a lender.

Second Lien Debt. Owners may also wish to approach a new lender and provide second liens on already encumbered assets. This, however, can be costly and difficult to negotiate, and first lien lenders may not be open to second liens on their collateral.

Funding Initiative. In 2015, Wärtsilä and Clean Marine Energy Europe Ltd. announced a funding initiative whereby the cost of scrubber acquisitions is repaid through premiums on heavy fuel oil ("HFO"). Under this model, the owner's payment amount would be based upon the then-existing spread between HFO and marine gasoil ("MGO"). The repayment period is expected to last four to six years, depending on the spread. While the initiative certainly eases the burden of upfront financing, it is also based upon the spread between HFO and MGO at a time where there is uncertainty regarding the cost of these fuels in the future.

Charterer Funding. As another less common financing option, some charterers are willing to fund the installation of scrubbers. Compared to more traditional methods of lending and traditional lenders, this option is generally considered to be significantly more expensive, as charterers and shipbuilders are going to expect substantial returns for fronting the capital, typically in the form of reduced charter rates or set-offs. This can be a very lucrative position for charterers, as it is currently cheaper to charter a ship with a scrubber than a ship fueled by MGO.

Yard Financing. Recently we have seen the shipyards installing the scrubbers agree to provide short-term financing on terms that often do not trip the debt prohibitions in an owner's underlying financing relating to the ship. Again, the existing financing documents must be closely reviewed to ensure this is permitted.

While there is a diverse array of options to finance scrubber acquisitions and installations, each shipowner has unique needs and circumstances that determine which options are viable for its fleet. It is important for owners to discuss what financing options are available to them and create a plan for compliance with the reduced sulphur emission cap taking effect in January 2020. The attorneys at Seward & Kissel have worked on a number of different scrubber financings and are available to assist no matter which financing option you choose.

Discontinuance of LIBOR

London Interbank Offered Rate (commonly known as LIBOR) is a benchmark interest rate used in hundreds of trillions of dollars worth of loans and derivative transactions, ranging from variable-rate home mortgage loans, interest rate swaps, loans supporting leveraged buy outs and of course, vessel purchase loans. LIBOR is determined on the basis of quotes submitted by panel banks, but because banks no longer rely on the interbank market for funding, these rate quotes are often estimates subject to discretion. The integrity of LIBOR has been in question recently (including as a result of the LIBOR-fixing scandal a few years ago).

The decision by British regulators to stop requiring LIBOR panel banks to submit rate quotes after 2021, thereby signaling the end of LIBOR has alarmed the financial markets that rely on LIBOR as a benchmark interest rate. Given that a commercial term loan typically has a tenor of five years or longer, new loan transactions being entered into now need to anticipate the consequences of LIBOR's potential demise.

Market participants have started to address the transition from LIBOR to alternative reference rates. For example, in the United States, the Alternative Reference Rates Committee (ARRC), comprised of regulators, financial institutions and industry groups like Loan Syndications and Trading Association (LSTA), has been active in developing a plan and has recently recommended Secured Overnight Finance Rate (SOFR) as one potential replacement for derivatives and some of the cash products (including loans).

The focus in the financing community currently is to devise contractual fallback language that the industry as a whole can coalesce around and can be incorporated in new loan agreements (and amendments). Many existing documents have built-in mechanisms dealing with temporary disruptions in the LIBOR market, but those provisions are unlikely to be a fix for the permanent cessation of LIBOR.

The proposed fallback languages currently in consideration focus on several issues, including:

- What event should trigger a transition from LIBOR to a new reference rate?
- What should be the new reference rate?
- How do lenders and the borrower agree to adjust the spread to account for the differences between LIBOR and the new reference rate?
- What voting threshold among the lenders is required to amend the reference rate provisions?
- Whether the fallback language should hard-wire a process by which the new reference rate is implemented

A one-size-fits-all approach may not be the answer, and the language may evolve into different versions for different products and deal structures. It remains to be seen how the industry responds to this important change in the financing market.

It is easy to glance over some of the boilerplate provisions in the back of a lengthy loan agreement, but a borrower is well-advised to pay attention to the developments regarding LIBOR and how the fallback provisions may affect its rights, should LIBOR cease to exist.

Differences between Public and Private M&A

In recent years, there has been a flurry of M&A activity in the shipping industry, with Seward & Kissel taking an active role in many of these transactions on behalf of its clients. Whether due to pressure from private equity shareholders seeking liquidity, a desire to create a larger platform to more easily access capital, demands for younger, more technologically-advanced and environmentally-friendly vessels, anticipated economies of scale, or other industry-specific factors that are already familiar to participants in this space, consolidation in shipping continues to accelerate.

Many of these transactions involve the acquisition of public companies listed in the U.S., which present unique issues and challenges that those unfamiliar with a public company sales process in the U.S. may not immediately appreciate. When considering such a transaction, there are some notable differences to keep in mind.

Timing Pressure. By their nature, public companies are more vulnerable to leaks or rumors that they are in merger discussions. Such leaks can create significant issues for the target and buyer alike, and potentially derail a transaction. As a result, parties are under greater pressure to complete due diligence and negotiate and sign definitive documents at a faster pace to minimize such risk.

Fiduciary Out and Related Deal Protection Terms. The boards of directors of public and private companies in the U.S. generally have a fiduciary duty to make sure the price at which their company is sold is fair and in the best interest of the company's shareholders. Given the threat of shareholder litigation, public target companies listed in the U.S. are under greater pressure to ensure that they have conducted some form of "market check" before or after signing a definitive agreement in order to maximize value for their shareholders. Similarly, in a public company sale in the U.S., the board of directors of the target company is usually provided with a "fiduciary out" that would allow it to terminate the proposed transaction if a superior offer from a third party materializes or in other limited circumstances. This is very different from a private transaction, where a seller would be prohibited from considering other offers after signing a binding agreement with a buyer. The wording of the "fiduciary out" provision, the specific circumstances where a "breakup fee" (typically an agreed-upon relatively small percentage of the overall transaction value) will be owed to the buyer if the target company terminates the transaction, and other deal protection mechanisms are heavily negotiated in public M&A deals in the U.S.

SEC Filings. Unlike private deals, transactions involving a target company listed in the U.S. are likely to require a number of filings with the Securities and Exchange Commission (e.g., proxy statements and registration statements, which are subject to the SEC's review and comment). This process can be time consuming and could extend the time period between signing and closing by several months.

Absence of Post-Closing Indemnification. Once a public company is acquired, the buyer almost never has recourse against the selling company's shareholders if something goes wrong after the closing. For example, unlike a private transaction, once a public company deal has closed the target company's shareholders typically cannot be sued for breaches of representations and warranties. As a result, the buyer's due diligence of the target company is of even greater importance, despite often being conducted on an accelerated timetable.

Public Disclosure. The material terms of a transaction involving one or more public companies listed in the U.S. (including full copies of the merger agreement or other definitive agreements) are subject to being described in great detail in public filings with the SEC. Private company sale terms, of course, would generally remain private absent an agreed press release by the parties revealing selected details.

As companies continue to seek out M&A opportunities, they should be mindful of the differences between public and private company deals in the U.S. When considering any M&A transaction, please consult with your Seward & Kissel relationship attorney early on to walk you through the M&A process.

Balance Sheet Transactions

The stock performance of public shipping companies during 2018 generally disappointed investors and issuers alike, with many companies trading at significant discounts to their NAV during the period. Across many sectors, this poor stock performance persisted despite the relative strength of charter rates, which left many companies with significant cash positions during the year.

With a high level of uncertainty in the shipping markets resulting from global trade tensions, the recent volatility in the broader markets and fleet renewal or expansion not an attractive use of capital for many companies, a significant amount of available cash was returned to shareholders during 2018, particularly during the fourth quarter. With few shipping companies paying cash dividends in this market, corporate share repurchases accounted for the majority of these transactions.

Among the companies repurchasing shares during the past 12 months were Euronav, Star Bulk, Golden Ocean, Scorpio Bulkers, Dryships and Diana Shipping. Perhaps the greatest factor contributing to the recent expansion of repurchase programs, besides the availability of cash, was the low stock prices that companies were able to repurchase at. Share repurchases at prices below net asset value, particularly when funded with the proceeds from asset sales, makes financial sense for the issuer and its shareholders, while also having the desired effect of supporting the stock price in the near term.

Like public companies in other industries, shipping company share repurchases were conducted pursuant to SEC regulations adopted under Rule 10b-18 of the Securities Exchange Act of 1934, which provides issuers with a safe harbor against market manipulation claims. The Rule however does impose certain restrictions on the manner and scope of the repurchases, including limits on the number of shares that a company can repurchase on a given day to 25% of the average daily trading volume, although certain larger block trades are permitted within the safe harbor.

At least one shipping company successfully repurchased shares through a registered self-tender offer that ended up being two and a half times oversubscribed, demonstrating the strong investor demand for such balance sheet transactions. While a self-tender allows a company to repurchase more than the number of shares that would have been permitted under a Rule 10b-18 program during the same period, the purchases are at a fixed price and has greater up-front costs, making it unsuitable for small programs.

The safe harbor provided by the Rule is also applicable only to common shares and repurchases are generally limited to the company's open trading windows under an insider trading policy, although a Rule 10b-18 repurchase program can be structured to permit repurchase during closed windows pursuant to pre-arranged trading parameters.

While share repurchases were the preferred method of returning capital to investors during the past year, it does have its disadvantages that a company must consider before implementation. For one, while actual or expected repurchases are generally favored by shareholders and can favorably impact stock prices, it reduces liquidity by reducing a company's public float, something many smaller companies cannot afford. Additionally, using available cash for share repurchases limits future investment opportunities or the ability to weather future downturns in an uncertain market.

Barnes v. Sea Hawaii Rafting, LLC

and the Scope of Bankruptcy Jurisdiction to Sell a Vessel Free and Clear of an Existing Maritime Lien

On March 28, 2018, in *Barnes v. Sea Hawaii Rafting, LLC*, a panel of the Ninth Circuit Court of Appeals notably questioned whether a bankruptcy court had any power to extinguish maritime liens in ordering a vessel sale under Section 363 of the Bankruptcy Code. 886 F.3d 758 (9th Cir. 2018). The Court found that maritime liens can only be extinguished by a court sitting in admiralty absent the consent of the lienors, distinguishing aspects of the Second Circuit's 2005 decision in *Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.)* 419 F.3d 83, 2005 AMC 1987 (2d Cir. 2005).

In *Barnes*, the plaintiff was injured on the *M/V Tehani* (the "Vessel") when the Vessel exploded. He asserted a maritime lien for seaman's wages and the maritime remedy of maintenance and cure against the Vessel *in rem*, and *in personam* against Sea Hawaii Rafting, LLC ("SHR"), the vessel owner, and Kris Henry ("Henry"), SHR's owner and manager. After some fifteen months of litigation, SHR and Henry filed for bankruptcy protection – SHR for dissolution under Chapter 7 and Henry for reorganization under Chapter 13 – resulting in imposition of an automatic stay under Section 362(a) of the Bankruptcy Code and staying the proceedings that plaintiff had commenced.

The bankruptcy court partially lifted the stay to allow the district court to adjudicate the merits of any maritime lien claim asserted by Barnes against the Vessel, but kept the stay to bar enforcement of any maritime lien against SHR or Henry. After reopening the case, the district court dismissed the plaintiff's claim against the Vessel for lack of *in rem* jurisdiction. While Barnes' appeal was pending, the bankruptcy court also purported to approve the sale of the Vessel free and clear of all liens for $35,000.

On appeal, the Ninth Circuit reversed the district court's order and issued a writ of mandamus to the district court to award the plaintiff maintenance. 886 F.3d at 765. The Court's jurisdictional analysis was notably definitive, finding that the admiralty "court's control over the vessel, once obtained, was exclusive" and that the "later-filed bankruptcy petition did not divest the district court of *in rem* jurisdiction" *Id.*

This decision squarely addresses issues that were avoided for the most part in *Millenium Seacarriers* and also calls into question decisions that assume a bankruptcy court's use of the automatic stay ousts the prior exercise of *in rem* jurisdiction and can enjoin those actions. *See Atl. Richfield Co. v. Good Hope Refineries, Inc.*, 604 F.2d 865, 869-70 (5th Cir. 1979). Instead, "neither the timing of the bankruptcy petition relative to the maritime lien nor the nature of the bankruptcy proceeding – liquidation versus reorganization – factored into [the Ninth Circuit's] decision" and the Court ruled that once *in rem* jurisdiction had vested with the admiralty court, the bankruptcy court could not later obtain jurisdiction by the filing of a bankruptcy petition. *See Barnes*, 886 F.3d at 774.

An important factor in *Millenium Seacarriers* was the fact that the lienors had voluntarily submitted their claims by filing notices of objection and litigating their liens in adversary proceedings. Indeed, the Second Circuit was explicit in stating it did not address "whether the bankruptcy court could have expunged the vessels of their liens had it not had jurisdiction over the lienors." 419 F.3d at 103. The Court found, moreover, that "[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." *Id.*

Those risks continue and are perhaps heightened since the Ninth Circuit's decision in *Barnes*. Prospective purchasers of vessels in distressed asset sales must be mindful of the additional diligence needed to understand the possible lien exposure maritime assets may face, where – after *Barnes* – the application of bankruptcy law may not in all circumstances permit that exposure to be fully extinguished.

Toisa Takeaways: Lessons from Two Years in Bankruptcy

Toisa Limited and its affiliates ("Toisa") filed for bankruptcy in the Southern District of New York on January 29, 2017, meaning that the cases are rapidly approaching their two-year anniversary (and hopefully their conclusion). Given the approaching milestone, it seems appropriate to look back and determine what lessons can be learned -- particularly, how could these cases have been expedited? Time adds to the administrative costs of any bankruptcy proceeding, so a quick trip through bankruptcy generally benefits all creditors.

Unfortunately, the Toisa cases have been quite the opposite. Toisa's bankruptcy was a "free-fall" filing, meaning that there was no pre-arranged agreement on a restructuring. Gregory Callimanopulos (the "Owner") and the management team remained in control of the debtor-in-possession. Toisa entered bankruptcy supported by a financial advisor that had limited experience in complex chapter 11 cases, which seemingly impeded the distribution of necessary financial information.

Approximately three months into the case, after much back and forth, the lenders persuaded the Owner to retain financial advisors with relevant experience. Even so, frustrations for the lenders continued, as the Owner and the lenders made no progress toward a consensual restructuring.

The Owner ultimately filed a plan on August 15, 2017 which allowed the Owner to maintain his equity position, which had no creditor support. On September 19, 2017, the lenders submitted a lender-supported plan term sheet in response. As the parties were at an impasse, they ultimately agreed to mediate. At mediation in November 2017, an agreement was reached whereby the Owner would relinquish control of Toisa in favor of a Chief Restructuring Officer (and a new board) in exchange for the release of certain claims. The term sheet was approved by the court on January 22, 2018, almost one year after the petition date, effectively removing the Owner from the case.

Since that time, the CRO and lenders have worked cooperatively to liquidate collateral (nearly all oceangoing vessels have been sold, with offshore sales in progress). The parties recently filed a largely consensual liquidating plan, providing for the complete wind-up of Toisa and its estate.

The obvious issue with the Toisa cases is the duration. As noted, the first year of the case was largely spent attempting to obtain information and awaiting a proposed plan that had little to no chance of success. So, what can be learned?

Retention of appropriate professionals is paramount to required information flow. Here, the Owner-retained financial advisors simply did not have the capacity to produce the volume of information required by a complex chapter 11 case (only a few firms have the personnel required to deal with these unique situations). Recognition of this problem and immediate action are important. Lenders should wield whatever leverage they may have at the first possible moment, including prior to bankruptcy, to avoid such a scenario.

Recalcitrant shareholders are difficult to deal with, especially given chapter 11's policy of granting the debtor an opportunity to restructure. It is likely that the bankruptcy court will give the debtor and its ownership/management time to formulate a plan absent exigent circumstances. In Toisa, the lenders expressed their frustration to the court on several occasions, but were only able to get the Owner to back away from the case after formal mediation with a former bankruptcy judge. With respect to this issue, the lenders' only obvious recourse may have been seeking mediation earlier in the case, as it is becoming the favored path to resolution of difficult issues for many bankruptcy judges.

The Jones Act and Restructurings — How Big a Hurdle?

In order to qualify to engage in the coastwise trade of the United States, a vessel must be (i) built in the United States, (ii) 75% owned by United States "citizens", (iii) controlled by United States citizens, (iv) crewed by United States citizens and (v) documented under United States flag. That all sounds simple enough but in practice it is a lot more complicated. The focus of this note is the citizenship requirement, specifically in the context of a corporate debt restructuring, a topic the relevance whereof has been made clear by the number of recent restructurings of Jones Act companies.

Demonstrating ownership and control can be difficult in the ordinary course, especially for a public company. Now, for a company in financial distress seeking to recapitalize, whether in or out of court, the task is even more complex. Quite often, the financial restructuring of a company – at least a successful one - involves a debt for equity swap whereby a certain class of creditors of a struggling company forgive some or all of the debt obligations owing to them in exchange for equity of the company. However, the aforementioned citizen ownership requirements present a significant hurdle to that approach.

Unlike the citizenship requirement for equity ownership, there is no analogous test for debtholders. Moreover, for most companies in distress, there is a fair chance that the debt of those companies has traded in the secondary market and is now owned by a wide array of entities including investment vehicles established in offshore jurisdictions. While there is nothing to prevent these vehicles from holding debt, those that cannot meet the citizenship test imposed by the Jones Act cannot merely convert their debt holdings into equity, unless such conversion keeps non-U.S. ownership below 25% of the total equity outstanding.

An elegant response to this problem developed and fine-tuned over the years is the use of warrants that can be issued to non-citizen debt holders (such warrants have been used in, most recently, Tidewater and GulfMark restructurings). As best as can be, the economic value of the warrants can approximate the value of the shares given to qualifying shareholders (e.g., through the use of a cashless exercise mechanism, dilution protections, ready transferability, etc.). The United States Coast Guard (from whom the prudent practitioner or issuer should seek a private letter ruling approving the form of warrant) has historically focused on whether the warrant holder has any voting rights or other elements of control or any economic rights analogous to dividend rights afforded a stockholder; if neither is present, there is an excellent chance the form of warrant will be approved.

Essentially, the Coast Guard has adopted the view that such warrants are not equity. This is true notwithstanding more conventional views (and certainly that adopted by the Securities and Exchange Commission) that warrants are "equity". Yet, in context, the view taken by the Coast Guard makes perfect sense (and, to be candid, if the Coast Guard had adopted a contrary view, certain restructurings might have ended up as liquidations). And, while control may be an issue in negotiating a restructuring with debtholders, dividends are not an immediate concern. Most affected creditors take the view that by the time any dividends are payable, they will have been able to sell their warrants to a party eligible to exercise them.

The successful use of these warrant structures at the company level presents an interesting further opportunity. That is, if warrants work on the company level to preserve citizenship, could an investment vehicle qualify as a U.S. citizen eligible for stock instead of warrants in a restructuring of a Jones Act company simply by mirroring the stock/warrant structure at the investor level? This is an intriguing prospect worthy of further thought and analysis. If the debtholder transfers the debt to a vehicle with similar ownership but in which qualifying holders were granted stock or its equivalent and non-qualifying holders received warrants, would that not (1) make the restructuring easier to accomplish and (2) broaden the base of U.S. citizen holders of the issuer? This would make it considerably easier for investment funds to participate in the ownership of a Jones Act company.

Case Updates & Other News

International Arbitration

In late January, Seward & Kissel began work on two maritime arbitrations concerning shipments of iron ore and related contracts for Commodities & Minerals Enterprise, LTD. ("CME") against a Venezuelan government-related entity. Hearings ran for twenty-five trial days in total and re-commenced less than two months following our firm's substantive engagement. Final awards were issued in our client's favor for some $192 million plus interest, which to our knowledge includes the largest award issued by a panel of the Society of Maritime Arbitrators. Relatedly, the firm successfully argued CME's claim for confirmation of a $63 million partial final security award in one of the arbitrations in the United States District Court for the Southern District of Florida (Miami Division).

O.W. Bunker Litigations

Since November 2014, Seward & Kissel has represented ING Bank N.V., as security agent for a syndicate of lenders, in over fifty proceedings across the United States arising out of the global collapse of the O.W. Bunker group, a multinational provider of marine fuels. ING has asserted claims as assignee of O.W. Bunker entities under the Commercial Instruments and Maritime Lien Act, 46 U.S.C. § 31342 ("CIMLA"), which provides a maritime lien on a vessel to "a person providing necessaries to [the] vessel on the order of the owner or a person authorized by the owner. . ." 46 U.S.C. § 31342(a). The district courts in these actions have thus needed to determine who "provided" necessaries upon the owner's order (and thus who has the lien) when there existed a supply chain involving multiple contractors and subcontractors. Seward & Kissel has obtained favorable results in the vast majority of district court decisions on this issue to date, and at the outset of 2018 in our prior year-in-review, we noted that there were over a dozen O.W. Bunker-related matters pending on appeal in the Second, Fifth, Ninth, and Eleventh Circuits. Those appeals have now all been argued and resolved in our client's favor (as party or *amicus curiae*) in virtually all respects, including most prominently in the following decisions: *NuStar Energy Servs. v. M/V Cosco Auckland*, No. 17-20246 (5th Cir. Jan. 14, 2019); *Clearlake Shipping Pte Ltd v. O.W. Bunker (Switz.) SA*, 911 F.3d 646 (2d Cir. 2018); *Bunker Holdings Ltd. v. Yang Ming Liber. Corp.*, 906 F.3d 843 (9th Cir. 2018); *ING Bank v. M/V Temara*, 892 F.3d 511 (2d Cir. 2018); *Valero Marketing & Supply Co. v. M/V Almi Sun*, 893 F.3d 290, 294-95 (5th Cir. 2018); and *Barcliff, LLC v. M/V Deep Blue*, 876 F.3d 1063 (11th Cir. 2017).

Marshall Islands Litigations

Seward & Kissel litigators bolstered their cross-border expertise, appearing before the High Court of the Republic of the Marshall Islands in two separate actions to successfully defend shareholder derivative and fraudulent conveyance actions brought against shipping companies whose businesses are registered in that jurisdiction. The firm obtained decisions of first impression on the application of Marshall Islands law to the common law and statutory claims alleged in those proceedings and obtained dismissals at the pleading stage in both cases.

Marshall Islands Bar Admission

Seward & Kissel's Mike Timpone, Robert Lustrin, Hoyoon Nam and Kurt Plankl have been admitted to practice in the Republic of the Marshall Islands, which will help the firm strengthen its Marshall Islands practice.

Partner Promotions

Robert Gayda and Hoyoon Nam have been promoted as Seward & Kissel's new Partners. Bob specializes in bankruptcy and restructuring matters, and Hoyoon focuses on financing matters.

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2018 Highlights

Ocean Rig UDW Inc. (NASDAQ:ORIG) in its $2.7B merger with Transocean Ltd.

Euronav NV in its merger with Gener8 Maritime

Poseidon Containers in its merger with Global Ship Lease, Inc.

Scorpio Tankers Inc. in its $340 million public offering of common shares

TORM plc in its private placement of newly issued Class A common shares

DNB in connection with the $130M million senior secured term loan facility extended to Seacor Marine Foreign Holdings Inc.

Borr Drilling Limited in its acquisition of Paragon Offshore Limited

Ship Finance International Limited in its $164M offering of 4.875 % Convertible Senior Notes Due 2023

Star Bulk Carriers Corp. in its acquisition of 15 dry bulk vessels from Songa Bulk ASA

DVB, as JV partner, in connection with an up to $150 million loan facility for the purposes of acquiring marine and intermodal containers

Euronav in its $434 million sale of six VLCCs to International Seaways (NYSE:INSW)

ING Bank N.V.

Obtained appellate victories in O.W. Bunker-related litigations in the Second, Fifth, Ninth and Eleventh Circuits for **ING Bank N.V.**, as Security Agent

TBS Ocean Logistics Inc. in connection with a strategic investment by Mitsubishi Corporation and Lars T Ugland

Dynagas LNG Partners LP in its $55 million public offering of 8.75% Series B Fixed to Floating Rate Cumulative Redeemable Perpetual Preferred Units

Obtained final awards in excess of $190M on behalf of **Commodities & Minerals Enterprise, Ltd.** in an arbitration against a Venezuelan government-related entity

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