Effective Chapter 15 Strategies for Marine Equipment Lessors and Maritime Lien Creditors

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I. Introduction

Chapter 15, the section of the United States Bankruptcy Code that provides U.S. bankruptcy courts assistance in foreign insolvency proceedings, is now more than a decade old. n1

Since its passage in 2005, 840 Chapter 15 cases of various types have been filed, resulting in 73 written opinions that address various issues under Chapter 15.

One thing is consistent across all of these cases; creditors, particularly creditors with junior security interests, including those holding maritime liens or maritime leasehold interests in multi-modal equipment, must be prepared to act decisively when there is even a hint of a Chapter 15 case filing.

What is clear from the Chapter 15 cases in the maritime area (there have been about a dozen of the 840 filed since

2005) and through the few preceding maritime cases filed under Chapter 15's predecessor, *U.S. Bankruptcy Code Section 304* (a more general provision providing for the U.S. Bankruptcy Court's assistance of foreign insolvency pre-proceedings), is that without thoughtful pre-planning, which must include awareness not only of U.S. Chapter 15 procedure and of foreign procedures either in [*45] primary cases or others providing for assistance to the primary, maritime lien holders and leaseholders can be substantially disadvantaged and in many cases lose the value of their liens, leases and equipment. n2

This paper addresses the particular concerns in Chapter 15 cases of maritime lien holders (both in tort and contract) and lessors of marine equipment such as ocean containers, chassis and generators. However, with the right pre-planning and quick action when a Chapter 15 filing is imminent, it is possible to minimize losses and perhaps even to come out ahead.

The three areas of successful challenge to a Chapter 15 filing that have emerged are: (1) that the debtor does not have sufficient U.S.-based assets to justify a chapter 15 proceeding; (2) that the debtor is insufficiently connected with the place of the foreign bankruptcy has been filed; and (3) that the foreign proceeding has not actually commenced or has concluded. n3 A further way to counteract a Chapter 15 case is for three or more creditors to initiate involuntary bankruptcy proceedings under Chapter 7 or 11. Initiating these proceedings may overcome a Chapter 15 filing and give the U.S. Bankruptcy Court primary jurisdiction over administration of the debtor's estate, at least in the U.S., over the Chapter 15 proceeding, and thus the foreign proceeding.

II. Creditors Must Pre-Plan for a Chapter 15 Case

A typical chapter 15 case will proceed in this way. First, there will be an insolvency proceeding initiated outside of the United States. n4 After the foreign insolvency initiation, creditors must be ready to anticipate that there will be a Chapter 15 filing in the U.S. and must attempt to both recognize and assist in the proceeding. In the history of Chapter 15, no U.S. bankruptcy courts have refused, based on a challenge to the procedure of the foreign bankruptcy court, to conclude that the foreign proceeding, in and of itself, cannot be recognized under Chapter 15 as either a primary or ancillary proceeding. n5 Chapter 15 imposes basic presumptions favoring recognition of an alleged foreign proceeding, n6 and because the Bankruptcy Court will look [*46] immediately to those presumptions, it is important, as early as possible and ideally well in advance of a Chapter 15 filing, for maritime equipment lessors and maritime lienholders, to identify what may be their unique defenses and strategies, as opposed to those available to other creditors.

A. Likely Venue of the Chapter 15 Proceeding

Like most bankruptcy cases led by competent debtor's counsel, the debtor will, without any formal advanced notice, spring up in the U.S. Bankruptcy Court (most Chapter 15 cases have been brought in the Southern District of New York, Delaware, the Southern District of Florida or the Southern District of Texas) with a plethora of motions which the debtor presents on an ex parte basis. n7 Because there is no automatic stay on filing of a Chapter 15 petition, a temporary restraining order ("TRO") will be among these motions. This motion restrains all actions against debtor property located in the United States n8 until the court can consider recognizing the foreign proceeding on a permanent basis under Chapter 15 and impose a permanent stay.

B. The Debtor's Choice of Foreign Forum

The fundamental question here is, "why did the debtor choose to proceed in a foreign proceeding, rather than a U.S. proceeding under Chapter 7 or 11?"

In order to bring a Chapter 7, 11 or 15 proceeding there must be debtor's assets and business in the U.S. "Therefore, even if the center of a debtor's business operations is outside of the U.S., they must satisfy a prerequisite to a Chapter 15 proceeding as having assets in the U.S. As the U.S. Court of [*47] Appeals for the Second Circuit held in In re Barnet, a foreign debtor can only have Chapter 15 recognition if it has business or assets in the U.S. n9 Such assets must be the

same as those forming a sufficient basis for a Chapter 11 reorganization or Chapter 7 liquidation, with both subject to the oversight of the U.S. Trustee and detailed financial reporting to the U.S. Bankruptcy Court.

If the debtor has chosen a foreign insolvency proceeding rather than one in Chapter 7 or 11, then creditors must immediately consider why the debtor has chosen the foreign proceeding, rather than a U.S. proceeding that requires significant oversight of the debtor. n10 Although U.S. Bankruptcy Courts will observe comity, the choice of an insolvency forum is a legitimate first question for creditors to not only ask, but raise to the U.S. Bankruptcy Court. Has the debtor chosen a forum favorable to the debtor, over a U.S. Bankruptcy forum? Unless the foreign proceeding is involuntary, the answer usually is, "yes." The fact is, no world insolvency jurisdiction will give U.S. maritime lien creditors, or maritime equipment lessors, greater rights than those afforded to them in a U.S. Bankruptcy Court. Consequently, U.S. maritime lien creditors and marine equipment lessors must be prepared to insist on their rights when the foreign debtor files a Chapter 15 petition, as that foreign debtor has recognized (and chosen and planned) that it will fare better in the foreign insolvency jurisdiction, rather than in the U.S. n11

III. Educating the Chapter 15 Bankruptcy Judge About Unique Maritime Issues

Maritime creditors who may be restrained in a U.S. Chapter 15 proceeding must be ready to appear by counsel on nearly a moment's notice to begin educating the bankruptcy court about the unique issues involved with maritime liens and mobile, leased maritime property. Unfortunately and increasingly so, most U.S. Bankruptcy judges (and many federal district judges as well) rarely will have initial understanding of the operation of maritime liens and of containerized and multi modal operations. Accepting that there can be such a thing as an unrecorded and "secret," yet perfected [*48] lien (the very nature of a U.S. maritime lien in rem), will be a matter of education for the bankruptcy court. Challenges of recovery and control of mobile equipment will also be a learning point for the bankruptcy court, as this equipment is constantly moving internationally and therefore between different legal regimes.

Although most chassis are now leased directly to truckers, there are still some intermodal chassis leased directly to steamship lines, including those operating ro-ro vessels that transport the chassis offshore. Consequently, a Chapter 15 stay, preventing recovery of chassis, raises concerns about the disposition of the chassis, payment of depots and terminals for storage, chassis return, repair and insurance. (If premiums are paid on the insurance, this payment will be extended to the lessor as additional insured).

Therefore, the first step once the Chapter 15 case is filed, is to educate the judge about the nature of the interests involved. Despite the strength of their argument, creditors should be prepared that a U.S. bankruptcy court first considering a Chapter 15 petition will, given bankruptcy courts' typical, initial incline toward debtors, enter the TRO. However, even though a TRO almost certainly will be entered, the education to the judge is not wasted because it prepares the bankruptcy court for opposition to entry of an unmodified, permanent stay order.

For example, some countries' vessel arrest laws, such as Spain's, require the entry of a judgment against the in personam debtor as a condition of entering a judgment in rem against a vessel arrested in the country. Maritime sales or lease terms and conditions frequently contain submission to U.S. jurisdiction clauses. This clause permits service of a U.S. District Court summons and complaint on the debtor, followed by entry of judgment if not successfully opposed. The creditor with such a contractual clause, with an arrest or potential arrest in a jurisdiction like Spain, must be prepared to argue to the judge that there should be a limited lift of bankruptcy stay to allow proceeding in personam against the debtor/bankrupt, in order to have the judgment entered necessary to affect the arrest proceeding.

In In re Britannia Bulkers A/S, n12 the Court did this in response to the showing of the creditor, allowing for the entry of judgment providing that there would be no execution on the judgment against the debtor in the U.S. n13 This case illustrates why it is important to know if one holds a maritime lien [*49] against the debtor's assets or vessels which the debtor is chartering, or has maritime rights arrest. It is also important to know where the vessels or property are circulating and what regimes apply to that vessel or property. For example, although the vessel may not yet be in a jurisdiction requiring interim in personam judgment against the debtor, a creditor may want to argue that any stay be

modified to allow for that judgment because the vessel is likely to arrive in such a jurisdiction.

A. The Debtor Must File its Foreign Case in its "Center of Main Interests"

The Second Circuit in In re Fairfield Sentry Ltd., n14 held that the foreign debtor's "center of main interests" (COMI), is the primary consideration bankruptcy courts should apply to determine whether and how Chapter 15 proceeds'. n15 Thus, it is possible that in order to obtain the benefits of a Chapter 15 case, a debtor might first choose the foreign jurisdiction most beneficial to it, and then between the filing and attempt at Chapter 15 petition filing, try to change its COMI. Fairfield Security leaves open the option to challenge a debtor's COMI as having been manipulated in bad faith.

Creditors seeking to challenge a Chapter 15 petition based on COMI should be knowledgeable of the debtor's COMI at the time the foreign proceeding is filed, and then take note of any change between that filing and the Chapter 15 petition filing. *11 U.S.C. § 1516(c)* imposes the presumption that the debtor's COMI is the place of its registered offices, but creditors may present evidence rebutting the presumption. n16 The court should question a debtor's COMI assertion where the debtor has multiple offices and substantial operations in areas other than its asserted COMI. n17

B. Unique Aspects of the U.S. Maritime Lien In Rem

Related is the need for education of the court about contract-based maritime liens in rem, which can be executed in only a few places outside of [*50] the U.S. Chapter 15 proceedings only restrain actions against the debtor's property located in the United States. The difficulty arises when a vessel, against which the creditor would have a maritime lien, is arriving in the United States and then may sail to other jurisdictions where the U.S. maritime lien holder either lacks priority or has no arrest rights at all. As vessels operations, furthermore, maritime liens, which are last in time, first in right, lose value, they continue to be subject to other maritime liens. Assume for example that a creditor holds a valid U.S. in rem maritime lien against a particular vessel chartered by the debtor. In this situation the Chapter 15 stay is entered, and the debtor's chartered vessel then sails and incurs more contract-based liens, which the debtor fails to pay.

C. Unique Aspects of U.S. Maritime Tort Liens

Among the remaining questions about Chapter 15 are those about the rights of creditors that may hold maritime tort claims against the debtor. For example, many bunker suppliers have in their sales terms and conditions provisions to retain title to the bunkers until the bunkers are paid for. Although when these "retention clauses" appear with a US choice of law clause, courts have held that title nevertheless has passed, courts recognizing retention clauses appearing with English law choice have held, in the United States and elsewhere, that the retention clause is valid and that the consumption of unpaid bunkers causes a conversion. This raises not only an action in tort, often post-insolvency petition filing, in personam against the debtor, but also one in tort for a maritime lien against the vessel.

Although the foreign bankruptcy proceeding might recognize a contract claim, it might not recognize a tort claim. A similar tort claim could include the continued use of containers and chassis after the expiration of a leasehold interest or termination. In the face of the lessor's demand to return equipment, the foreign insolvency court might also not recognize these claims. The creditor or lessor thus must be prepared to argue to the court in Chapter 15 that, similar to a proceeding in another bankruptcy chapter such as Chapter 7 (liquidation) or 11 (reorganization), the stay should be lifted to allow for the litigation of the tort claim before a U.S. District Court in admiralty so the creditor's right of action, arising under U.S. law, can be preserved.

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D. Unique Aspects of Maritime Torts and Indemnity-Only Policies

Of even more concern, in the case of owned vessels, are tort liens from collision or personal injury. n18 These may not ultimately be insured against because most marine protection and indemnity ("P&I") vessel insurance policies are

indemnity "pay when paid" policies. An insolvent insured/owner may not be able to pay the loss and therefore will not qualify for indemnity reimbursement under the policy.

E. U.S. Maritime Law Gives Maritime Liens Priority Over Foreign Mortgages

In the United States, while a maritime lien holder in realm almost always will take priority over a foreign mortgage, the foreign mortgage will take priority over the US maritime lien most everywhere else in the world. Consequently, in an insolvency situation, the holder of a maritime lien in rem will be in conflict with the otherwise senior security interest holder of a vessel mortgage. It will be the interest of the mortgage holder, which often is working closely with the debtor, to resist any attempt to lift stay for an arrest in the United States, because it wants to foreclose outside the United States on the mortgage interest. Almost always, this foreclosure, even if a United States maritime lien holder has no rights or the foreclosures taking place, will extinguish the maritime lien in rem.

This is why the maritime lien holder, and marine equipment lessor, must be prepared to educate and move quickly once there is a chapter 15 proceeding filed. First, the creditor must use the occasion of the TRO hearing to educate the court, and then should insist that as a condition of the entry of any permanent restraint to have the maritime lien holder, and equipment lessor, either adequately secured or permitted to proceed to arrest or to recover equipment.

The maritime lien holder must be prepared to show the court that, if the vessel were arrested in the U.S., there is equity in the vessel over and above any other security interest. This sometimes is a complicated argument, looking not only at the total number of maritime liens that could be asserted against the vessel, but also being prepared to face the argument that because the vessel is outside of the United States, the maritime liens in rem will not be recognized and have no value. The maritime lien holder must be prepared to argue that it has very reasonable grounds for insecurity if the vessel, which [*52] is about to call the US, is allowed to discharge and depart the US without providing security.

IV. Arrest Before Commencement of a U.S. Chapter 15 Proceeding and TRO

If there is a foreign insolvency filing, and thus reason for concern about one, maritime lien holders should move quickly to arrest any vessels they can prior to the entry of a Chapter 15 temporary restraining order. Once the TRO is issued, it will be difficult to convince the Bankruptcy Court to lift the stay to allow for arrest quickly enough before the vessel arrives and deports. The Bankruptcy Court may simply refuse to lift the stay to allow the arrest and instead require the creditor to file a claim in the form proceeding. However, once an arrest is made, the court is unlikely to require the creditor to release the arrest, without the posting of security for the perfected lien.

A. Maritime Attachment Before Chapter 15 Commencement and TRO; Turnover

In contrast to arrests in other jurisdictions, is a maritime attachment, where the creditor holding a maritime contract or tort claim attaches assets of the debtor in the United States. U.S. Bankruptcy Courts exercising their powers under Chapter 15 have, despite the argument of attaching creditors that they hold a proper attachment lien against the assets that was executed before any temporary restraining order, required the creditors to release the attachment. These courts have adopted the argument that although they may not have avoidance power under Chapter 15, they do have the power to order the turnover of debtor assets. n19

In a general U.S. bankruptcy law context, this would be considered to be a violation of creditors' rights under the Bankruptcy Code's voidable preference section, *11 U.S.C. § 547*. That section provides for the defenses of simultaneous exchange for value, ordinary course of business, and set off. Chapter 15 excludes preference and voidable preference actions. Nevertheless, Chapter 15 does not exclude avoidance actions that require the turnover of estate assets, which can include security interests against the [*53] property of the estate. n20 Turnover can only include assets in the U.S., and turnover orders must include conditions to protect creditors and other parties interested in the property that is to be turned over.

Nevertheless, creditors should still proceed to use maritime attachments against the possibility of a Chapter 15 filing, as there may be good defenses to it. For example, a further defense could be that the foreign proceeding does not continue, but instead is dismissed. Once a foreign proceeding is dismissed, any orders in the Chapter 15 proceeding that are brought in order to assist the proceeding also become ineffective.

B. Know the Foreign Insolvency Law Involved in the Foreign Main Proceeding

Chapter 15 requires that U.S. Bankruptcy Courts:

In interpreting this chapter [*11 U.S.C.§§1501* et seq.], the court shall consider its international origin, and the need to promote an application of this chapter [*11 U.S.C.§§1501* et seq.] that is consistent with the application of similar statutes adopted by foreign jurisdictions. n21

Therefore, counsel for creditors, in a potential or current Chapter 15 proceeding, must know (or have good foreign insolvency counsel identified to advise them on) the foreign insolvency law involved. The origin of this principle of U.S. Bankruptcy Courts in Chapter 15 recognizing and applying the main proceeding's law, is United Nations Commission on International Trade Law ("UNCITRAL") Model Law on Cross-Border Insolvency, which the U.S. enacted into Chapter 15. n22 A central principle of the UNCITRAL: Model Law is that courts assisting a foreign main proceeding are, to the extent possible, to apply the principles of the foreign proceeding, carry out the powers of the foreign insolvency proceeding, and marshal assets of the [*54] debtor in assistance of that proceeding. At the same time, the public policy exception for this chapter states that:

Nothing in this chapter [*11 U.S.C. §§1501* et seq.] prevents the court from refusing to take an action governed by this chapter [*11 U.S.C. §§1501* et seq.] if the action would be manifestly contrary to the public policy of the United States. n23

Although Chapter 15's public policy exception is narrow, creditors that believe the application of foreign insolvency law will prejudice their interests should still raise it. n24 For example, in In re Sivec SRL, n25 the Bankruptcy Court in Chapter 15 refused to stay creditors' pre-existing U.S. District Court case, where Italian insolvency law would have required creditors to try their case in Italy. n26 The court observed that Italian law would not recognize the creditors' interests, leaving them unprotected.

C. The Foreign Main Proceeding Administers the Insolvent's Estate

Chapter 15 limits U.S. Bankruptcy Courts' power to U.S. territorial jurisdiction. Chapter 15 therefore does not create a "bankruptcy estate," and instead, U.S. Bankruptcy Courts are to exercise comity (in general deference to) and cooperate with the foreign insolvency court. n27 Generally, the powers of U.S. Bankruptcy Courts in Chapter 15 are much less extensive than those in Chapters 7 or 11. Chapter 15 is limited to stay of actions in the United States against debtor property in the United States. U.S. Bankruptcy Courts under Chapter 15 are explicitly without the power to order, pursuant to U.S. Bankruptcy, fraudulent conveyance or avoidance provisions, (*11 U.S.C.§§547*, *548*) the avoidance of preferential payments, or to require return of property because of an alleged fraudulent conveyance. n28 Nevertheless, even prior to recognition, simply on filing, U.S. Bankruptcy Courts may grant [*55] certain immediate relief, including stay of execution n29 after recognition, pursuant to *11 U.S.C. § 1521* ("Relief that may be granted upon recognition"), courts may extend further relief, as follows:

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter [*11 U.S.C.§§1501* et seq.] and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including-

(1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a) [*11 U.S.C. § 1520(a)*];

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a) [*11 U.S.C. § 1520(a)*];

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a) [*11 U.S.C. § 1520(a)*];

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

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a) [*11 U.S.C. § 1519(a)*]; and

(7) granting any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a) [*11 U.S.C. §§522*, *544*, *545*, *547*, *548*, *550*, and *724(a)*].

(b) Upon recognition of a foreign proceeding, whether main or nonmain, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or [*56] another person, including an examiner, authorized by the court, provided that the court is

satisfied that the interests of creditors in the United States are sufficiently protected.

(c) In granting relief under this section to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the law of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(d) The court may not enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding, under this section.

(e) The standards, procedures, and limitations applicable to an injunction shall apply to relief under paragraphs (1), (2), (3), and (6) of subsection (a).

(f) The exercise of rights not subject to the stay arising under section 362(a) [*11 U.S.C. § 362(a)*] pursuant to paragraph (6), (7), (17), or (27) of section 362(b) [*11 U.S.C. § 362(b)*] or pursuant to section 362(o) [*11 U.S.C. § 362(o)*] shall not be stayed by any order of a court or administrative agency in any proceeding under this chapter. n30

Under Chapter 15, the foreign court in which the primary proceeding is held administers the bankruptcy estate. Therefore, creditors must choose whether they will submit to the foreign jurisdiction and any restraint that it has on those creditor's' action, in order to assert a claim. While it may seem that claims deadlines and bar dates of a foreign proceeding are irresistible, creditors, particularly U.S. maritime creditors which may have actions available around the world, should seriously consider not submitting to the foreign proceeding. Although a TRO and final order in a Chapter 15 proceeding will restrain actions in the U.S., it will not restrain actions outside of the U.S., even by creditors subject to the U.S. Bankruptcy Court's jurisdiction.

Consequently, in connection with any potential for an ongoing Chapter 15 proceeding, a creditor must consider whether it will submit to the foreign proceeding, including filing a claim. Submission to that foreign proceeding may subject the creditor to the automatic stay or other stay of that insolvency proceeding, so that the creditor may be precluded from proceeding anywhere [*57] in the world against the debtor's assets. At the same time, the creditor may also potentially make itself subject to claims by the debtor in the foreign proceeding, including, for example, for alleged "wrongful arrest" or another similar claim, even where the arrest occurred outside of the jurisdiction of the foreign main proceeding.

D. Anticipating Other Jurisdictions' Proceedings, to Assist Foreign Main Proceedings

When a Chapter 15 has been filed in recent cases, debtors also have filed companion proceedings to assist the primary bankruptcy in a range of other jurisdictions. n31 In the case of In re STX Pan Ocean for example, STX Pan Ocean filed proceedings similar to the STX U.S. Chapter 15 filing, in New Zealand, Australia, United Kingdom and Japan. n32 This left open, however, many world jurisdictions in which to proceed against STX Pan Ocean assets, including Panama, India, Chile, and France. Creditors which filed in the Korean proceedings arguably were precluded from proceeding in

every jurisdiction. If a creditor does have the possibility of recovering, for example, in Panama, where the debtor's vessel will eventually have to call, and there is little chance of recovery through the foreign proceeding, the creditor justifiably should decide not to submit to the foreign proceeding.

The same situation applies to the recovery of maritime equipment. In a maritime insolvency, a container carrier often will continue to use much of the lessor's equipment, having it transported to the ultimate destination, but being uninterested or without the means to pay for the return of the equipment. The debtor also will leave un-utilized equipment with depots and terminals, which will quickly refuse to release the equipment until the equipment lessor pays significant amounts for storage, gate and other charges (a/k/a, "ransom").

V. Terminating Leases and Arresting, Before TRO Entry in Chapter 15: Anticipatory Repudiation

In the face of a Chapter 15 proceeding and international insolvency, lessors must be prepared to quickly terminate leases and take possession of their leased maritime equipment. Lessors, however, should make sure they are not tied by lease provisions requiring notice before termination.

[*58] A U.S. Bankruptcy Court in Chapter 15, likely will enforce such a provision, and the lessor will find himself/themselves constrained from recovering its equipment by its own lease containing some days of "cure" on default, or required days of advanced notice before termination. U.C.C. § 2A-109(1) (adopted in many U.S. states, including New York), provides as follows:

A term providing that one party or his [or her] successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he [or she] deems himself [or herself] insecure" or in words of similar import must be construed to mean that he [or she] has power to do so only if he [or she] in good faith believes that the prospect of payment or performance is impaired. n33

Certainly a foreign insolvency filing founds a "good faith belief" of impaired performance. Marine equipment lessors with lease clauses giving time for termination after notice of default, rather than one to accelerate at will, should change the lease clauses to conform with U.C.C. § 2A-109.

Maritime contract creditors relying on contract-based maritime liens, similarly should make sure that their sales terms and conditions do not limit their right to act immediately when there is an insolvency situation. It is common to have 30-day payment terms in standard commercial sales contracts extending credit, including sales of maritime goods and services. What happens, however, when there is an insolvency threat - or actual foreign insolvency - within 30 days? The creditor cannot proceed, because the debt is not due. n34 It therefore must await action by another creditor, or TRO entry, leading to its effective loss of maritime lien rights.

[*59] Maritime (for that matter, any other) creditors should consider whether there is a commercial advantage in extending payment terms, particularly where a customer may not be able to make timely payments. Instead, creditors should consider making their invoices immediately due, with a discount on payment in a certain number of days and interest thereafter. Consequently, if they are insecure about payment, they may press immediately for payment or terminate their lease because of nonpayment, instead of having (because of their own lease or payment terms) to make a further demand for payment, which is a condition of their acting to protect their interests.

The U.C.C. further provides as follows:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance

will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract. n35

As applicable to leases, the U.C.C. contains the following terms similar to those for sale of goods:

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in [*60] writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he [or she] has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance. n36

Maritime creditors and lessors that have sales terms with extended payment periods, or that give time to cure default after a certain time period on the threat of insolvency, should make immediate demand for adequate assurance of performance, assuming their contracts are subject to U.S. law. At the same time, maritime creditors and lessors must be aware of the non-U.S. law which might be applied in a foreign main insolvency proceeding, to a termination and enforcement action, taken before the expiration of sales payment terms or cure periods.

Under U.S. law, adequate assurance may include a cash deposit, bond or guarantee from a credit-worthy (as the creditor reasonably determines) third party guarantor. "Reasonable time" is relative to the debtor's financial situation. Arguably, if a foreign insolvency has been filed, "reasonable" is immediate. Without such demand and failure to provide adequate security, however, the maritime lien creditor and equipment lessor, which has extended credit terms but must arrest or attach before the terms expire, may be liable for breach of contract, and have its arrest or attachment action, or action to recover equipment, set aside on that basis.

Similarly, many maritime sales contract terms and conditions, and leases, require notice of default as a prerequisite to a maritime creditor's or lessor's action enforcing their respective rights. Under U.S. law, such notice is not necessary and should be omitted from sales terms and leases. The U.C.C. provides as follows: "except as otherwise provided in this Article [*61] or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement." n37

Notice of default provisions unnecessarily delay enforcement actions, and if not met, can also provide a basis for a debtor's claim that the creditor or lessor did not give adequate "notice," and has thus wrongfully taken action.

Pre-planning for a Chapter 15 proceeding, as well as properly-informed action during that proceeding, where there is to be action taken before the expiration of payment or lease default cure periods, therefore, must consider all potentially applicable law governing early termination and enforcement. Creditors and lessors should also closely review their sales terms and lease provisions to assure that they do not contain impediments to their own recovery, which could even raise liabilities (or defenses to slow recovery efforts) if not arguably met.

VI. Reasonable Grounds for Insecurity and Stay Lifts in Chapter 15

The ability of a lessor to argue to the Bankruptcy Court in Chapter 15, that it should lift the automatic stay to permit equipment recovery, requires persistent efforts by the lessor with the customer to follow the equipment and also identification of, and persistent lessor communication with lessees' depots and terminals. Well in advance of any filing, good practice requires the lessor to identify the depots and terminals used for its equipment, and the extent of the debt owed the depots and terminals. Even though the Bankruptcy Court may be disinclined to otherwise defer to the jurisdiction of the primary insolvency filing, lessors who/that can show mounting depot in terminal costs, which will not be paid and which will be exercised as liens for the terminal or depot against the equipment, may be able to persuade a U.S. Bankruptcy Court to lift the stay when the debtor cannot adequately secure against the charges which terminals and depots assert against the equipment.

The U.C.C. provides that:

(a) The court may grant relief under section 1519 or 1521 [*11 U.S.C. § 1519* or *1521*], or may modify or terminate relief under [*62] subsection (c), only if the interests of the creditors and other interested entities, including the debtor, are

sufficiently protected.

(b) The court may subject relief granted under section 1519 or 1521 [*11 U.S.C. § 1519* or *1521*], or the operation of the debtor's business under section 1520(a)(3) [*11 U.S.C. § 1520(a)(3)*], to conditions it considers appropriate, including the giving of security or the filing of a bond.

(c) The court may, at the request of the foreign representative or an entity affected by relief granted under section 1519 or 1521 [*11 U.S.C. § 1519* or *1521*], or at its own motion, modify or terminate such relief.

(d) Section 1104(d) [*11 U.S.C. § 1104(d)*] shall apply to the appointment of an examiner under this chapter [*11 U.S.C. §§1501* et seq.]. Any examiner shall comply with the qualification requirements imposed on a trustee by section 322 [*11 U.S.C. § 322*]. n38

One Bankruptcy Court reasonably exercised its discretion in balancing interests of licensees against interests of debtors when it found that the application of *11 U.S.C. § 365(n)* was necessary to ensure that licensees under foreign debtor's United States patents were sufficiently protected. n39

VII. Lessors' Recovery and Debtors' Use of Leased Maritime Equipment

Along with protecting the licensees interests in lifting the stay, is the question of how Chapter 15 affects an insolvency lessee's use of leased equipment, after the Chapter 15 filing. If the lessor has not effectively terminated its lease prior to the filing, the Chapter 15 TRO might restrain the lessor from recovering its equipment in the U.S. *11 U.S.C. § 365* provides that the debtor must assume or reject the lease within 60 days and on assumption must pay current all of the debt due on the lease. n40 Continued use of the equipment is also chargeable as an administrative expense, with priority, against other creditors in the estate. When considering the situation of a lessor to a Chapter 15 debtor, lessor's counsel must know the foreign bankruptcy law, and whether it provides for the payment to a lessor of [*63] administrative expense for continued use of equipment. If the foreign insolvency law does not provide for that payment, then the lessor should be able to argue that at the minimum, the stay should be lifted for recovery of units within the United States.

In a Chapter 11 case, the Bankruptcy Court in In re Global Container Lines Ltd., n41 explained the operation of *11 U.S.C. § 365*, lease resumption and rejection, and recovery of post-rejection storage charges (demanded by depots and terminals for container return), as follows:

Section 365(g) of the Bankruptcy Code generally addresses the effect of a rejection of an executory contract or unexpired lease, and provides that when the contract or lease has not been previously assumed, rejection constitutes a breach immediately before the date of the filing of the petition. []. Section 502(g)(1) provides that rejection claims under Section 365 "shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition." []. Therefore, the rejection of an unexpired lease results in a breach and generally gives rise to a

prepetition claim for damages against the estate. []. Moreover, the creditor's resultant claim will be afforded priority and status pursuant to the lease and the general provisions of *Section 501* through *510 of the Bankruptcy Code*. []

Section 365(p) addresses the effect of rejection on an unexpired personal property lease and provides that the rejected leased property is no longer property of the estate. []. As such "the non-debtor party to the contract may generally pursue state law remedies for breach of contract, including eviction for breach of lease." []. Upon the entry of the Rejection Order, any interest of the Debtors in the containers ended because both the leases and the containers were no longer property of these estates. The Lessors were left to exercise their remedies under nonbankruptcy law to regain possession and use of the containers. n42

The court in In re Global Container Lines Ltd., then analyzed Section 365(g) and explained:

[*64]

Section 365(g) provides that a claim for rejection damages is by definition a prepetition claim. []. Accordingly, pursuant to *Sections 501* and *502 of the Bankruptcy Code*, the Lessors may file proofs of claim for the rejection. []. Lessors must find some other provision under the Bankruptcy Code to recover storage charges that were incurred post-petition.

Section 365(d)(5) requires the Chapter 11 trustee to timely perform all obligations of the debtor, first arising from or after sixty days following the order for relief in a chapter 11 case under an unexpired lease of personal property until the lease is assumed or rejected, unless the court, based upon the equities of the case, orders otherwise. []. This provision expressly overrides Section 503(b)(1), again, unless the equities require otherwise. []. Thus, according to 365(d)(5), any storage charges which accrued in the period starting from the sixtieth day after the filing of the Chapter 11 petition through to the day the leases were rejected would have to be paid by the Debtors. n43

Applying the facts and analyzing Section 365(d)(5), the court reasoned that:

Here, however, the Leases were rejected as of the date of the Hearing, December 22, 2009, which was less than sixty days after the Petition Date. Section 365(d)(5) does not necessarily mandate that the Debtors perform under the unexpired leases during the first sixty days of the Chapter 11 case. []. Regardless, the estate will be liable for the reasonable value of benefits received from use of the leased property.

Accordingly, a different analysis may be required for storage charges that arise after the first sixty days of a Chapter 11 case from storage charges that were incurred during the first sixty days of the bankruptcy. This order is without prejudice to the Lessors' ability to file claims for the storage charges. However, because this Court is not addressing filed claims, this Court will not address the analysis of such claims. n44

The point of the illustration, is that container lessor creditors must even be aware of what seems to be the minutia of

foreign main proceedings law; [*65] including as it relates to the recovery of storage charges, along with the more general provisions governing lease acceptance and rejection - and - recognition of the leases' law choices.

Because a lessor's greatest recovery charge is often storage (ransom) charges by depots and terminals, how those charges are credited as part of a lessors' claims in an asset estate (either pre-or post-petition) of course is significant. This includes whether the lessor should press for a concurrent U.S. involuntary Chapter 7 or 11 proceeding to govern recovery of payments for U.S. storage charges.

In a pre-Chapter 15 case, under the *11 U.S.C. § 304* predecessor to Chapter 15 (Saleh v. Triton Container Int'l (In re Saleh)), n45 the Bankruptcy Court modified a TRO to allow recovery of ocean containers, as follows:

At the November 28, 1994 hearing, the Petitioners described a "standing offer" to all creditors that own cargo containers leased by CAVN. Specifically, CAVN has agreed to inform each such creditor of the location of their containers and abandon CAVN's interest in them, if the creditor provides documentation identifying the containers and supporting the creditor's ownership interest. This offer was documented by letters from the Petitioners to several cargo container creditors which were introduced at the November 28 hearing as Composite Exhibit "1". To implement the Petitioners' expressed intent to abandon leased cargo containers, the preliminary injunction will be modified to provide a procedure for identification and abandonment of CAVN's interest in leased containers and other leased equipment located in the United States. n46

The Bankruptcy Court then gave the following ruling regarding the preliminary injunction:

4. The preliminary injunction entered pursuant to the November 4 Order is hereby modified with respect to containers or other equipment leased to CAVN and located in the United States as follows:

A. Creditors who claim an ownership interest in containers or other equipment shall provide Petitioners with documentation [*66] identifying the equipment and supporting their claim. Within seven calendar days of receiving the information from a creditor, the Petitioners shall furnish information to the creditor identifying the location of the listed containers or equipment and indicating, to the extent that the equipment or container is located in the United States, whether the equipment or container will be surrendered, subject to the rights of any third parties who may claim an interest.

B. If the Petitioners seek to maintain the injunctive relief with respect to identified containers or other leased equipment, they must file a motion requesting the continuation of that injunctive relief and attach to the motion their response and backup data, including the information provided by the creditor and the information provided by the Petitioners in response.

C. If the Petitioners do not identify the location of the containers or other leased equipment in a timely manner as

required, or do not request continued injunctive relief, then without further order, the preliminary injunction is modified to allow the creditor to proceed with any litigation or to pursue any other remedies available under its agreements with CAVN solely with respect to that creditor's containers or other leased equipment. n47

The Bankruptcy Court accordingly permitted modification of the stay, to permit lessors to locate their equipment before it moved back offshore from the United States, and to claim that equipment. Such a modification is essential to lessors, not only to allow for recovery of their equipment inside the United States (before it is placed in terminals which may charge significant storage and other fees for equipment release) n48 but also to enable recovery at all (because, container lines in insolvency rarely will pay for the return of leased equipment, once unloaded, particularly in ports where the containers would return empty from the port of loading).

In Chapter 11 proceedings in the United States, "first-day orders" allow for the payment to "critical vendors" of otherwise pre-petition debt. When there is an imminent insolvency filing, creditors also should be prepared to [*67] work with the debtor to obtain potential first-day orders allowing for payments in the foreign proceeding.

Discovery is also permitted in Chapter 15 proceedings, both by debtors and creditors. Creditors who are considering opposing a Chapter 15 proceeding should consider having discovery requests ready, and motions to permit them, to determine whether the debtor has property in the U.S. and whether the debtor properly is situated in the jurisdiction where the suit is brought. The debtor may also be able to conduct discovery to locate assets in the United States. The discovery can only include however, the discovery of U.S. based assets, and may not be used for discovery in the foreign proceeding, especially where the foreign proceeding does not provide for its own discovery.

The vessels which the debtor has chartered provide another basis for argument to the Bankruptcy Court in Chapter 15. The argument is that the debtor does not own the vessels, and therefore the creditor should be able to exercise a maritime lien against the vessels without restraint. Creditors therefore should know whether the charterers automatically terminate upon insolvency.

VIII. Pre-Empting or Moderating a Chapter 15 Proceeding, With an Involuntary Chapter 7 or 11 Proceeding

Maritime lien creditors and container lessors face significant disadvantages if they do not act quickly upon the hint of the filing of a foreign bankruptcy, and before a Chapter 15 petition and TRO. The basis of that filing may be one far short of what might be required in the initiation of a U.S.-based bankruptcy in Chapter 7 or 11. U.S. courts in Chapter 15 have even recognized foreign involuntary insolvency proceedings initiated by a single creditor. The foreign proceedings usually will afford creditors significantly fewer rights than U.S. proceedings. Consequently, well prior to a Chapter 15 filing, which should be anticipated, creditors should be prepared with all defenses against the Chapter 15 filing, if not for any other reason than to gain leverage to protect their interest.

This includes collaboration with other creditors, provided that there are sufficient assets located in the U.S. to bring an involuntary Chapter 7 or 11 [*68] filing. n49 This enables the creditors to choose the court (assuming sufficient debtor contact with the jurisdiction) where the involuntary proceeding will take place, thus preempting the debtor's court choice not only for the Chapter 15 filing, but also, at least for U.S. located assets, of its foreign insolvency filing.

It also will provide an opportunity to educate the court in advance about the creditor's initiative, and the unique maritime issues involved in the proceeding.

Both the UNCITRAL Model Law informing Chapter 15, and Chapter 15, allow for Chapter 7 or 11 proceedings to administer, at least, the debtor's assets in the U.S. If the debtor's COMI (center of main operations) is determined to be in the U.S. and the foreign proceeding thus not the foreign main proceeding, then the Chapter 7 or 11 proceedings take precedence over all debtor assets.

Even if the foreign proceeding is the foreign main proceeding, however, *11 U.S.C. § 1528* ("Commencement of a

case under this title after recognition of a foreign main proceeding") states as follows:

After recognition of a foreign main proceeding, a case under another chapter of this title may be commenced only if the debtor has assets in the United States. The effects of such case shall be restricted to the assets of the debtor that are within the territorial jurisdiction of the United States and, to the extent necessary to implement cooperation and coordination under sections 1525, 1526, and 1527 [*11 U.S.C.§§1525*, *1526*, and *1527*], to other assets of the debtor that are within the jurisdiction of the court under sections 541(a) of this *title [11 U.S.C. § 541(a)*], and 1334(e) of title 28 [*28 U.S.C. § 1334(e)*], to the extent that such other assets are not subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter. n50

Along with recognition of the foreign main proceeding, *11 U.S.C. § 1529* ("Coordination of a case under this title and a foreign proceeding") regulates concurrent Chapter 15, and Chapter 11 or 7 cases, as follows:

If a foreign proceeding and a case under another chapter of this [*69] title are pending concurrently regarding the same debtor, the court shall seek cooperation and coordination under sections 1525, 1526, and 1527 [*11 U.S.C.§§1525*, *1526*, and *1527*], and the following shall apply:

(1) If the case in the United States is pending at the time the petition for recognition of such foreign proceeding is filed-

(A) any relief granted under section 1519 or 1521 [*11 U.S.C. § 1519* or *1521*] must be consistent with the relief granted in the case in the United States; and

(B) section 1520 [*11 U.S.C. § 1520*] does not apply even if such foreign proceeding is recognized as a foreign main proceeding.

(2) If a case in the United States under this title commences after recognition, or after the date of the filing of the petition for recognition, of such foreign proceeding-

(A) any relief in effect under section 1519 or 1521 [*11 U.S.C. § 1519* or *1521*] shall be reviewed by the court and shall be modified or terminated if inconsistent with the case in the United States; and

(B) if such foreign proceeding is a foreign main proceeding, the stay and suspension referred to in section 1520(a) [*11 U.S.C. § 1520(a)*] shall be modified or terminated if inconsistent with the relief granted in the case in the United States.

(3) In granting, extending, or modifying relief granted to a representative of a foreign nonmain proceeding, the court must be satisfied that the relief relates to assets that, under the laws of the United States, should be administered in the foreign nonmain proceeding or concerns information required in that proceeding.

(4) In achieving cooperation and coordination under sections 1528 and 1529 [*11 U.S.C. §§1528* and *1529*], the court may grant any of the relief authorized under section 305. n51

If the debtor is choosing to file an insolvency proceeding outside of the U.S., most likely its filing will be in the location of its principal operations. [*70] Therefore, creditors should, as part of their normal credit assessment practices, be aware of the operation of insolvency proceedings in the main jurisdiction of their customers, and be prepared to anticipate Chapter 15 defenses.

On the other hand, this also can help anticipate the fact that there will not be a defense to a Chapter 15 proceeding and that there must be a different strategy to protect interests. United States Bankruptcy Courts defer to the foreign proceedings and only rarely have lifted stays or declined to recognize a foreign proceeding.

IX. Conclusion

Increasingly, and particularly in the maritime area, insolvencies involve multiple jurisdictions and multiple court orders, and therefore require knowledge in advance of the insolvency laws of the jurisdictions in which a customer operates.

Even where there may not ultimately be an insolvency proceeding with the customer, knowledge of this will assist the credit decisions of those relying on maritime liens or other maritime procedures for security and recovery, and those assessing the ability to recover multi-modal equipment in insolvency.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensNatureProperty Subject to LienBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewTransportation LawWater TransportationLicensing & Registration

FOOTNOTES:

n1. Chapter 15 Basics, U.S. Courts, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx (last visited 11/22/2016).

n2. See, e.g., *CSL Australia PTY. LTD. v. Britania Bulkers, PLC, 2009 WL 2876250, at 4* (S.D.N.Y. Sept. 8, 2009).

n3. See, e.g., *In Re British American Ins. Co. Ltd., 425 B.R. 884 (Bankr. S.D. Fla. 2010).*

n4. See Chapter 15: Bankruptcy Basics, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/ Chapter15.aspx (last visited 11/22/2016).

n5. See *11 U.S.C.A. § 1517* (West 2016).

n6. See *11 U.S.C.A. § 1516* (West 2016).

n7. See generally, Chapter 15: Bankruptcy Basics, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/ Chapter15.aspx (last visited 11/22/2016). The Southern District of Texas does not require local counsel, for pro hac vice admission and direct CM/ECF filings. The Southern District of New York requires local counsel to move in non-bar members pro hac vice but does not require those local counsel's active participation, afterwards; on pro hac admission counsel may file and appear directly in the Southern District of New York without local counsel involvement. In contrast, both the Districts of Delaware and Southern District of Florida require active local counsel involvement and even with pro hac admission do not allow non-regular bar members to file on CM/ECF. Consequently, pre-planning and coordination of local counsel, depending on the Chapter 15 filing court, is necessary. Lead counsel should be prepared to enter a Chapter 15 proceeding as quickly as possible, either directly or with required local counsel, and to receive contemporary filing notices through CM/ECF.

n8. See *11 U.S.C.A. § 1502* (West 2016).

n9. *In re Barnet, 737 F.3d 238 (2d Cir. 2013).*

n10. Bankruptcy Basics: http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx (last visited 11/22/2016).

n11. See *11 U.S.C.A. § 1522* (West 2016).

n12. *2009 Bankr. LEXIS 2648* (S.D.N.Y. Jan. 30, 2009).

n13. *In re Britannia Bulkers A/S, 2009 Bankr. LEXIS 2648, at 1, 2* (S.D.N.Y. Jan. 30, 2009).

n14. *714 F.3d 127 (2d Cir. 2013).*

n15. *Id. at 133.*

n16. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 332 (Bankr. S.D.N.Y. 2008).*

n17. *In re Kemsley, 489 B.R. 346, 360 (Bankr. S.D.N.Y. 2013); In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 332 (Bankr. S.D.N.Y. 2008)* (Chapter 15 dismissed, where main assets were in New York but registered office in Cayman Islands).

n18. See *46 U.S.C.A. § 31301* (West 2010).

n19. *In re Atlas Shipping A/S, 404 B.R. 725; 2009 A.M.C. 1150 (Bankr. S.D.N.Y. 2009)* (applying turnover under *11 U.S.C. § 1521*(a)(5) and (b) to vacate pre-Chapter 15 filing Rule B maritime attachments, ordering transfer of attached funds to primary Danish jurisdiction).

n20. *11 U.S.C.A. § 542* (West 2016); *In re AJW Offshore Ltd., 488 B.R. 551, 558 (Bankr. E.D.N.Y. 2013).*

n21. *11 U.S.C.A. § 1508* (West 2016).

n22. Helpful, quick access sources for creditor's U.S. counsel to familiarize themselves with the foreign insolvency law involved, United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf (2014) (last visited 11/22/2016); and its related case law abstract database, Case Law on UNCITRAL Texts ("CLOUT") - htttp://www.uncitral.org/clout /showSearchDocument.do (last visited 11/22/2016).

n23. *11 U.S.C.A. § 1506.* (West 2005).

n24. See, *In re Millennium Global Emerging Credit Master Fund Ltd., 2012 U.S. Dist. LEXIS 88782, at 16* (S.D.N.Y. June 25, 2012) (Which states that, "The public policy exception to the Bankruptcy Code is a narrow one").

n25. *476 B.R. 310 (Bankr. E.D. Okla. 2012).*

n26. *In re Sivec SRL, 476 B.R. 310, 324-25 (Bankr. E.D. Okla. 2012).*

n27. *O'Sullivan v. Loy (In re Loy), 432 B.R. 551, 558 (Bankr. E.D. Va. 2010).*

n28. *Tacon v. Petroquest Res. Inc., 601 F.3d 319, 322-23 (5th Cir. 2010);* Consistent with the "comity" emphasis of Chapter 15, the court in Chapter 15 may, however, apply any avoidance and fraudulent conveyance provisions in the law of the primary proceeding jurisdiction.

n29. See *11 U.S.C. § 1519* (2012).

n30. *11 U.S.C. §§1501* et seq (2012) (alterations in original).

n31. See, e.g., In re STX Pan Ocean, Case No. 13-12046 (Bankr. S.D.N.Y. 2013).

n32. Id.

n33. U.C.C. § 2A-109 (1974).

n34. This is not only a potential pitfall for maritime lien creditors under U.S. law, but under other jurisdictions that will enforce payment terms in favor of the debtor or, where the creditor wishes to arrest a vessel, the owner of a vessel chartered by the debtor. The High Court of Singapore in The STX Mumbai, held that bunker supplier which had extended 30-day payment terms, but arrested two days before their expiration, wrongfully arrested and could be liable to the vessel owner in damages. STX Mumbai, [2014] SGHC 122 (Sing.).The High Court observed that the bunker supplier's sales terms and conditions had nothing providing for acceleration in case if insolvency or credit insecurity of the in personam debtor. Sale and lease terms and conditions certainly should provide for arrest, and cancellation and immediate right of equipment recovery, in situations of insolvency or credit insecurity, to help avoid the result that, the creditor/lessor, must choose either not to act because it is limited by its own sales or lease terms (which depended on its mis-assessment of the debtor's solvency), or, to act and essentially be subjected to liability because of its own terms. Id.

n35. U.C.C. § 2-609 (2012).

n36. U.C.C. § 2A-401 (2002).

n37. U.C.C. § 2A-502 (2002).

n38. *11 U.S.C. § 1522* (2012) (alterations in original).

n39. *Jaffe v. Samsung Elecs. Co., 737 F.3d 14, 30 (4th Cir. 2013).*

n40. See *11 U.S.C. § 365* (2012).

n41. *2010 Bankr. LEXIS 5596* (Bankr. E.D.N.Y. Feb, 25 2010).

n42. 42.Id. at 5, 6, 7 (citations omitted).

n43. Id. at 8 (citations omitted).

n44. Id. at 9 (citations omitted).

n45. *In re Petition of Saleh, 175 B.R. 422 (Bankr. S.D. Fla. 1994).*

n46. *Id. at 423.*

n47. *In re Petition of Saleh, 175 B.R. 422, 426-28 (Bankr. S.D. Fla. 1994).*

n48. See U.C.C. § 2A-306 (2002).

n49. *11 U.S.C. § 1531* (West 2005) (Consequently, a benefit of recognition of a foreign main proceeding in Chapter 15, is that creditors pressing an involuntary Chapter 7 or 11 do not have to prove that the debtor is insolvent - or - refute debtor's contentions that it isn't insolvent).

n50. *11 U.S.C. §§1501* et seq (2012) (alterations in original).

n51. *11 U.S.C. § 305* (2012) (alterations in original).