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

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Contents - Hyperlinks

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Simms Showers has an international practice, representing many of the world's leading bunker suppliers as well as a range of other leading maritime interests. Simms Showers is one of the most active firms working internationally, and throughout the U.S. in the area of vessel arrest, maritime attachment, and related maritime remedies for creditors. The Firm has recovered over U.S. $100 million for its clients as the result of successful vessel arrest, maritime attachment and related proceedings throughout the world. Simms Showers also is a leader in the area of international maritime insolvency creditors' rights. Its principals have been involved in every major United States and international maritime bankruptcy since 1985, including TMT, Sanko Shipping, OSG, Genmar, Eastwind (Probulk), and Trailer Bridge.

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He is a member of the Maritime Law Association of the United States and of the bars of the United States Supreme Court, the United States Court of International Trade, the United States Courts of Appeal for the Third, Fourth, Fifth, Seventh, and Eleventh Circuits; United States District Courts for the District of Maryland (Trial Bar), District of Columbia, Northern District of Illinois, the states of Maryland and Illinois, the District of Columbia, and through special admission practices in federal and state courts throughout the United States.

Mr. Simms also serves as a Director of World Relief, Husband of his wife of 25 years, Denise, and Dad of daughter Alison, a Public Health major at Johns Hopkins and of son John

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Chapter 15, the section of the United States Bankruptcy Code providing for U.S. bankruptcy courts assistance of foreign insolvency proceedings, is nine years old in 2014.[2] Since its passage in 2005, 840 Chapter 15 cases of various types have been filed, resulting in 73 written opinions addressing various issues under Chapter 15.

One thing is consistent across all of these cases. This is, that if 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 (and there have been about a dozen of the 840 filed since 2005), and the few preceding maritime cases filed under Chapter15's predecessor, U.S. Bankruptcy Code Section 304 (a more general provision providing for US 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 primary cases or other 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.

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. With the right pre-planning and then quick action when a Chapter 15 filing is imminent, however, it is possible to minimize losses and perhaps even to come out ahead.

The three areas of successful challenge to Chapter 15 filing, however, that have emerged are first, that the debtor does not have sufficient US-based assets to justify a chapter 15 proceeding, second, that the debtor is insufficiently connected with the place of the foreign bankruptcy has been filed, and third, that the foreign proceeding has not actually commenced or

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[1](...continued)
attending Middlebury College, and of West Highland White Terrier Barrett, who enjoys chasing squirrels with the same enthusiasm that Mr. Simms has for chasing ships.

[2] A general description of the history and operation of Chapter 15 appears at the Administrative Office of the U.S. Courts website, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx

has concluded. 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. This may overcome a Chapter 15 filing and 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 and thus the foreign proceeding.

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. After the foreign insolvency initiation, creditors must be ready to anticipate that there will be a Chapter 15 filing in the U.S. attempting to recognize and assist that for. In the history of Chapter 15, no U.S. bankruptcy courts have refused, based on the challenge to the procedure of the foreign bankruptcy court, to conclude that the foreign proceeding is not one in of itself which cant be recognized under Chapter 15 as either a primary or ancillary proceeding.[3] Chapter 15 imposes basic presumptions favoring recognition of

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[3] Chapter 15, 11 U.S.C. § 1517 ("Order granting recognition") effectively mandates such recognition, providing as following:

> (a) Subject to section 1506 [*11 U.S.C. § 1506*], after notice and a hearing, an order recognizing a foreign proceeding shall be entered if–
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> > (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502 [*11 U.S.C. § 1502*];
> >
> > (2) the foreign representative applying for recognition is a person or body; and
> >
> > (3) the petition meets the requirements of section 1515 [*11 U.S.C. § 1515*].
>
> (b) Such foreign proceeding shall be recognized–
>
> > (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or

(continued...)

an alleged foreign proceeding,[4] and because the Bankruptcy Court will look 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 strategy, in distinction to those available to other creditors.

Likely Venue of the Chapter 15 Proceeding: This is because, like most all bankruptcy cases led by competent debtor's counsel, the debtor will without any formal advanced notice

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[3](...continued)

(2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 [*11 U.S.C. § 1502*] in the foreign country where the proceeding is pending.

(c) A petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time. Entry of an order recognizing a foreign proceeding constitutes recognition under this chapter [*11 U.S.C. §§ 1501 et seq.*].

(d) The provisions of this subchapter [*11 U.S.C. §§ 1515* et seq.] do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist, but in considering such action the court shall give due weight to possible prejudice to parties that have relied upon the order granting recognition. A case under this chapter [*11 U.S.C. §§ 1501* et seq.] may be closed in the manner prescribed under section 350 [*11 U.S.C. § 350*].

[4] 11 U.S.C. § 1516 ("Presumptions concerning recognition") states as follows:

(a) If the decision or certificate referred to in section 1515(b) [*11 U.S.C. § 1515(b)*] indicates that the foreign proceeding is a foreign proceeding and that the person or body is a foreign representative, the court is entitled to so presume.

(b) The court is entitled to presume that documents submitted in support of the petition for recognition are authentic, whether or not they have been legalized.

(c) In the absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests

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.[5] Because there is no automatic stay on filing of a Chapter 15 petition, among these motions will be one for a temporary restraining order ("TRO"), restraining all actions against debtor property located in the United States[6] until the court can consider recognizing the foreign proceeding on a permanent basis under Chapter 15 and impose a permanent stay.

The Debtor's Choice of Foreign Forum: The fundamental question is, "why did the debtor choose to proceed in a foreign proceeding, rather than a U.S. proceeding in Chapter 7 or 11?"

A fundamental among Chapter 15, and Chapter 7 and 11 proceedings is, that there must be debtor's assets and business in the U.S., in order to bring the proceeding. That is, a debtor even if the center of its business operations is outside of the U.S., must as a prerequisite to a Chapter 15

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[5] 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.

[6] 11 U.S.C. § 1502 ("Definitions") defines the extent of Chapter 15 jurisdiction, to:

> (8) "within the territorial jurisdiction of the United States", when used with reference to property of a debtor, refers to tangible property located within the territory of the United States and intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States.

proceeding, must have assets in the U.S. As the U.S. Court of Appeals for the Second Circuit held in *In re Barnet*, 737 F.3d 238 (2d Cir. 2013), a foreign debtor can only have Chapter 15 recognition if it has business or assets in the U.S. Such assets musts 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 immediately must consider why the debtor has chosen the foreign proceeding, rather than a U.S. proceeding which requires significant oversight of the debtor. Although U.S. Bankruptcy Courts will observe comity, the deference to foreign proceedings properly brought in the foreign jurisdictions, at the same time, the choice of insolvency forum is a legitimate first question for creditors to ask, and 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, that no world insolvency jurisdiction will give U.S. maritime lien creditors, or maritime equipment lessors, greater rights than a U.S. bankruptcy court will give them. Consequently, U.S. maritime lien creditors and marine equipment lessors must be prepared to insist on their rights, as the foreign debtor files a Chapter 15 petition, that debtor having recognized (and chosen and planned) that it will fare better, in the foreign insolvency jurisdiction, rather than in the U.S.

Educating the Chapter 15 Bankruptcy Judge About Unique Maritime Issues: Maritime creditors who may be restrained in a U.S. Chapter 15 proceeding therefore must be ready to appear by counsel on nearly a moment's notice to begin to educate the bankruptcy court about the unique issues involved with maritime liens and mobile, leased maritime property. Most U.S. Bankruptcy judges (unfortunately, increasingly so 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 lien (the very nature of a U.S. maritime lien *in rem*), will be a matter of education for the bankruptcy court, as will the challenges of recovery and control of mobile equipment which is constantly moving internationally and therefore between different legal regimes.

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

Consequently the first step once the Chapter 15 cases filed is to educate the judge about the nature of the interests involved. Creditors should be prepared that despite the strength of argument, a U.S. bankruptcy court first considering a Chapter 15 petition will, given bankruptcy courts' typical, initial incline toward debtors, enter the TRO. Even though a TRO almost certainly will be entered, however, the education 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, permitting service of a U.S. District Court summons and complaint on the debtor, and 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 *Britannia Bunkers A/S*, No. 08-165187 (Bankr. S.D.N.Y., July 15, 2009, Docket No. 11), 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. This illustrates why it is important to know, if one holds a maritime lien against the debtor's assets, or vessels which the debtor is chartering, or has maritime rights arrest, that where the vessels or property is 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.

The Debtor Must File its Foreign Case, in its "Center of Main Interests": The Second Circuit in *In re Fairfield Sentry Ltd.*, 714 F.3d 127 (2d Cir. 2013), held that the foreign debtor's "center of main interests" (COMI), that the primary consideration bankruptcy courts should apply to determine whether and how Chapter 15 proceeds looks to the date the debtor's representative files the Chapter 15 petition.[7] It thus is possible that in order to obtain the benefits

[7] The Bankrupty Court in Chapter 15 is not required to accept only the foreign representative's assertion, however, that the case proposed for recognition as the foreign main proceeding is in the jurisdiction of the debtor's center of main interests. Instead, the court may (continued...)

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, attempt to change its COMI. *Fairfield Security* leaves open the challenge to a debtor's COMI as having been manipulated in bad faith.

Creditors seeking to challenge a Chapter 15 petition based on COMI thus should be knowledgeable of the debtor's COMI at the time of filing the foreign proceeding, and then take discovery 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. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* (Bankr. S.D.N.Y. 2008). 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. *In re Kemsley* (Bankr, S.D.N.Y. 2013)*; In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.* (Bankr. S.D.N.Y. 2008)(Chapter 15 dismissed, where main assets were in New York but registered office in Cayman Islands).

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 on in few places outside of the U.S. Chapter 15 proceedings only restrain actions against the debtor's property located in the United States. The difficulty arises where 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, supplanted by 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. 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.

Unique Aspects of U.S. Maritime Tort Liens: Among the questions in Chapter 15 remain those about the rights of creditors which may hold maritime tort claims against the debtor. For example, many bunker suppliers have in their sales terms and conditions provisions to

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[7](...continued)
require additional facts, including from discovery, as a condition of finding that the debtor's asserted foreign main proceeding, is one brought at the debtor's center of main interest. *In re Basis Yield Alpha Fund (Master)* 381 Bkr. 37 (Bkr. S.D.N.Y. 2008).

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 a 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.

Unique Aspects of Maritime Torts and Indemnity-Only Policies: In the case of owned vessels, of even more concern is tort liens from collision or personal injury. 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 thus qualify for indemnity reimbursement under the policy.

U.S. Maritime Law Gives Maritime Liens Priority Over Foreign Mortgages: In the United States also, 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 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 they 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 to 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 is about to call the US, is allowed to discharge and depart the US without providing security.

Arrest Before Commencement of a U.S. Chapter 15 Proceeding and TRO: Therefore if there is a foreign insolvency filing, and for that matter reason for concern about one, maritime lien holders should move quickly to arrest any vessels which they can prior to the entry of a Chapter 15 temporary restraining order. Once the TRO issues, it will be difficult to convince the Bankruptcy Court to, quickly enough before the vessel arrives and departs, lift the stay to allow for arrest. The Bankruptcy Court may simply refuse to lift the stay to allow the arrest and instead requiring the creditor to file a claim in the form proceeding. Once an arrest is made, however, the court is unlikely to require the creditor to release the arrest, without the posting of security for the perfected lien.

Maritime Attachment Before Chapter 15 Commencement and TRO; Turnover: In contrast 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 an attachment lien against the assets properly, 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.[8]

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 which 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, it does not exclude avoidance actions under 11 U.S.C. § 542, requiring the turnover of estate assets, which

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[8] *In re Atlas Shipping A/S* (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).

can include security interests against the property of the estate. *In re AJW Offshore Ltd.*, 488 B.R. 551 (Bankr. E.D.N.Y. 2013). Turover can only include assets in the U.S., and turnover orders must include conditions to protect creditors and other parties interested in the property turned over.

Nevertheless, creditors still should proceed to use maritime attachment against the possibility that if a Chapter 15 petition is filed, there may be good defenses to it. For example, 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 brought to assist it also become ineffective.

Know the Foreign Insolvency Law Involved in the Foreign Main Proceeding: 11 U.S.C. § 1508 ("Interpretation") requires that in Chapter 15, 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.

Consequently, 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. Bankrutpcy 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[9] A central principle of the UNCITRAL: Model Law, is that courts assisting a foreign main

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[9] Helpful, quick access sources for creditors' U.S. counsel to familiarize themselves with the foreign insolvency law involved, are, are the United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (United Nations, New York, 2014) http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf, and its related caselaw abstract database, Case law on UNCITRAL Texts ("CLOUT") - - htttp://www.uncitral.org/clout/showSearchDocument.do

proceeding are to the extent possible, applying the principles of the foreign proceeding, carry out the powers of the foreign insolvency proceeding and marshal assets of the debtor in assistance of that proceeding. At the same time, 11 U.S.C. § 1506 ("Public policy exception") 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.

Although Chapter 15's public policy exception is narrow, *In re Millennium Global Emerging Credit Master Fund Ltd.* 474 BR 88 (Bankr. S.D.N.Y. 2012), creditors which believe that application of foreign insolvency law will prejudice their interests, should still raise it. For example, in *In re Sivec SRL* 476 BR 310 (Bankr, E.D. Okla. 2012), 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. The court observed that Italian law would not recognize the creditors' interests, leaving them unprotected.

The Foreign Main Proceeding Administers the Insolvent's Estate: Chapter 15 limits U.S. Bankruptcy Courts' powers 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. *O'Sullivan v Loy (In re Loy),* 432 BR 551 (Bankr. ED Va. 2010) . Generally, the powers of U.S. Bankruptcy Courts in Chapter 15 are much less extensive than those in Chapters 7 or 11, limited to stay of actions in the United States, against debtor property in the United States. U.S. Bankruptcy Courts in Chapter 15 explicitly are without the power to order under 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. [10] Nevertheless, even prior to

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[10] 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. *Tacon v Petroquest Res. Inc. (In re Condor Ins. Ltd.), 603 F.3d 319* (5th Cir. 2010). This is a further reason why creditors must be familiar with the primary jurisdiction's insolvency law - including to argue, in the face of any attempted avoidance or preference actions - that the primary jurisdiction law restricts avoidance or preference.

The foreign representative may also initiate 11 U.S.C. §§ 547, 548 preference actions, where the Chapter 15 proceeding is in parallel with a Chapter 11 or 7 proceeding:

(continued...)

recognition, simply on filing, U.S. Bankruptcy Courts may grant certain immediate relief, including stay of execution[11] After recognition, pursuant to 11 U.S.C. § 1521 ("Relief that may be

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[10](...continued)
11 U.S.C. § 1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a) [*11 U.S.C. §§ 522*, *544*, *545*, *547*, *548*, *550*, *553*, and *724(a)*].

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

[11] 11 U.S.C. § 1519 ("Relief that may be granted upon filing petition for recognition") specifies a Bankruptcy Court's powers in Chapter 15, as follows:

(a) From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including–

(1) staying execution against the debtor's assets;

(2) entrusting the administration or realization of all or part of the debtor's assets located in the United States to the foreign representative or another person authorized by the court, including an examiner, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a) [*11 U.S.C. § 1521(a)*].

(b) Unless extended under section 1521(a)(6) [*11 U.S.C. § 1521(a)(6)*], the relief granted under this section terminates when the petition for recognition is granted.
(continued...)

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

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[11](...continued)

> (c) It is a ground for denial of relief under this section that such relief would interfere with the administration of a foreign main proceeding.
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> (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 this section.
>
> (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 [*11 U.S.C. §§ 1501* et seq.].

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 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 [*11 U.S.C. §§ 1501* et seq.].

Because under Chapter 15, the foreign court in which the primary proceeding is held it administers the bankruptcy estate, creditors therefore must choose whether they will submit to the foreign jurisdiction and any restraint that it has on those creditors as' 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, U.S. maritime creditors 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 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 in the world against the debtor's assets. At the same time, the creditor may also make itself subject potentially to claims by the debtor in the foreign proceeding, including, for example, for alleged "wrongful arrest" or some similar claim, even where the arrest has been outside of the jurisdiction of the foreign main proceeding..

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. In the STX Pan Ocean case for example, STX Pan Ocean filed proceedings similar to the STX U.S. Chapter 15 filing, in New Zealand, Australia, United Kingdom, and Japan. 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").

Terminating Leases and Arresting, Before TRO Entry in Chapter 15: Anticipatory Repudiation: In the face of a Chapter 15 proceeding and international insolvency, lessors thus must be prepared to quickly terminate leases and to take possession of their leased maritime equipment. Lessors, however, make sure they are not tied by lease provisions requiring notice before termination.

A U.S. Bankruptcy Court in Chapter 15, likely will enforce such a provision, and the lessor find itself constrained from recovering its equipment by its own lease containing some days of "cure" on default, or required days of advanced notice before termination. Section 109 of the U.S. (adopted in many U.S. states, including New York), Article 2A)"Leases - General Provisions") provides as follows:

> § 2A-109. Option to Accelerate at Will.
>
> (1) 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.

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 what UCC § 2A-109 permits.

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.[12] It therefore must await

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[12] 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,"* [2014] SGHC 122, held that bunker supplier which had

(continued...)

action by another creditor, or TRO entry leading to its effective loss of maritime lien rights.

. Maritime (for that matter, any other) creditors should consider whether there is commercial advantage in extending payment terms, particularly where a customer may not be able to make timely payment. 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.

U.C.C. § 2-609 (2012) ("Right to Adequate Assurance of Performance") 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

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[12](...continued)
extended 30 day payment terms, but arrested two days before their expiration, wrongfully arrested and could be liable to the vessel owner in damages. 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.

> 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.

Applying to leases, U.C.C. § 2A-401 ("Insecurity: Adequate Assurance of Performance") 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 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.

Maritime creditors and lessors which have sales terms with extended payment periods, or which give times to cure default after a certain time period, on the threat of a foreign (or any) insolvency, thus if their contracts are subject to U.S. law, should make immediate demand for adequate assurance of performance. At the same time, maritime creditors and lessors must be aware of the non-U.S. law which might be applied, including in any foreign main insolvency proceeding, to 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. U.C.C. § 2A-502 ("Notice After Default") provides as follows, that:

> Except as otherwise provided in this Article 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.

Notice of default provisions unnecessarily delay enforcement actions, and if not met also can provide a basis for a debtor's claim that the creditor or lessor, not somehow given adequate "notice," has 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 take all potentially applicable law, governing early termination and enforcement, in mind. Creditors and lessors also should 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, or arguably not, met.

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 must identify the depots and terminals used for its equipment, and the extent of the debt, to the degree possible, owed the depots and terminals. Even though the bankruptcy court may be disinclined to otherwise but to defer to the jurisdiction of the primary insolvency filing, lessors which 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.

11 U.S.C. § 1522 ("Protection of creditors and other interested persons") does provide 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 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*].

Bankruptcy court reasonably exercised its discretion in balancing interests of licensees against interests of debtor and finding that application of *11 U.S.C. § 365(n)* was necessary to ensure licensees under foreign debtor's United States patents were sufficiently protected. *Jaffe v Samsung Elecs. Co. (2013, CA4 Va) 737 F3d 14, 108 USPQ2d 1942.*

Lessors' Recovery and Debtors' Use of Leased Maritime Equipment: With this 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.[13] Continued use of the equipment

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[13] 11 U.S.C. § 365 ("Executory contracts and unexpired leases" provides in pertinent part as follows:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)
> (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> * * *
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.
>
> (2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a case under this title;
>
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
>
> (D) the satisfaction of any penalty rate or penalty provision relating to a
>
> (continued...)

also is chargeable as an administrative expense, with priority, against other creditors in the estate. Lessor counsel considering the situation of a lessor to a Chapter 15 debtor must know the foreign bankruptcy law and whether it provides for the payment to a lessor of 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 it least, the stay should be lifted for recovery of units within the United States.[14]

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[13](...continued)

> default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.
>
> * * *
>
> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
>
> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment; . . . .
>
> * * *
>
> (d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

[14] In a Chapter 11 case, the Bankruptcy Court in *In re Global Container Lines Ltd.*, 2010 Bankr. LEXIS 5596 (Bankr. E.D.N.Y. Feb. 25, 2010) explained the operation of 11 U.S.C. § 365 and lease resumption and rejection - and recovery of post-rejection storage charges (demanded by depots and terminals for container return), as follows:

(continued...)

[14](...continued)

Section 365(g) of the Bankruptcy Code generally addresses the effect of a rejection of an executory [*6] 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. 11 U.S.C. § 365(g)(1). 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." 11 U.S.C. § 502(g)(1). Therefore, the rejection of an unexpired lease results in a breach and generally gives rise to a prepetition claim for damages against the estate. See 11 U.S.C. §§ 365(g), 502(g); *see also In re Penn Traffic Co.*, 524 F.3d 373, 378 (2nd Cir. 2008) (*citing In re Child World, Inc.*, 147 B.R. 847, 852 (Bankr. S.D.N.Y. 1992). 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. *See Medical Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 387 (2d Cir. 1997).

Section 365(p) addresses the effect of rejection on an unexpired [*7] personal property lease and provides that the rejected leased property is no longer property of the estate. 11 U.S.C. § 365(p). 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." *In re Stoltz*, 315 F.3d 80,86 (2d Cir. 2002). 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.

Section 365(g) provides that a claim for rejection damages is by definition a prepetition claim. 11 U.S.C. § 365(g). Accordingly, pursuant to Sections 501 and 502 of the Bankruptcy Code, the Lessors may file proofs of claim for the rejection. See 11 U.S.C. § 501, 502. 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

(continued...)

[14](...continued)

> 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. 11 U.S.C. § 365(d)(5). This provision expressly overrides Section 503(b)(1), again, unless the equities require otherwise. Id. 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. See generally 3 Collier on Bankr. 365.04[6][b] (Alan N. Resnick & Henry J. Sommer, [*9] eds., 16th ed.)
>
> * * *
>
> 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. See 3 Collier on Bankr. 365.04[7][a] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.) (citing HN4the "settled rule that until assumption or rejection of the debtor's lease, the estate is not liable under the terms of the contract or lease."). Regardless, the estate will be liable for the reasonable value of benefits received from use of the leased property. *See In re Texaco*, 254 B.R. 536, 557 (Bankr. S.D.N.Y. 2000).
>
> 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.

The point of the illustration, is that container lessor creditors must be aware of even what seems to be the minutia if foreign main proceedings law, 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.

(continued...)

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)*, 175 B.R. 422, 428 (Bankr. S.D. Fla. 1994)), the Bankruptcy Court modified a TRO to allow recovery of ocean containers, as follows:

> E. Modification Of Preliminary Injunction With Respect To Leased Cargo Containers And Other Leased Equipment
>
> 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.
>
> * * *
>
> 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 identifying the equipment and

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[14](...continued)

Because often a lessor's greatest recovery charge is storage (ransom) charges by depots and terminals, how those charges are credited as a part of lessors' claims, in an asset estate (either pre- or post-petition) of course is significant, including, bearing on 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.

> 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.

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)[15] but to enable recovery at all (because, container lines in insolvency rarely will pay for the return of leased equipment, once unloaded, particularly

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[15] *See* U.C.C. Article § 2A-306 ("Priority of Certain Liens Arising by Operation of Law"):

> If a person in the ordinary course of his [or her] business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or this Article unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

in ports where the containers would return empty from the port of loading).

In Chapter 11 proceedings United States, something called " 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 work with the debtor to obtain potential first-day orders allowing for payments, in the foreign proceeding.

Discovery also is permitted in Capter 15 proceedings, both by debtors and creditors. Creditors 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 which is brought suit. The debtor may also be able to conduct discovery to locate assets in the United States. The discovery can only conclude, however, the discovery of U.S.-based assets and not be used for discovery to assist the foreign proceeding, especially where there the foreign proceeding does not provide for its own discovery.

The vessels which the debtor has charted 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 them without restraint. Creditors therefore should know whether the charterers automatically terminate upon insolvency.

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 would require 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 are available in 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, even, provided that there are sufficient assets located U.S., to bring an involuntary Chapter 7 or 11 filing.[16] This enables the creditors to

[16] Pursuant to 11 U.S.C. § 1531 ("Presumption of insolvency based on recognition (continued...)

choose the court (assuming sufficient debtor contact with the jurisdiction) where the involuntary proceeding will take place, preempting the debtor's court choice not only for the Chapter 15 filing, but also, at least for U.S.-located assets, of its non-U.S. insolvency filing.

It also will provide an opportunity to educate the court in advance, with the creditors initiative, about 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

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[16](...continued)
of a foreign main proceeding"):

> In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under section 303 [*11 U.S.C. § 303*], proof that the debtor is generally not paying its debts as such debts become due.

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.

> subject to the jurisdiction and control of a foreign proceeding that has been recognized under this chapter [*11 U.S.C. §§ 1501* et seq.].

Along with this, 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 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 [*11 U.S.C. § 305*].

If the debtor is choosing to file in insolvency proceeding outside of the U.S., most likely its filing will be in the location of its principal operations. Creditors should as a part of their normal credit assessment practices therefore be aware of the operation of insolvency proceedings in the main jurisdiction of their customers, to 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 and that there must be a different strategy to protecting interests. United States Bankruptcy Courts defer to the foreign proceedings and only rarely have lifted stays or declined to recognize a foreign proceeding.

Conclusion

Increasingly and particularly in the maritime area, insolvencies involve multiple jurisdictions, 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 in 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.