

WHEN WORLDS COLLIDE:

The interaction between insolvency and maritime law

Keynote address at the 2nd meeting of the Judicial Insolvency

Network

New York, 22 September 2018

The Honourable Judge of Appeal Steven Chong

Supreme Court of Singapore*

My fellow judges,

I. A collision

1. Let me begin by saying how honoured I am to be given this opportunity to address all of you. When Ramesh approached me some months ago to ask that I deliver this speech, he suggested that I speak on the interaction between insolvency and maritime law, which is a subject that has vexed the courts the world over. As it is an area which is both complex and somewhat unpredictable, I told Ramesh that I will attempt to examine this subject with the lenses of a maritime as well as an insolvency law practitioner. It is my hope that the resultant picture of the interaction will be not too blurry.

* I wish to acknowledge the valuable assistance of my colleague, Scott Tan, and my law clerk, Tan Jun Hong, in the research for this speech.

2. I begin with this fundamental observation: At their core, insolvency and maritime law both deal with the rights of creditors to payment of their claims.¹ However, they approach the issue very differently. Insolvency law generally seeks to centralise all assets of the debtor in a *single forum* in order that it can be distributed in a simple, inexpensive, and expeditious manner for the benefit of *all creditors*.² To that end, it postpones the rights of individual creditors, who are restrained from bringing individual actions during the pendency of the insolvency process to prevent the dissipation of the assets of the estate. In this way, it may be said that its precepts are communitarian and its provisions exert a centripetal force towards centralisation. Maritime law, on the other hand, contemplates a multiplicity of proceedings in a multiplicity of fora. Its *sine qua non* is the action *in rem*, which allows maritime creditors to obtain security for their claims by arresting the ship that is connected with their claims in *any* port where she may be found. The guiding philosophy of maritime law is pragmatic individualism and its laws operate centrifugally, away from the centre.

3. Most of the time, these bodies of law do not intersect. However, they collided spectacularly in August 2016, when Hanjin Shipping Co Ltd filed an application for rehabilitation with the Korean Bankruptcy Court. Hanjin was the seventh largest container shipping line in the world, so this sent tsunamis through the industry.³ Hanjin's fleet of 96 container vessels were left stranded at sea with some \$14bn worth of cargo onboard as ports and container lashing

providers refused them entry for fear that they would not be paid.⁴ Creditors circled, and 11 of Hanjin's vessels were arrested within a week.⁵ Hanjin obtained certain provisional orders to preserve its assets and Mr Tai-Soo Suk, the foreign representative of Hanjin, rushed around the world to seek interim orders to inoculate Hanjin's fleet against arrest.⁶

4. This forced courts to consider whether insolvency's preference for collectivity should prevail, or whether admiralty's cherished protection of the self-help remedy of arrest should take precedence. This, I would suggest, is a classic example of a true clash of norms between two bodies of law that have assumed different priorities in response to the different historical circumstances, and social and economic realities that attended their development. Incidents like this, and the tensions which they give rise to, will only increase in frequency as the growing internationalisation of insolvency law brings it into closer contact with admiralty law.⁷

5. Ultimately, the demands of both must be held in tension, and the answer to precisely how this balance should be struck is one which each jurisdiction must answer for itself. The aim of my paper is therefore a modest one. I hope to explain the unique features of maritime law and the shipping industry which pose particular challenges for the practice of cross-border insolvency. I will then attempt to make a case for greater comity between these two bodies of law and will close with a discussion on the right of lien-holders

to arrest a vessel *after* the recognition of foreign insolvency proceedings, which is a topic that has vexed some Model Law jurisdictions.

II. The world of the sea and the world of land

6. To set the stage, let me first paint a picture of the sea.⁸ In a sense, maritime law has always known the problem of cross-border trade and commerce, because ships have always traded internationally. In the course of a voyage, ships need support from a wide variety of actors – seamen, salvors, chandlers, repairers, agents and so on – who reside in ports in a variety of jurisdictions during the course of their voyage. However, ships are mobile and no supplier would be willing to supply goods to a ship without some assurance of payment. In response to this need, maritime law allowed for an action *in rem* to be commenced directly against the *res*⁹ – which is usually a ship that is connected with the claim – to afford claimants direct and immediate recourse for the payment of their claims.¹⁰

A. The action in rem and the right of arrest

7. There are two important features of the action *in rem* that stand out for comment as they have a material bearing on cross-border insolvency. The first is that it is legally distinct from an action *in personam*. If the owners appear to defend the action, the action will proceed thereafter as a hybrid action *in rem* and *in personam*,¹¹ with the result being that if the ship proves insufficient to meet the claim, the owners' other assets will be available for the purposes

of enforcement.¹² Conversely, if the owners do not appear, the claimant may recover whatever he can from the proceeds of sale and sue for the balance by a separate action *in personam* against the shipowners.

8. Second, the action *in rem* gives rise to the right to arrest the ship. This refers to the *physical, and not legal, detention* of the vessel by judicial process to secure a claim.¹³ The precise modalities of the right of arrest and its juridical basis vary between jurisdictions,¹⁴ but in common law jurisdictions a claimant may procure the arrest of the ship by filing an application, usually *ex parte*, with the court to seek an order that an officer of the court – usually known as the sheriff or the marshall – assist in the detention of the vessel. The officer then executes the warrant by serving it on the ship, most often by affixing the warrant on the outside of the ship's superstructure. Once it has been arrested, the vessel will remain within the control of the court until the order is countermanded or the vessel is sold by an order of court.¹⁵

9. An arrest offers a claimant several unique advantages. First, it prevents the ship from leaving the jurisdiction of the arresting court. Second, it immobilises the ship, which prevents it from accumulating further liabilities that might diminish the claimant's prospects of recovery. Finally, and perhaps most significantly, an arrested ship may be sold by judicial sale if the claim is not satisfied or secured. The effect of all of this is that an arrest exerts considerable commercial pressure on the shipowner to provide security for

the release of the vessel. As Dr Lushington observed in the 18th century case of *The Volant*, “[a]n arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment.”¹⁶

B. Claims that may be enforced using the action in rem

10. There are broadly three categories of claims which can give rise to an action *in rem*: proprietary claims (including claims by mortgagees), those arising out of maritime liens, and those involving statutory rights of action *in rem*. Their significance to cross-border insolvency lies in the fact that these categories of claims give rise to secured interests in the vessels. For present purposes, I will focus only on the latter two, beginning first with maritime liens.¹⁷ The classic definition of a maritime lien can be found in the decision of the Privy Council in *The Bold Buccleugh*, where it was described as a “claim or privilege upon a thing to be carried into effect by legal process ... [which lies] inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process ... relates back to the period when it first attached.”¹⁸ Put another way, a maritime lien is an encumbrance or a charge that is established by operation of law (a) upon the accrual of certain maritime causes of action, (b) that attaches to the vessel the operation of which has given rise to those claims; (c) for the purposes of securing those claims through preferential satisfaction from the value of the vessel.

11. As with many things in maritime law, the historical origins of the

maritime lien are shrouded in obscurity.¹⁹ Only a fairly compact list of claims give rise to maritime liens.²⁰ In Singapore like in many common law jurisdictions, this list comprises only salvage, damage done by the ship, seaman's and master's wages, bottomry, and master's disbursements.²¹ One commentator described them as constituting a "special security mechanism, specifically orientated towards navigation, which allow ships to move constantly to serve their commercial objectives, without avoiding the obligations arising out of this continuous movement."²²

12. Maritime liens have two characteristic incidents. The first is their persistence. Because they attach to the ship that is associated with the claim, they survive any changes in ownership and continue to encumber the vessel throughout the entirety of its life *unless* the vessel is sold by way of a judicial sale.²³ The second is the unique system of priorities associated with them. Unlike the general rules of priority relating to legal and equitable interests, claims secured by maritime liens are ranked qualitatively, based on the importance of the activity being secured to the operation of the vessel. In Singapore, the order of priorities is generally as follows: damage liens rank above earlier salvage liens which themselves rank above wage liens, which, in turn, take precedence over master's disbursements and bottomry liens.²⁴ It should be noted that maritime liens typically rank above mortgages.

13. I turn now to statutory rights of action *in rem*, which is known in

common parlance as a “statutory lien”.²⁵ This category represents the bulk of claims against vessels in the event of insolvency. The right to bring an action *in rem* was initially only available to enforce maritime liens.²⁶ This changed through the statutory expansion of the admiralty jurisdiction of the English courts to include such matters as claims arising out of charterparties, bills of lading, ship repairs, and supplies for the operation and maintenance of vessels, just to name a few. I will broadly describe these claims as general maritime claims, and the claimants who bring them as general maritime claimants.

14. Statutory liens differ from maritime liens in one important respect: whereas maritime liens arise and attach to the ship from the time of the underlying cause of action, statutory liens only crystallise upon the issue of the *in rem* proceedings.²⁷ Initially, general maritime claimants only possess a bare right to commence proceedings *in rem* to invoke the admiralty jurisdiction of the court, and nothing more. It is only after such a claimant commences an action *in rem* – which takes place upon issuance of the writ – that he acquires a security interest in the property.²⁸ This is particularly important in the insolvency context because it means that a general maritime claimant who has commenced an *in rem* claim stands in the position of a secured creditor and can take steps to arrest the ship, notwithstanding the commencement of insolvency proceedings; and conversely, one who has not has no such secured right and must stand *pari passu* with the general body of unsecured

creditors in the event of the debtor's insolvency.²⁹ I will return to this point later.

15. Taken together, these building blocks of maritime law – the action *in rem*, the maritime lien, and the statutory lien – coupled with the procedural remedy of arrest, form what Chief Justice Allsop, writing extra-judicially, described as a global “enforcement and security regime”.³⁰ This regime is founded on the concept that the ship – or a substitute asset, like the funds created from its sale – is to be used as pre-judgment security for the satisfaction of maritime claims.³¹ It developed as a specific response to the need of maritime commerce to provide maritime claimants with some assurance of payment, and it has proven itself to be remarkably durable. This system is notable both for the high degree of substantive uniformity – created in part by the numerous international conventions that have developed to govern various areas of maritime law³² – as well as the intricacy and sophistication of its rules.³³

III. The tension between maritime law and insolvency law

16. Maritime law is a specialised body of rules that is marked by two specific features. First, it deals only with maritime claims; second, it is principally concerned with maritime property, mostly ships. In this sense, it stands in stark contrast with insolvency law, which strives to satisfy *all creditors* as a body, regardless of the nature of their claims, through a realisation of *all* of the assets of the debtor. These two bodies of law have

historically developed independently of each other, like two ships sailing past each other in the night.

17. The gulf between the two is exemplified by *Diablo Fortune Inc v Duncan, Cameron Lindsay*,³⁴ which came before the Singapore Court of Appeal this March. That appeal raised a single, and deceptively simple question of law, which was whether liens over sub-freights and sub-hires are charges that would be unenforceable against an insolvent company without prior registration. What was interesting about it was that if you had asked a shipping and an insolvency lawyer, both would have thought the answer to be perfectly obvious. A shipping lawyer would have said it is inconvenient, and even commercially impractical, to register such liens, given the frequency with which such charterparties are entered into, and their oftentimes short durations. The insolvency lawyer, on the other hand, would expect to find all charges encumbering a company's assets on the charge register, and argue that registration is essential because creditors rely on the register in deciding whether to extend credit or enter into transactions with the company.³⁵

18. Both perspectives were ventilated in the appeal. After hearing arguments, we held that the lien had to be registered, despite the substantial inconvenience that this would cause. As we said, "The concomitant commercial consequences of requiring registration, however, cannot change the nature of the security; nor can it justify this court in exempting liens on sub-

freights from registration.”³⁶ However, at the same time, we acknowledged the widely held view that registration would add little in this context since those who regularly deal with charterers are aware that such liens are standard form in charterparties and recommended that Parliament study the issue, which it did.³⁷ A few months ago, Parliament passed an amendment to the Companies Act to exempt shipowners’ liens from the requirement of registration.³⁸

19. The issue in *Diablo* was resolved satisfactorily. However, there are many areas of possible tension between maritime law and insolvency law that still remain unresolved, and which are not amenable to obvious solutions. In order to begin to grapple with this issue, it will be helpful to identify the potential fault lines. In my view, there are three distinctive features of maritime law, and the structure of the shipping industry more generally, which present particular challenges to insolvency practitioners and courts. These are:

- (a) the multiplicity of forums involved in maritime proceedings;
- (b) the secrecy of maritime liens; and
- (c) the “one-ship” company structure.

A. *Multiplicity of forums*

20. I begin with the point about multiplicity of forums. Because ships are mobile, a maritime claimant has to act speedily to arrest her the moment she comes within jurisdiction. Thus, maritime creditors file writs in various

jurisdictions in anticipation that the ships connected with their debts will sail, however fleetingly, into jurisdiction to be arrested. The result, as Lord Simon of Glaisdale eloquently observed in his dissenting speech in *The Atlantic Star*, is that “‘Forum-shopping’ is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants, but the system has unquestionably proved itself on the whole as an instrument of justice.”³⁹

21. The difficulty with this, from an insolvency perspective, is that it violates the principle of collectivity, which calls for the centralisation of all the assets of the debtor. This is a problem that is further compounded by the persistence of the maritime lien. As I have said, it is settled law that maritime liens persist despite changes in ownership and they can only be extinguished by way of a judicial sale conducted by the admiralty court.⁴⁰ This is the only form of process that is recognised by other jurisdictions as having the effect of allowing title of the ship to pass without encumbrances; a sale sanctioned by the insolvency court may not be recognised as having this effect.⁴¹ However, judicial sales can take several months,⁴² which poses a particular challenge in the insolvency context, where time can often be of the essence. The delay imposes a variety of different costs such as the opportunity cost of lost hire, the costs associated with wear and tear and the upkeep of the vessel during the pendency of the sale, and anchorage costs. A private direct sale is rarely an option since admiralty courts will only sanction private direct sales if

there are “powerful special features” or “special circumstances” that justify a departure from the normal judicial sale process.⁴³ This high threshold reflects the admiralty courts’ wariness against being perceived to be mere rubber stamps that facilitate private bargains in an admiralty bazaar.⁴⁴

B. *The secrecy of maritime liens*

22. I turn now to maritime liens, which have been described as “invisible, secret, indelible, or inalienable encumbrance[s]”.⁴⁵ As I have explained, a maritime lien attaches to the ship from the time of the accrual of the cause of action and “travels with” the ship until it is carried into effect by an arrest. This means that the owner of a vessel which has been purchased otherwise than by a judicial sale may one day find out that the vessel he owns is saddled with encumbrances the nature of which he was not previously aware.⁴⁶ From the perspective of an insolvency practitioner, this tolerance for secrecy is objectionable because it is at odds with the rule of equity, well-established in property law, that *bona fide* purchasers for value without notice are not bound by prior equitable charges of which they had no notice.⁴⁷

23. This problem is compounded by the diversity in the nature and form of maritime securities. For instance, the recognition and enforcement of maritime liens raises a choice of law question as to whether these are matters of procedural or remedial matters which are to be determined in accordance with the *lex fori*;⁴⁸ or whether these are matters of substance to be determined by

the *lex causae*.⁴⁹ This is problematic because different jurisdictions recognise different maritime liens. In the United States, for instance, a claim for necessities is secured by a maritime lien, while this is not the case either in the UK or in Singapore.⁵⁰

24. The upshot of all this is that creditors are sometimes left unsure as to where they stand. This uncertainty is well illustrated in the ensuing litigation arising from the recent collapse of OW Bunker & Trading A/S in 2014, one of the world's largest bunker suppliers. A typical OW contract consisted of three parties. There was the "purchaser", typically a shipowner or operator, who purchased bunkers from an OW entity. There was a "physical supplier", which would have contracted with the OW entity to supply the actual bunkers to the purchaser's vessel on OW's behalf. And then there would be the OW entity itself (or in some cases, a string of OW entities⁵¹). When OW Bunkers collapsed, many of the purchasers faced claims both from the physical suppliers and from the liquidators of the OW entities. The claims brought by the physical suppliers, who did not have privity of contract with the purchasers, was founded on, among other things, the alleged existence of a "maritime lien" over the bunkers that were supplied, which is recognised in the US but in few other places. Faced with these competing claims, the purchasers filed applications for interpleader relief, and this not only delayed the liquidation of OW Bunkers, but put the estate of the company to additional legal costs through their participation in these proceedings.⁵²

C. One-ship companies

25. Finally, I come to the concept of the “one-ship” company. Typically, if a business owns more than one ship, it will transfer legal ownership of each of its vessels to a separate legal entity. Each entity, which is known as a “one-ship” company, will often be incorporated in a flag of convenience state and it will, in turn, entrust the management of the ship to a company which will usually be owned by the parent company.⁵³ Oftentimes, all the companies in this shipping group will have the same ultimate beneficial owner, even though they remain legally distinct entities at law.

26. This somewhat convoluted structure developed as a means of avoiding the “sister-ship” or “surrogate ship” arrest. To explain, under the common law, the right of arrest was limited only to the offending ship which was directly implicated in the cause of action. However, this changed with the 1952 Arrest Convention, which allowed claimants to arrest not only the offending ship, but also any other ship which was, at the time the cause of action arose, beneficially owned by a person who would be liable in an action *in personam*, provided that person was also the owner of the offending ship at the material time.⁵⁴ To prevent their fleets from being arrested *en masse*, shipping companies use the device of the one-ship company to avoid that coincidence of ownership that is necessary for a sister ship arrest.⁵⁵ Today, this practice is widespread and it has been judicially recognised as a legitimate way for shipping companies to manage their risks and limit their liability

provided the structure is in place at the outset.⁵⁶

27. However, this poses a particular difficulty in the insolvency context, because it raises the difficult question of how the insolvency of group enterprises are to be managed. In order for the restructuring to be successful, it would be ideal if all of the assets of the business could be gathered and centrally administered.⁵⁷ However, the problem is that in the eyes of the law, each of these one-ship companies is a distinct legal entity and must be subject to its own insolvency process. This is not something which the *Model Law* currently addresses, although I understand that UNCITRAL is working on developing a protocol to the Model Law to address the problem of group enterprises.⁵⁸

IV. Should maritime claims be treated differently?

28. Given the challenges posed by the unique features of maritime law, the question then arises: is there any justification for treating maritime claims differently from other types of claims in the event of insolvency? I would suggest to you that the answer is yes. In a paper delivered in 2009, Justice Steven Rares of the Federal Court of Australia, writing extra-judicially, gave four reasons for why this should be so, all of which have to do with the difficulty of pursuing maritime claims:⁵⁹

- (d) First, he pointed out that ships are peripatetic and highly mobile, and so there is a need to give maritime claimant easy access

to pre-judgment security. As the English Court of Appeal said in the *Re Aro* case, “ships are owned and trade internationally, and unless a claimant can gain immediate security for a claim [through an arrest] he may never have the opportunity effectively to pursue it”.⁶⁰

(e) Secondly, it is often uncertain who the owner of the vessel is because shipping registers are not always reliable. This makes it difficult for the provider of goods and services to know the identity of the owner of the ship that he is supplying goods or services to.

(f) Thirdly, it is not always clear whether one is dealing with the shipowner or charterer. Thus, even if one can ascertain the identity of the owner of the ship, one cannot always guarantee that he is the right party to pursue *in personam* for the unpaid bills. Quite often, such debts are incurred by a web of managers and agents operating from various ports.

(g) Fourthly, ships often fly under flags of convenience in states without developed legal structures that would facilitate the easy enforcement of claims.

29. I respectfully agree with all of the reasons he has given, and would add two more of my own. The first has to do with legal theory. As Lord Hoffmann pointed out in *Cambridge Gas*, the goal of insolvency law is not to create or extinguish rights, but to determine the manner in which they are to

be satisfied – usually through a process of collective execution against the property of the debtor – in accordance with their form, extent, and characteristics, which are determined by other areas of law.⁶¹ This being the case, there is every reason to respect the rights which are created by maritime law, which is an autonomous “body of private law which concerns itself with the rights and obligations between persons involved in sea and water transport”.⁶²

30. This brings me to my second point, which has to do with policy. If the rules of maritime law were to be ignored, the entire face of the shipping industry would be upended overnight. In *Holt Cargo Systems Inc v Trustees of ABC Container Line NV*, Binnie J, giving judgment on behalf of the Canadian Supreme Court put it as follows:⁶³

Reliance on [the maritime security regime] was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant trustees’ claim to “international comity” in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system -- the law of maritime commerce.

31. To give you an illustration of the intricacies of the system of maritime commerce that Binnie J referred to, perhaps I should comment briefly on the area of limitation of liability, which is an enormously complex area. There are

many different limitation regimes, such as tonnage, weight and package limitations which are the subject matter of different conventions which are in force in different jurisdictions to varying extents; and to add to the complexity, there are various types of parties whose interests may be implicated, including shipowners, charterers, insurers, and so on. Historically, these various limitation regimes were devised to incentivise ship ownership and to allow shipowners to obtain affordable insurance given the unique risks attendant to sea voyages. The system of limitation is therefore an intricate lattice of rules and principles driven by competing considerations that on, on the whole, has proven to be one which conduces to justice. It has been aptly described as the “organizational core of the shipping sector” which the “international legal order has not merely accepted as a historical privilege, but has encouraged and modernized”.⁶⁴ To treat maritime claimants no differently from ordinary claimants would inevitably unravel this intricate balance of risks, rights, liabilities and priorities.

32. In this connection, I think it is important to stress that this is not about the protection of the parochial interests of the maritime industry. Shipping, as a 2013 Forbes article put it, is “Globalization’s Lifeblood”.⁶⁵ It would be no exaggeration to say that global economic prosperity depends on the vitality of the shipping industry which depends, in turn, on the continued health of the system of pre-judgment security afforded by maritime law.

33. In the final analysis, this is why I think that the demands of both insolvency law and maritime law must be held in tension. I would suggest that the attitude of the court should be as follows: accommodation where possible; balance, where it is not; and in all things, respect and comity. I propose to illustrate how this operates in practice by reference to a particularly vexed issue in the law of cross-border insolvency, namely, the right of lien-holders to arrest a vessel *after* the recognition of foreign insolvency proceedings.

V. The arrest of a ship after the recognition of foreign insolvency proceedings

34. To set the stage, it will be helpful to recall the words of article 20(1) of the Model Law, which provides that:⁶⁶

- (1) Upon recognition of a foreign proceeding that is a foreign main proceeding:
 - (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed;
 - (b) Execution against the debtor's assets is stayed;
 - (c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

35. This default position is qualified by paragraph 2, which provides that the "scope, and the modification or termination, of the stay and suspension ... are subject to ... any provisions of law of the enacting State relating to insolvency". This is further caveated by paragraph 4, which states that this

does not affect the right to request the commencement of a proceeding under the laws of the enacting State relating to the insolvency or the right to file claims in such proceedings.

36. In broad terms, the Model Law contemplates that when a foreign main proceeding (“FMP”) is granted recognition, all legal actions are automatically stayed, and a claimant cannot proceed against the vessel unless two conditions are satisfied. First, the forum provides for the mandatory stay to be modified in respect of secured claims; second, the forum recognises the claim which is being asserted as a secured claim.⁶⁷

37. On the first issue, different jurisdictions have taken different positions. Japan, for instance, does not provide any exemption for secured creditors and requires them to take part and prove their claims in the insolvency together with the general body of creditors. This is probably the position which prevails in the United States and South Africa as well. Singapore, on the other hand, explicitly preserves the right of secured creditors to enforce their security over the debtor’s property. In the United Kingdom, everything depends on whether proceedings have culminated in a judicial seizure and sale – if they have, the claimant can proceed against the funds of the sale notwithstanding the opening of insolvency proceedings; but if no sale has yet taken place, the claimant cannot commence proceedings *in rem* but must instead participate in the insolvency. Yet other jurisdictions, like New Zealand and Kenya, have

granted their courts complete discretion in deciding whether the stay ought to apply; whereas countries like Australia and Canada have adopted an intermediate position of not exempting pre-existing secured claims from the mandatory stay if the insolvent debtor is in administration, but allowing them to continue if the debtor is in liquidation.⁶⁸

38. On the second issue of the recognition of secured claims, the position, at least insofar as maritime lien-holders is concerned, is fairly clear. As I explained, the security interest created by a maritime lien accrues at the time of the cause of action.⁶⁹ Thus, a maritime lien-holder suing in a jurisdiction that offers a carve-out for secured creditors will be able to proceed against the vessel.⁷⁰ That having been said, maritime liens save for crew wages typically do not feature prominently in an insolvency setting. This is due to the nature of the claims- salvors would not release the salvaged vessel before being paid or their claims secured and collision claimants would react immediately to secure their claims independent of insolvency. This is not the case for a general maritime claimant, whose security interest in the form of a statutory lien only crystallises at the time of the issuance of the *in rem* writ.⁷¹ General maritime claimants who have issued such a writ before the commencement of insolvency proceedings acquire the status of statutory lien holders and stand in the same position as maritime lien-holders in that they are both not caught by the stay; general maritime claimants who have *not*, however, are *not* secured creditors, and cannot bring an action without leave.⁷² Typically, such

leave would be refused.⁷³

39. I suggest that the current position is undesirable, for two reasons:

(a) First, it results in regulatory arbitrage and economic waste. Ships are valuable assets, and their cargo, potentially even more so. Thus, it is important, even when times are bad, to ensure that they can complete their voyages to avoid incurring further losses. Under the current regime, however, ships will gravitate towards jurisdictions that guarantee protection from arrest, which might not be the port where they need to unload their goods.

(b) Second, it leads to a “race to the courthouse”. Under the current system, so much depends on the order of proceedings.⁷⁴ The moment insolvency proceedings have been opened, general maritime claimants will race to arrest the vessels of the distressed company in whatever jurisdiction they can to secure their claims. Conversely, the foreign representative of insolvent shipping companies will immediately take steps to seek pre-emptive recognition in as many jurisdictions as possible. This is economically inefficient, and it leads to capricious results.⁷⁵

40. One author has suggested that the root of the problem lies with the fact that maritime lawyers were not consulted when the Model Law was being

developed, as evinced by the fact that neither the Model Law nor the *UNCITRAL Guide to Enactment* make explicit reference to rights arising under maritime law.⁷⁶ The ideal might be for such issues to be dealt with by way of a separate protocol to the Model Law, such as the one that the *Comité Maritime Internationale* briefly considered but decided against pursuing.⁷⁷ However, I suggest that even in the absence of such a protocol, the international community can move towards greater coordination and coherence in our approach towards this issue.

41. In broad terms, my proposed approach is as follows:

(a) When an application is made for the recognition of FMP proceedings, or for any form of pre-recognition interim relief under Article 21 of the Model Law, the applicant must inform the court if it owns any ships engaged in international commercial trade. This would alert the court to be cognisant of issues peculiar to claims against ships owned by the applicant.

(b) If the court grants a stay, it shall exercise its powers under the Model Law to specify that any application for the issuance of a warrant of arrest in respect of the applicant's vessels should be heard by a judge (instead of a registrar or master of the court) whose attention should be drawn to the fact that there is a subsisting recognition order,

and may decide whether the application should be heard on an *ex parte* basis (as is usually the case) or on an *inter partes* basis.

(c) If a warrant of arrest is issued and served, the arresting court should then consider whether to exercise its discretion under Art 21(1)(e) of the Model Law to release the asset to the FMP court for the benefit of all creditors, subject to an assurance by the FMP court that all maritime creditors would be accorded the same secured status in the insolvency proceedings that they would enjoy in the arresting jurisdiction, possibly through the establishment of a “synthetic” proceeding.

42. Allow me to elaborate on the elements of my proposed approach.

A. Conditional stay

43. The first element of my proposed approach is adapted from the practice of the Australian courts. Since the 2013 decision of *Yu v STX Pan Ocean*, the Federal Court of Australia has, in granting a stay, always included a condition that any application for the issue of a warrant of arrest shall be listed for hearing before a judge, whose attention should be drawn to the judgment rendered by the recognition court.⁷⁸ The purpose of this, as Allsop CJ explained in a later case, is to allow the court to balance the demands of maritime law on the one hand with those of insolvency law on the other.⁷⁹

44. Sometimes, it is imperative that an arrest be allowed to proceed in order to protect the interests of vulnerable claimants. This would be so, for instance, if there are unpaid crew on board the ship. Denying an arrest in those circumstances would be to consign them to indentured servitude for the remainder of the voyage.⁸⁰ But on the other hand, there are cases when an arrest is less urgent, and where it may be impractical and even capricious to allow the arrest to proceed and thereby scupper the prospects of an orderly resolution of the proceedings in the FMP. This might be so, for instance, where the claim is ranked so low compared to the other secured claims that there is in fact no reasonable prospect of any recovery beyond the costs of the arrest.

45. I agree entirely with this, and my only observation is that this process would be assisted if the applicant seeking a warrant of arrest were required to give notice to the owner/operator of the vessel to be arrested, in order that the application can proceed on an opposed *ex parte* basis. This is common practice in applications for *ex parte* injunctions,⁸¹ and it was done in the *Kim v SW Shipping* case where Besanko J granted a general moratorium following the recognition of rehabilitation proceedings in Seoul on terms that any application for issue of a warrant for the arrest of any vessel owned by the applicant in Australia must be made “with a minimum of 4 hours’ notice to the Australian legal representatives for the [applicant].”⁸² The benefits of such an approach would be two-fold. First, the court will be assisted by submissions on the considerations that might weigh against the grant of the warrant of

arrest. Second, the court will be able to get a sense of the arguments and evidence which might arise when the matter moves to an *inter partes* stage, which would save time and costs moving forward.

46. Rares J has pointed out that the practical effect of the giving of such notice would be to give the shipowner time to divert the ship out of jurisdiction, thereby frustrating the attempt at arrest.⁸³ This concern is not unfounded. However, I suggest that the risk can be mitigated by making the requirement of notice a *discretionary*, rather than *mandatory* requirement. That is to say, the application for the warrant will be made, *at first instance*, on an *ex parte* basis and the judge hearing the matter will then decide whether to direct service of the application to the other side after hearing arguments. The judge may direct service in cases where there no material risk of prejudice to the arresting party, but it may not if it is satisfied that the risk is well-founded. At the end of the day, this is a matter that the judge hearing the matter is best placed to decide, after considering all the facts and circumstances of the case.

47. Before I leave this, I should add that it does not matter whether the issuance of a warrant of arrest is discretionary, as is the case in Singapore,⁸⁴ or whether it is available as of right, as is the case in the UK⁸⁵ and Australia⁸⁶ because it is always within the prerogative of the court to decline to exercise jurisdiction and set aside an arrest, even if a warrant has been issued.⁸⁷

B. *Remitting asset to FMP Court*

48. I come now to the second element of my approach. To fully realise the promise of modified universalism, the arresting jurisdiction must also give serious consideration to whether it ought to entrust the seized assets to the FMP for general distribution, as provided for under Art 21(e) of the Model Law.

49. This was done in the case of *In re Atlas Shipping A/s*.⁸⁸ That case involved a Danish shipowner which was declared insolvent in Denmark. After the company had been declared insolvent, but before the Danish proceedings had been recognised in the US, several of its creditors filed “Rule B” attachments over the money in its bank accounts in New York. After recognition, the Danish foreign representative applied for an order vacating the attachments and requested that the funds be remitted to Denmark. This order was granted on the strength of the representative’s representation that relief would be “without prejudice to the creditors’ rights, if any, to assert in the Danish bankruptcy court their rights to the previously garnished funds.”⁸⁹ The court acknowledged, however, that it was up to the Danish court to determine “what benefit, if any, [the creditors] should enjoy as a result of their having previously obtained Rule B attachments over the funds.”⁹⁰

50. Prof Martin Davies applauds this decision and argues that “reciprocal comity” would mandate that the FMP court grant the claimants the same secured status in the FMP proceedings as they would have enjoyed in the

arresting court in exchange for the remittal of the funds. However, he notes that there are two significant obstacles that stand in the way of such an approach. The first is that many Commonwealth jurisdictions, including Singapore and the UK, take the position that the recognition of a lien should be a matter determined by the *lex fori* (that is to say, the FMP jurisdiction), and not the forum of arrest. The second is that the issue of priorities, being a remedial question, is one that typically falls to be decided according to the *lex fori* – that is, the law of the FMP jurisdiction.⁹¹ The effect of both of these points is that there is no assurance that either the security interest, or the priorities that would have been accorded thereby, can be given effect to.

51. I agree with Prof Davies's suggestion of reciprocal comity, and I think the solution to the two problems he has identified lies in the use of "synthetic proceedings", as it was pioneered in the seminal decision of the English High Court in *Collins & Aikman*.⁹² That case involved main insolvency proceedings which opened in the English High Court. A few Spanish trade creditors objected to English jurisdiction on the basis that their claims would have been accorded more favourable treatment if they had been decided under Spanish bankruptcy law. This was an obstacle to the British administrators' desire for an expeditious resolution of the proceedings in a single forum. To get around this, the court allowed the administrators to carve out a special claim category for the Spanish creditors to guarantee them the same distribution that they would have received had the matter been adjudicated in Spain under Spanish

law. This way, the Spanish claims were treated *as if* they had been adjudicated in Spain, without them actually being heard there. This not only saved costs but avoided the prospect of multiple inconsistent rulings.⁹³

52. If this proposal is adopted in the shipping context, it will not matter what the position taken in the FMP as regards the recognition of maritime securities or priorities is. All that matters is that it will distribute the estate of the insolvent *as if it were* applying the law of the arresting jurisdiction. An arresting court can take the lead in conducting a judicial sale (which is often done more efficiently by the arresting court), and remit the sale proceeds to the FMP with full confidence that a special claim category will be carved out for local secured creditors.⁹⁴ In this way, the interests of all parties are protected, and the overall insolvency process will be better managed. In this regard, I should also mention that the JIN, and the JIN Guidelines in particular, can play an invaluable role in this regard by facilitating direct communication and cooperation between arresting and insolvency courts.⁹⁵

53. I close with two observations. First, this process is flexible. It would be open, it seems to me, for the arresting court to decide to satisfy the debts of some of the more vulnerable claimants first, such as the members of crew, before remitting the remainder of the sale proceeds to the FMP jurisdiction on the back of an undertaking that the “synthetic” proceedings will be conducted to preserve the rights of the maritime claimants. Second, I appreciate that it is

likely that this proposal will only be useful in cases where the value of the ship is close to or exceeds the value of the secured claims in the jurisdiction. If the fund is not even sufficient to substantially cover the claims of all secured creditors, it may well be that remittal might not be of much utility.

VI. Conclusion

54. In conclusion, I will say that I am heartened that some progress has been made for a rapprochement between maritime and insolvency law, but I believe that more can be done. Even in the absence of treaty-driven reform, the international community can and should move towards greater coherence between these two bodies of law; and for greater coordination between arresting and restructuring jurisdictions. I hope my paper has sufficiently raised awareness to the competing tensions between these two important branches of the law in order that constructive steps might be taken to adequately address them. Thank you very much.

-
- 1 Steven Rares, "Ship Arrests, Maritime Liens and Cross-Border Insolvency", Address at the
6th Annual World Congress of Ocean 2017 (3 November 2017) ("Ship Arrests, Maritime
Liens, and CBI"), available at <<http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/rares-j-20171103/left-column/rares-j-20171103>> (accessed 17 September 2018) at para 3.
- 2 See, eg, *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3
SLR 239 at [18].
- 3 Marcus Hand "The end of Hanjin Shipping – officially declared bankrupt" (17 February
2017), available at <<http://www.seatrade-maritime.com/news/asia/the-end-of-hanjin-shipping-officially-declared-bankrupt.html>> (accessed 17 September 2018).
- 4 *Ibid.*
- 5 "Hanjin Shipping bankruptcy causes turmoil in global sea freight" (2 September 2016),
available at <<https://www.theguardian.com/business/2016/sep/02/hanjin-shipping-bankruptcy-causes-turmoil-in-global-sea-freight>> (accessed 17 September 2018).
- 6 See, eg, *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] 5 SLR
787 and *Tai-Soo Suk v Hanjin Shipping Co Ltd* [2016] FCA 1404.
- 7 G Seitz, "Interaction between admiralty and bankruptcy law: Effects of globalisation and
recurrent tensions" (2009) 83 *Tulane Law Review* 1339.
- 8 The precise details of the development of admiralty law from the time of the Rhodian law
of the 9th century BC to the 12th century Laws of Oleron and finally to present day is a topic
which has been well-traversed in academic literature: see William Tetley, "*The General
Maritime Law—The Lex Maritima*", (1994) 20 *Syracuse Journal of International and
Comparative Law* 105 at pp 109–113; Michael White, *Australian Maritime Law*, (The
Federation Press, 3rd Ed, 2014) at pp 1–14; and M E J Black AC, "*Admiralty Jurisdiction
and the Protection of Seafarers*" (F S Dethridge Memorial Address 1999) (2000) 15
ANZMarLawJl 1, pp 4–7.
- 9 Mohammud Jaamae Hafeez-Baig, "Navigating the waters between admiralty and cross-
border insolvency: a comparison of the Australian, German and French positions" [2017]
LMCLQ 97 ("Navigating the Waters") at pp 108–109. In *Kim v Daebo International Shipping
Co Ltd* [2015] FCA 684 ("*Kim*"), the Federal Court of Australia said that the impetus for the
development of maritime law was the protection of "the interests of those who trade or have
encounters with a peripatetic ship and those interested in her which may never call in a
port of the creditor's own jurisdiction": at [14] *per* Rares J.
- 10 Toh Kian Sing SC, *Admiralty Law and Practice*, (LexisNexis, 3rd Ed, 2017) ("Admiralty Law
and Practice") at pp 13 and 19.
- 11 *The Ohm Mariana ex Peony* [1993] 2 SLR(R) 113 at [39].
- 12 *The Lloydiana* [1983] 2 Lloyd's Rep 313.
- 13 Lia Athanassiou, *Maritime Cross-Border Insolvency: Under the European Insolvency
Regulation and the UNCITRAL Model Law*, (Informa Law, 2017) ("Maritime Cross Border
Insolvency") at p 113.
- 14 See Navigating the Waters at 118-127 for a discussion of the German and French remedy
of "attachment", as distinct from the common law position.
- 15 *Admiralty Law and Practice* at p 200.
- 16 *The "Volant"* (1842) 1 W Rob 383 at 387.
- 17 Maritime liens have little in common with land liens, and are not based on possession: see
G Gilmore and Ch Black, *The Law of Admiralty* (2nd Ed, 1975) at p 589, cited in *Maritime
Cross Border Insolvency* at p 108.
- 18 *The Bold Buccleugh* (1851) 7 Moo PC 267 ("*The Bold Buccleugh*") at 284–285.
- 19 *The Tolten* [1946] P 135 at 149–150 *per* Scott LJ.
- 20 In *The Halcyon Isle* [1981] AC 221, the Privy Council commented, at 240G, that the list of
maritime liens can only be expanded by the legislature.
- 21 *Admiralty Law and Practice* at p 285.

22 *Maritime Cross Border Insolvency* at p 108, citing Thomas Schoenbaum, *Admiralty and*
23 *Maritime Law* (2nd Ed, 1994) at p 247.
24 *The Acrux* [1962] 1 Lloyd's Rep 405.
25 *Admiralty Law and Practice* at pp 373–376.
26 See, eg, *The Zafiro* [1960] P 1 at 13.
27 See the decision of the House of Lords in *The Indian Grace (No 2)* [1997] 3 WLR 818 at
28 823E–825F *per* Lord Steyn.
29 *The Monica S* [1968] 2 WLR 431 at 439.
30 *Ibid*. This is also the position take in Singapore: see the decision of the Singapore Court of
31 Appeal in *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2
32 SLR(R) 793 at [28].
33 *In re Aro Co Ltd* [1980] 1 Ch 196 (“*Aro Co Ltd*”).
34 James Allsop, “Security Interest in Ships” in D Attard (ed), *The IMLI Manual on International*
35 *Maritime Law* vol 2 (OUP, 2014) at pp 152–153.
36 *Ibid*, and *Maritime Cross-Border Insolvency* at p 112.
37 See generally Paul S Griggs, “Uniformity of maritime law: An international perspective”
38 (1999) 73 *Tulane Law Review* 1551 at pp 1554–1565.
39 *Maritime Cross Border Insolvency* at pp 91–94.
40 *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129.
41 *Ibid* at [3].
42 *Ibid* at [72].
43 *Ibid* at [4] and [72].
44 See Companies (Amendment) Act 2018 (Act 35 of 2018).
45 *The Atlantic Star* [1974] 1 AC 436 at 472H–473B.
46 See para 13 above.
47 See *The Tremont* (1841) 1 W Rob 163 at 166; *The Turtle Bay* [2013] 4 SLR 615 (“*The*
48 *Turtle Bay*”) at [13], and Steven Rares, “Admiralty Law: The Flying Dutchman of Cross-
49 Border Insolvency” (2009) Federal Judicial Scholarship 22 (“*Flying Dutchman*”) at para 53;
50 *In re Millenium Seacarriers Inc* 419 F 3d 83 (2nd Cir, 2005) and *Readhead v Admiralty*
51 *Marshal, Western Australia District Registry* (1998) 87 FCR 229 at 242F, and *Yakushiji v*
Daiichi Chuo Kisen Kaisha (2015) 333 ALR 513 (“*Yakushiji*”) at [23].
52 Paul Myburgh, “Satisfactory for its Own Purposes: Private Direction Arrangements and
53 Judicial Vessel Sails” (2016) 22 *Journal of International Maritime Law* 355 (“*Myburgh*”),
54 available at <<https://ssrn.com/abstract=2921700>> (accessed 17 September 2018) at p 5,
55 where it is recorded that it took 8 months for the vessel *The Sea Urchin*, to be sold after
the Singapore High Court refused an application for a private direct sale (see *The Sea*
Urchin [2014] 2 SLR 646.
56 *Ibid* at pp 15–17 and *The Turtle Bay* at [29].
57 *Myburgh* at p 27.
58 *Maritime Liens* at p 14.
59 *Maritime Cross Border Insolvency* at pp 109–110.
60 R G Marsden, “Two Points of Admiralty Law” (1886) 2 LQR 357 at 363.
61 This is the position taken by Singapore, New Zealand and South Africa: see Sarah
Derrington and James Turner QC, *The Law and Practice of Admiralty Matters* (OUP, 2nd
Ed, 2016) at para 4.49, citing *The Halcyon Isle* [1981] AC 221, *The Ship Bett Ott v General*
Bills Ltd [1992] 1 NZLR 655, and *Transol Bunker BV v MV Adrico Unity* (1987) 3 SALR
794.
62 This is the position taken in Canada, among other places: see Aleka Mandaraka-Sheppard,
Modern Maritime Law, Volume 2: Managing Risks and Liabilities, (Informa Law, 3rd Ed,
2013) at p 184.
63 William Tetley, *Maritime Liens and Claims* (1st Ed, Business Law Communications Ltd,
1985) at p 252.
64 *PST Energy 7 Shipping LLC v OW Bunker Malta Ltd* [2016] AC 1034.

52 See, eg, *Precious Shipping Public Co Ltd and others v OW Bunker Far East (Singapore)*
Pte Ltd and others and other matters [2015] 4 SLR 1229, where interpleader relief was not
 granted (see, especially, [48]–[54] on maritime liens).

53 *Maritime Cross-Border Insolvency* at p 18. Even though this was referred to as a description
 of the structure of Greek-owned companies, it is an accurate description of the practice in
 many parts of the world.

54 See Steven Chong, “Charting Our Own Courses: The Australia, New Zealand, and
 Singapore Journeys in Maritime Law” (2016) 30 ANZMarLawJl 1 at paras 18–25. When
 this was given force of law, many jurisdictions went even further and permitted the arrest
 of “sister-ships” which were, at the material time, beneficially owned by anyone who would
 have been liable *in personam*, be he a charterer or just someone in control of the vessel
 and not only to owners: see, the decision of the Singapore Court of Appeal in *The Permina*
108 [1974–1976] SLR(R) 850, and the decision of the Singapore High Court in *The Catur*
Samudra [2010] 2 SLR 518 at [60]–[61].

55 D Christodoulou, *The Single Ship Company* (Athens: Ant N Sakkoulas, 2000), p 22.

56 Courts the world over have said that they will not, save in exceptional circumstances, lift
 the corporate veil: see, generally, the decision of the Singapore High Court in *The Skaw*
Prince [1994] 3 SLR(R) 146 at [19], the decision of the Hong Kong Court of Appeal in
Chimbusco Pan Nation Petro-Chemical Co Ltd v The Owners and/or Demise Charterers of
the Ship or Vessel “Decurion” [2013] 2 Lloyd’s Rep 408 at [68] and *Water Woon on*
Company Law (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Rev Ed, 2009) at para 2.65.

57 See generally Irit Mevorach, “Cross-Border Insolvency of Enterprise Groups: The Choice
 of Law Challenge” (2014) BJCFL 226.

58 See UNCITRAL, *Report of Working Group V (Insolvency Law) on the work of its forty-ninth*
session (New York, 2-6 May 2016), A/CN.9/870.

59 *Flying Dutchman* at para 27.

60 *Aro Co Ltd* at 206A-B.

61 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors*
of Navigator Holdings Plc [2007] 1 AC 508 at [14] *per* Lord Hoffmann and *Maritime Cross-*
Border Insolvency at pp 102 and 240.

62 William Tetley, *International Maritime and Admiralty Law* (International Shipping
 Publications, 2002) at p 3, cited in *Navigating the Waters* at pp 103–104.

63 *Holt Cargo Systems Inc v Trustees of ABC Container Line NV* [2001] 3 SCR 907 (“*Holt*
Cargo”) at [27].

64 *Maritime Cross-Border Insolvency* at p 123.

65 Barry Glassman, “Shipping: Globalization’s Lifeblood”, *Forbes* (2 January 2013), available
 at <https://www.forbes.com/sites/advisor/2013/01/02/shipping-globalizations-lifeblood/#76ddca56296e> (accessed 17 September 2018).

66 UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the “Model Law”).

67 Hong Yanci, “Effects of Recent Insolvencies in the Offshore Oil and Gas Industry on the
 Efficacy of Knock-For-For Knock Provisions”, CML Working Paper Series, No 2018/009
 (March 2018), available at <http://law.nus.edu.sg/wps> (accessed 17 September 2018) at
 p 30.

68 *Ibid* at pp 31–33; Martin Davies, “Cross-Border Insolvency and Admiralty: A Middle Path of
 Reciprocal Comity”, available at [http://comitemaritime.org/wp-](http://comitemaritime.org/wp-content/uploads/2018/05/Cross-border-insolvency-and-admiralty-a-middle-path-Martin-Davies-.pdf)
[content/uploads/2018/05/Cross-border-insolvency-and-admiralty-a-middle-path-Martin-](http://comitemaritime.org/wp-content/uploads/2018/05/Cross-border-insolvency-and-admiralty-a-middle-path-Martin-Davies-.pdf)
Davies-.pdf (accessed 17 September 2018) (“*Reciprocal Comity*”) at pp 5–8.

69 *Admiralty Law and Practice* at p 275, citing *The Bold Buccleugh* at 284.

70 See the decisions of the Federal Court of Australia in *Yu x STX Pan Ocean Co Ltd* (2013)
 223 FCR 189 (“*Yu*”), at [40]–[42]; *Kim* at [3]–[15].

71 See above at para 16.

72 Leave was granted to claimants bringing statutory *in rem* claims in the New Zealand High
 Court decision of *Kim v STX Pan Ocean Co Ltd* [2014] NZHC 845.

73 *The “Oriental Baltic”* [2011] 3 SLR 487 at [13]; *The “Hull 308”* [1991] 2 SLR(R) 643 at
 [13]–[14], citing *Aro Co Ltd* at 209.

74 *Reciprocal Comity* at pp 3–4.
 75 *Reciprocal Comity* at p 18.
 76 Yu at [13]; Julie Soars, “Cross-Border Insolvency and Shipping – A Practical Guide”,
 available at <http://www.fedcourt.gov.au/__data/assets/pdf_file/0013/31153/Julie-Soars-20150423.pdf> (accessed 17 September 2018) at paras 9 and 13.
 77 This was first mooted in Christopher Davis’ “Report on the work of the International Working
 Group on Cross-Border Insolvency” (5 April 2016), available at <
<http://comitemaritime.org/wp-content/uploads/2018/05/2016-04-Report-on-the-IWG-on-Cross-Border-Insolvency.pdf>> (accessed 17 September 2018), but the CMI came to the
 view after the 2017 CMI assembly in Genoa that it was “unlikely to attract wide support”:
 CMI News Letter (No 1, Jan 2018), available at <<http://comitemaritime.org/wp-content/uploads/2018/05/N%C2%B01-January-2018.pdf>> (accessed 17 September
 2018).
 78 Yu at [48]; see also Kim at [15] and *Board of Directors of Rizzo-Bottiglieri-De Carlini*
Armatori SpA v Rizzo-Bottiglieri-De Carlini Armatori SpA [2017] FCA 331.
 79 Ship Arrests, Maritime Liens, and CBI at paras 56–57, citing the decision of the Federal
 Court of Australia in *Yakushiji* at [21].
 80 See the decision of the Federal Court of Australia in *Hur (in his capacity as foreign*
representative of Samsun Logix Corporation) v Samsun Logix Corporation (2015) 238 FCR
 483 (“*Hur*”) at [33] per Rares J.
 81 See the decision of the English High Court in *Pickwick International Inc (GB) Ltd v Multiple*
Sound Distributors Ltd and another [1972] 3 All ER 384 at 385.
 82 *Kim v SW Shipping Co Ltd* [2016] FCA 428.
 83 *Board of Directors of Rizzo-Bottiglieri-De Carlini Armatori SpA v Rizzo- Bottiglieri-De Carlini*
Armatori SpA [2017] FCA 331 at [30] per Rares J.
 84 See the decision of the Singapore Court of Appeal in *The Vasilij Golovnin* [2008] 4 SLR(R)
 994 at [83].
 85 See the decision of the English Court of Appeal in *The Varna* [1993] 2 Lloyd’s Rep 253 at
 257–258.
 86 See *Kim* at [9].
 87 See generally Steven Rares, “Declining Jurisdiction Following Arrest”, paper presented at
 the National University of Singapore Colloquium on the Arrest Conventions 1952 and 1999
 on 28-29 November 2016, available at <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-raises/raises-j-20161129>> (accessed 17 September 2018).
 88 404 BR 726 (SDNY, 2009).
 89 *Ibid* at 742.
 90 *Ibid* at 747.
 91 *Reciprocal Comity* at pp 21–22.
 92 *Re Collins & Aikman Eur SA and other companies* [2006] EWHC (Ch) 1343.
 93 John A. E. Pottow, “A New Role for Secondary Proceedings in International Bankruptcies”
 (2011) 46 Texas International Law Journal 579, at p 585.
 94 Indeed, it is often in the FMP court’s interest to have the arresting court take charge of the
 sale process. As I observed at [12] and [21] above, only a judicial sale can give the
 purchaser a clean title free of liens and encumbrances; a sale by a scheme manager /
 receiver / judicial manager / foreign representative does not have this effect. See also, *The*
Constellation [1996] 1 WLR 272.
 95 See Guideline 7 of the JIN Guidelines for Communication and Cooperation between Courts
 in Cross-Border Insolvency Matters.