OLD WINE, NEW BOTTLES:

A RENEWED CALL FOR THE HARMONIZATION OF BANKRUPTCY AND ADMIRALTY LAWS IN THE MARITIME INDUSTRY IN THE WAKE OF COVID-19 (CORONA VIRUS) - THE ONGOING CONFLICT BETWEEN BANKRUPTCY AND ADMIRALTY LAWS IN THE SPACE OF GLOBAL SHIPPING

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GLENYS P. SPENCE, J.D., LL.M.*

"[A]s long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages."[1]

INTRODUCTION

Historically, bankruptcy law and admiralty/maritime law have been on a collision course. The nature of admiralty/maritime law is international for the obvious transnational transportation and movement of goods and people while bankruptcy law is a homeward bound scheme which seeks to protect debtors' assets from the long arm of creditors.[2] Modern commercial law principles have their genesis in the *lex mercatoria* (merchant law), and matters relating to the transportation of goods and the movement of people by sea are governed by the admiralty and maritime laws which originated from a long line of medieval maritime codes and the lex mercatoria.[3] Today, these laws clothed in the garb of antiquity are fraught with tensions and are often difficult to reconcile and adapt to

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[1] In re The John G. Stevens, 170 U.S. 113, 119 (1898).

[2] *See generally* Lawrence Rutkowski & Robert J. Gayda, *Bankruptcy: The Winners, The Losers, and the Collateral Damage*, 18-4 BENEDICT'S MARITIME BULLETIN 01 (2020) ("Shipping bankruptcies give rise to unique legal and practical issues given the transitory nature of the principal assets – ships – the typically foreign domicile of shipping companies and the awkward intersection of bankruptcy and admiralty law.").

[3] *See generally* FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL (7th. ed. 2017) ("Admiralty or maritime law is one of the world's oldest bodies of law . . . [A]mong the [codes] remembered are the Tablets of Amalfi, near Naples, and the Rules of Oleron, an island off the French west coast. Form these codes there eventually developed a body of general maritime law.").

modern commercial transactions.[4] In the area of maritime bankruptcy, this tension is sharply pronounced and often collides with the special admiralty rules of the United States. This jurisdictional chasm between these two bodies of law still exist because admiralty law is *sui generis* internationally.[5] It is an embryonic creation, which came into being for the specific purpose of governing ocean-driven transnational transactions.[6] The current attempts to sever this body of law from its federal moorings to promote uniformity through treaty law are fraught with legal uncertainties and threaten to disrupt a well-developed legal order.[7] The tension today is uncannily reminiscent of the 400-year contest between the English admiralty and common law courts.[8] Just as that matter was put to rest based on the

[4] 14A ARTHUR R. MILLER & CHARLES W. RIGHT, FEDERAL PRACTICE AND PROCEDURE § 3671 (4th ed. 2020) ("The development of the admiralty jurisdiction of the federal courts sometimes has lacked coherence and has continued to prove incapable of precise definition by the courts even to this day. This may be, as one commentator has suggested, partially the result of the ambiguity of the Constitution with respect to both the scope of the admiralty jurisdiction itself and the division of regulatory authority within this source of federal subject-matter jurisdiction.").

[5] *See, e.g.*, Armada (Sing) Pte Ltd. v. Amcol Int'l Corp., 244 F. Supp. 3d 750, 761 (N.D. Ill. 2017) (citation omitted) (explaining that concerns over the extra-territorial application of federal maritime law are irrelevant because "by its very nature [the court's maritime jurisdiction] extends to matters beyond the nation's borders" and that "[h]ardly any area of law could be viewed as more extraterritorial than admiralty law . . . admiralty [law] by definition extends beyond United States territorial boundaries").

[6] *See, e.g.*, Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (stating that a "significant relationship with maritime commerce" is requisite to admiralty jurisdiction).

[8] *See generally id.* (first citing Charles L. Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 280 (1950) ("The main thing is that if the court of admiralty is to exist at all, it should exist because the *business of river, lake, and ocean shipping* calls for supervision by a tribunal enjoying a particular expertness in regard to the more complicated concerns of that *business*.") (emphasis added); then citing Frederick W. Swaim, Jr., *Yes, Virginia, There is an Admiralty: The* Rodrigue *Case*, 16 LOYOLA L. REV. 43, 44 (1970) ("Maritime commerce—and nothing more—is the *raison d'etre* for the courts and rules of admiralty.")); 13 Rich. II, c. 5 (that the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward III, grandfather of our lord the king that now is . . . Nevertheless the death of a man, and of a maihem (sic) done in great ships, being hovering in the mainstream of great rivers, only, beneath the bridges of the same rivers night to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also to arrest ships in the great flotes (sic) for the great voyages of the king and of the realm; saving always to the king all manner of forfeitures and profits thereof coming; and he shall have jurisdiction upon the said flotes (sic) during the said voyages, only saving always to the lords, cities and boroughs, their liberties and franchises. 15 Rich II, c. 3.

inconvenience of geography, the current strife between admiralty and bankruptcy jurisdiction may well come to rest upon the same shore.[9]

Bankruptcy law on the other hand, is less embryonic than admiralty law. Although a creature of federal law, bankruptcy law is not exclusively federal nor does it derive from the Constitution, the well-spring of admiralty law.[10] Moreover, bankruptcy law is significantly different between countries and is based upon moral and social mores of each country. Maritime and admiralty law on the other hand is international based upon shared international and transnational values as old as the oceans.[11] Thus, bankruptcy law can be described as a creature of domestic origin while the roots of admiralty law are primordially international.[12] The United States adoption and incorporation of the UNCITRAL model law on cross-border insolvency into the bankruptcy code is causing turmoil in the federal courts as demonstrated by recent cases concerning seafarer's claims for wages and maintenance and cure. While the incorporation of the model law is positive for

[9] Hale and Fleetwood on Admiralty jurisdiction, Vol. 108 of the Seldon Society (1992) reprinted in Admiralty and Maritime Jurisdiction and Practice, Chp. I, Jo Desha Lucas and Randall Schmidt (Foundation Press 2012), (Turning to the Views of Lord Justice Hale (The Sum therefore of what hath been said is this: "As to places upon the Land, these Conclusions are clear and evident: "1. That as to all causes, as well criminal as civil, arising upon terra firma, whether criminal or civil, the common law hath jurisdiction exclusive of the jurisdiction of the Admiral . . . As to the high sea, altum mare: as to causes civil and criminal, as the death of a man entirely happening upon the vast ocean, or those parts thereof that are contiguous to or belonging to any dominion of any other Crown . . . any of those alta marina, are properly determinable before the Admiral or Commissioners of Admiral Jurisdiction").

[10] *See Foremost*, 457 U.S. at 680 n.3 (1982) (first citing Comment, 12 Cal. Western L. Rev. 535, 558, n. 133 (1976) ("The historical justification for admiralty law and courts is commercial. Its law was designed to meet commercial needs and practice.) next citing Randall Bridwell & Ralph U. Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of* Executive Jet, 1974 DUKE L.J. 757, 793.

[11] *See* Frederick W. Swaim, Jr., *Yes, Virginia, There Is an Admiralty: The Rodrigue Case*, 7 LOY. MAR. L.J. 5, 5 (2009) ("The problem under discussion is that of jurisdiction. It should be emphasized at the outset that, in the law of admiralty, the term "jurisdiction" denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be applied by those courts considering the controversy. This is so because a court of admiralty sits solely to administer and apply the maritime law. Indeed, this is the only law it may constitutionally apply when sitting as an admiralty court. It is, if you will, a special-industry court, the only such in our judicial system; and that industry for which the admiralty court exists is the maritime industry. Maritime commerce-and nothing more-is the raison d'etre for the courts and rules of admiralty.").

[12] Gary F. Seitz, *Interaction Between Admiralty and Bankruptcy Law: Effects of Globalization and Recurrent Tensions*, 83 TUL. L. REV. 1339, 1340–41 ("Unlike bankruptcy law, which can vary dramatically from nation to nation based upon the unique domestic social values attached to financial matters, given its origins and purpose, maritime law is inherently international in nature.").

international business transactions or transnational transactions, extending Chapter 15 into the embryonic interstices of maritime law to disrupt the rights of "the wards of the admiralty" is an unwelcome intrusion into long-held principles of admiralty law.[13]

This article will analyze the complications that arise in the maritime industry when the owner of a vessel declares bankruptcy. Of current importance is the rate of bankruptcy filing heralded by the global Covid-19 pandemic.[14] One of the most pressing issues is the plight of seafarers such as crewmen who are struggling to receive wages for labor and also wages for maintenance and cure, which arose both pre-pandemic and have increased during the pandemic. This article will focus on the plight of these seafarers whose wages for labor and maintenance and cure are in danger of falling prey to the automatic stay provisions and lien priority when district courts cede jurisdiction to the bankruptcy code under Chapter 15 of the bankruptcy law. For cases in the admiralty, jurisdiction is proper under an independent source of subject-matter jurisdiction, which is separate from cases arising under the other two enumerated classes under the Article III power. The distinction begs the question of whether the bankruptcy power, which falls under the "laws of the United States," should be imposed on cases arising under the admiralty and maritime jurisdiction.[15]

[13] Governor & Co. of the Bank of Scot. v. Sabay*,* 211 F.3d 261, 265–66 (5th Cir. 2000) ("In truth, *no* authority really need be cited for the fact that seamen, the 'wards of admiralty', historically have received favored treatment from the Congress and the admiralty courts." (citing Bainbridge v. Merchants & Miners Transp. Co., 287 U.S. 278, 282 (1932) ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class."))).

[14] Johnathan C. Gordon, *Crossing The Line in Cross-Border Insolvencies*, 27 AM. BANKR. INST. L. REV. 17, 43 (2019) ("As the economy continues to become more global and businesses more international, the number of cross-border insolvency proceedings will rise.").

[15] Swaim, *supra* note 12, at 7-8 ("Since a court of admiralty exists to administer the maritime law, and thus to serve the maritime (or shipping) industry, subject-matter represents the only truly rational criterion of admiralty and maritime jurisdiction.").

THE ISSUES

The maritime industry is uniquely vulnerable to the pressures brought about by external forces.[16] Recently, Royal Caribbean Cruises announced a loss of about six billion dollars since the pandemic.[17] Since the global recession of 2008, the maritime industry has struggled to recover and survive from financial pressures. Once again, the industry is facing another challenge: the global pandemic of COVID-19. The maritime industry was among the first commercial casualty of the pandemic. The reaction was swift, and cruise operators did not waste any time to file for bankruptcy once countries began to close their ports to cruise ships. The cargo concerns are also jolted by the realities of shipping during a pandemic as crew members are impacted by the virus. Many cruise ships have been quarantined or refused entry by ports around the globe. In short, the impact of the pandemic was immediate in the industry.[18] The first round of bankruptcy filing, coupled with the

[16] Martin Davies, *Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity*, 66 AM. J. COMPAR. L. 101, 102–03 (2018) (citing Ashley Cruz, *Bankruptcy Woes: Hanjin Makes Waves Across the World*, GLOBAL TRADE, Sept. 27, 2016) ("The post-2008 wave of shipowner insolvencies brought to light some pressing questions for the law relating to cross-border insolvency. By its very nature, much of the shipping business is global in scale, with the result that a shipowner may have mobile assets (its ships) dispersed all around the world when it opens insolvency proceedings in its base of operations. An insolvency with globally spread assets is not that unusual but, for good or ill, ships are different from other assets in that there is an ancient and well-established body of law that gives rights to creditors in ways quite different from those that apply in relation to their land-based counterparts. When a shipowner becomes insolvent, or when it appears that it soon may be so, creditors often move to arrest its ships or attach its other assets wherever in the world they can be found, using admiralty procedures designed to protect the interests of local claimants. When that occurs, a head-on collision arises between insolvency law and admiralty law, raising interesting conceptual questions for both. This remains a very topical question, as there are still very few signs of recovery in the global shipping market. For example, Hanjin Shipping, the seventh-largest shipping line in the world at the time, filed for bankruptcy in Korea on August 31, 2016, setting off a wave of disruption to supply chains all around the world, and leaving many creditors uncertain about their prospects of recovery.").

[17] *Royal Caribbean Loses $5.8 Billion but Says Cruising Returning Soon,* MAR. EXEC. (Feb. 02, 2021, 7:50 AM), https://www.maritime-executive.com/article/royal-caribbean-losses-5-8-billion-but-says-cruising-returning-soon ("In 2020, the company was only able to operate 20 percent of its planned cruises before the shutdown, which led to a net loss of $5.8 billion for the full year.").

[18] *How Cruise Lines are Preparing for a Post-Pandemic World*, MAR. EXEC. (Sept. 30, 2020, 7:13 AM), https://maritime-executive.com/features/how-cruise-lines-are-preparing-for-a-post-pandemic-world ("It's no surprise or secret that the coronavirus pandemic has dealt a major economic blow to cruise ship lines. Some of the earliest, most gripping stories of COVID-19's spread outside of China involved quarantined cruise ships searching for safe harbor in the viral

effects on the stocks of these maritime companies, have reignited the tensions and the complexities in bankruptcy and admiralty law in the United States and their impacts on the global maritime industry.

Although the United States has attempted to harmonize international bankruptcy principles with the law of admiralty, problems of jurisdiction and recognition of foreign judgments still persist. In bankruptcy cases relating to the sale of a vessel and the distribution of proceeds according to the ranking of liens, the admiralty law of the United States and the bankruptcy law frequently struggle for power to hear these cases. Where a foreign forum is involved, this power struggle is even more contentious. The process can be an equally frustrating one for legal practitioners and industry players.

Some of the difficulties lie in reconciling the Model Law on Cross-Border Insolvency, promulgated in the US Bankruptcy Code and recognition of foreign procedures as it relates to the automatic stay. Another murky issue is the uncertainty surrounding the rights of creditors and the judicial sale of a ship to satisfy creditors. These creditors are often suppliers, service providers, crew members, and ports. The ongoing issues posed by the many interests that are negatively affected when a vessel owner goes bankrupt highlight the pressing need for the harmonization of maritime and bankruptcy law.[19]

But, harmonizing these two disparate bodies of law is easier said than done because most of the United States' maritime partners either do not recognize maritime liens, or as in the case of China, have not ratified the Model Rules on Cross-Border Insolvency. In fact, the United States is one of the few developed

storm. After some initial scrambling to bring home everyone already at sea, most cruise ships have been in port and empty of passengers, awaiting word that it's safe to sail again."); *See also*, U.S. DEP'T HEALTH HUM. SERVS. & CTRS. FOR DISEASE CONTROL & PREVENTION, SECOND MODIFICATION AND EXTENSION OF NO SAIL ORDER AND OTHER MEASURES RELATED TO OPERATIONS (2020).

[19] Davies, *supra* note 17, at 101 ("The law relating to cross-border insolvency is largely founded on the concept of universalism, which requires all claims against the insolvent debtor to be marshaled together in one country, usually that of the debtor's principal place of business. Any assets of the insolvent debtor that are found in other countries are to be brought into the insolvency proceedings, so that a single, orderly management of claims and assets can take place under the control of the court in which the insolvency proceedings have been opened. In stark contrast, admiralty law has for centuries protected the interests of claimants by allowing them to seize maritime assets such as ships by judicial process in order to satisfy their claims from the seized assets, even if (indeed, especially if) the owner of those assets has entered insolvency proceedings in another country.").

countries that recognizes maritime liens.[20] The fact that China has not ratified the Model Law is problematic because of China's growing hegemony in the maritime industry.[21] Given that China's maritime industry has grown over the last five years through its Belt and Road Initiative, the universality of the model law without China's membership is doubtful.[22] Specifically, where any international convention or other law conflict with Chinese law, the latter will trump all other law.[23] As it relates to the priority of seamen's rights, Chinese maritime law differs from the United States in the characterization of liens for seamen wages.[24]

Unlike the United States, and like most other countries, China's maritime law is based on a comprehensive maritime code. Much of US maritime law is judge-made law or based on the common law tradition. Thus, the incorporation of a model law on cross-border insolvency is more easily "back-doored" into US maritime jurisprudence than it would be to impose the strictures of the Model Law into the Chinese Maritime Code.[25]

The maritime legal community and industry players are crying out for uniformity in the maritime trade. Given the current world crisis and the immediate

[20] WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 551 (2d ed. 1998) [hereinafter Tetley] (stating that maritime liens arise only in the United States, France, and those nations that signed on to the 1926 Brussels Convention, which provides a maritime lien for necessaries under limited circumstances).

[21] Mark S. Hamilton, *Sailing in A Sea of Obscurity: The Growing Importance of China's Maritime Arbitration Commission*, 3 ASIAN-PAC. L. & POL'Y J. 10, 501 (2002) ("Given the world's reliance on maritime transport and China's increasing importance as a provider of maritime transport services, China's Maritime Code could have a profound influence on international commerce.").

[22] *Id.* at 481-82 ("In 1949, the Chinese Merchant Marine consisted of only fourteen vessels. Since 1961, when the PRC established the China Ocean Shipping Company (COSCO) to oversee the development of its merchant marine, China has increased its tonnage at an average rate of 13.6% per year, a rate greater than any other country in the world. China currently owns approximately 1500 ocean-going vessels. In 1994, Chinese-owned and registered vessels were sailing to over 1100 ports in 150 countries.") (footnotes omitted).

[23] Kevin X. Li, *Maritime Jurisdiction and Arrest of Ships Under China's Maritime Procedure Law (1999)*, 32 J. MAR. L. & COM. 655, 659 (2001) (citing MARITIME. CODE art. 268 (China) and CIVIL PROCEDURE LAW art. 238 (China)) ("When national laws conflict with treaties concluded or acceded to by China, the latter shall be applied.").

[24] Kevin X. Li, *Review of Chinese Maritime Law: 2006*, 38 J. MAR. L. & COM. 369, 373-74 (2007) (referring to the different nature of crew wages that arise out of working on board and not on board. The former one has Maritime Lien priority, while the latter one is a creditor's right but not a maritime lien).

[25] *See* Hamilton, *supra* note 22, at 482 ("In the last twenty years, China has become a major maritime transport services provider, but while China's emphasis on its shipping industry is relatively recent, its experience with alternative forms of dispute resolution is centuries old.") (footnote omitted).

impact on the industry, the time is ripe to address these tensions by enacting clearly harmonized rules to govern bankruptcy in the maritime industry. [26] Narrowing the legal gaps will promote certainty and uniformity in an industry that is crucial to a robust and healthy international trade regime. [27]

The argument rests on whether harmonization of the insolvency law should include the maritime sector, which is *sui generis*. Transactions that are squarely within the admiralty are unique and predate the modern bankruptcy scheme. Thus, while a model law on cross-border insolvency is desirable for the industry, the push for uniformity will upset long-held principles within the admiralty jurisdiction and cause further confusion within the industry. The current jurisdictional tension also begs the question of whether a well-developed, robust jurisprudence like the law of admiralty should be subjugated for the sake of international uniformity.

When compared with other so-called uniform laws of incorporation such as the Convention on the International Sale of Goods (CISG), courts in the United States tend to ignore the idealistic goals of international uniformity if the predictability of United States law is threatened or where application of the law will touch the delicate balance of federalism. For example, in the application of the CISG to transnational sale of goods disputes, the prevailing view is to opt out of its operation in international contracts, rather than subjugate the Uniform Commercial

[26] Melissa K.S. Alwang, *Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets*, 64 FORDHAM L. REV. 2613, 2613 (1996).

[27] Hamilton, *supra* note 22, at 480-81 ("According to the International Maritime Organization (IMO), there are literally thousands of ships engaged in providing transport services internationally. Estimates suggest that at least eighty-percent of the world's trade goods are transported by ships. In the U.S. alone, the waterborne cargo industry contributes seventy-eight billion dollars each year to the U.S. Gross Domestic Product. China's shipping industry is equally important to its economy; nearly ninety percent of the goods China imports and exports arrive or leave through Chinese ports. Approximately seventy-five billion dollars in bilateral trade passes through U.S. and Chinese ports annually. In an address for World Maritime Day 2000, IMO Secretary-General William O'Neil observed that: No matter where you may be in the world, if you look around you it is most probable that you will see something that either has been or will be transported by sea. There is every likelihood that the chair you are sitting on, the paper on which you are reading this message or the radio to which you may be listening or even the clothes you are wearing have something in their content that has been carried on board a ship. Shipping is truly an international industry and will play an increasingly important role in the growth of international trade.").

Code (UCC).[28] So too in admiralty, predictability and clarity in the law are of utmost importance, particularly where the rights of seafarers are concerned. In fact, there are several maritime treaties, which the United States has declined to ratify because its maritime jurisprudence is well-established. To understand the tension, a brief background on the origins of federal maritime jurisdiction is necessary.

PART I: ADMIRALTY JURISDICTION – BACKGROUND

Admiralty or maritime law developed from ancient Mediterranean maritime codes. These codes were created to govern the transportation of goods over water which, like today, was integral to the economies of the ancient world. The codes were gradually adopted by the various city-states of the ancient world and later codified as substantive rules to govern the shipping trade as well as to settle disputes between merchants of the trade. Special courts in coastal towns were created to deal with maritime disputes. As England began to grow in commercial and imperial power, maritime courts were replaced with admiralty courts under the jurisdiction of the Lord of the Admiralty. This specialized structure of admiralty law was instrumental to the expansion of England and her colonies, including America, now the United States. Vice-admiralty courts were established in the American colonies to preside over maritime disputes.

After the American Revolution, the power to regulate prizes and piracy was granted to Congress and a court of admiralty was established with original jurisdiction in state courts. Needless to say, there was a complete lack of uniformity among the states.[29] Consequently, the newly minted United States Constitution

[28] United Nations Convention on Contracts for the International Sale of Goods, Arts. 1(1)(a), 95, 15 App. U.S.C.A., *See also* Prime Start Ltd. v. Maher Forest Prod., Ltd., 442 F. Supp. 2d 1113 (W.D. Wash. 2006) (United Nations Convention on Contracts for the International Sale of Goods (CISG) applies, to contracts of sale of goods between parties whose places of business are in different countries, one of which countries is the United States, only if those countries are parties to CISG; while another provision of CISG, known as Article 1(1)(b), makes CISG applicable if the rules of private international law lead to the application of the law of a country that is a party to CISG, the United States, when it ratified CISG, invoked CISG's option not to be bound by Article 1(1)(b)).

[29] William H. Theis, *United States Admiralty Law As an Enclave of Federal Common Law*, 23 TUL. MAR. L.J. 73, 78-79 (1998) ("The early American decisions typically made a painstaking review of sources like Justinian's Digest, the Laws of Oleron, the Laws of Wisbuy, the Consulate of the Sea, and the Maritime Ordinances of Louis XIV. They also consulted commentators on maritime law, such as Valin, Pothier, Bynkershoek, Malynes, and Molloy. Treatises by Browne, Abbott, and Kent also gained ready acceptance upon their publication in the early

included the federal power over "admiralty and maritime" matters and American admiralty law was conceived and flourished within the specially-established federal courts with substantive rules to govern maritime transactions and to resolve maritime disputes.

Article III of the United States Constitution extends "judicial power" to three classes of cases: (i) cases in law and equity, arising under the constitution, the laws of the United States, and treaties, (ii) cases affecting ambassadors, or other public ministers and consuls, and (iii) *cases of admiralty and maritime jurisdiction.*[30] The Supreme Court has interpreted this Constitutional provision to contain three separate grants of power: (1) it empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the Supreme Court" which were authorized by Art. I., Sec. 8, Cl. 9; (2) it empowered the federal courts in their exercise of admiralty and maritime jurisdiction to draw on the substantive law "inherent in the admiralty and maritime jurisdiction and to continue the development of this law within constitutional limits"; and (3) it empowered Congress to revise and supplement the maritime law within the limits of the Constitution. Jurisdiction over maritime cases, then, arises from the Constitution of the United States.[31]

Under the United States Constitution, maritime cases are within the exclusive jurisdiction of the federal courts in which Congress has granted the

nineteenth century. These authorities dealt with the special problems of maritime commerce. They represented a consensus of principles recognized by seafarers and merchants involved in maritime commerce, although, as is true of any consensus, there were differences in the application of core doctrines.").

William H. Theis, *United States Admiralty Law as an Enclave of Federal Common Law*, 23 TUL. MAR. L.J. 73, 79 (1998) ("Together, those sources provided a maritime law that had been incorporated into English common law, and which was later received by the colonies, along with the rest of English common law. The change in government brought by the American revolution did not abrogate this body of transnational commercial law, and may have broadened its base. With the revolution, American courts could receive this body of transnational law without any of the limitations placed on it by the English courts, which were laboring under their own jurisdictional constraints. Although the American courts did not regard this law as binding on them in a strict sense, they preferred to follow this preexisting law rather than to create a new legal system out of whole cloth.").

[30] U.S. CONST. art. III, § 2 (emphasis added).

[31] *The Hine,* 71 U.S. 555, 558, 18 L. Ed. 451 (1866) (The Judiciary Act of 1789, § 9, 28 U.S.C.A. § 41) (conferring jurisdiction on federal district courts in civil causes of admiralty and maritime jurisdiction is authorized by Constitution).

special powers to hear cases sounding in admiralty.[32] In the Judiciary Act of 1789, Congress used the same language to confer admiralty jurisdiction on the federal district courts.[33] In granting exclusive jurisdiction to the federal district courts, Congress carved out certain areas to share with the state courts, but retained certain maritime cases under the exclusive admiralty jurisdiction of the federal district courts. Actions in rem, actions in personam accompanied by maritime attachment or garnishment process under the Federal Rules of Civil Procedure, Rule B, and actions to foreclose preferred ship mortgages under the Ship Mortgage Act are all firmly entrenched within the exclusive admiralty jurisdiction. Thus, Congress has never ceded the jurisdiction of the federal district courts in admiralty matters to any other court.[34] The US Constitution and the Federal Judiciary Act of 1789 carved

[32] U.S. CONST. art. III, § 2, cl. 1("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

[33] The Judiciary Act of 1789, Chapter XX. An Act to Establish the Judicial Courts of the United States, 1st Cong., 1st Sess., Sept. 24 1789, 1 Stat. 76 ("[The] district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; … and shall also have exclusive original cognizance of all civil causes of admiralty and Maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States…. And the trial of issues in fact, in the district courts, in all causes except civil cases of admiralty and maritime jurisdiction shall by jury."). *See e.g.* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) ("[The] Judiciary Act of 1789 reflected the constitutional authorization of Clause 1 of §2, which extended the judicial power "to all Cases of admiralty and maritime Jurisdiction.").

[34] *See generally* Oregon R. & Nav. Co. v. Balfour, 179 U.S. 55 (1900) ("By the 2d section of article 3 of the Constitution, the judicial power extends "to all cases of admiralty and maritime jurisdiction," the word "maritime" having been added, out of abundant caution, to preclude a narrow interpretation of the word "admiralty.").

out an "exclusive" space for admiralty and maritime jurisdiction within the broader federal jurisdictional scheme.[35]

Based on the grant of power to Congress to delegate jurisdiction over admiralty and maritime cases, maritime insolvency cases are still within admiralty jurisdiction and not that of the bankruptcy courts.[36] Courts have long held that admiralty law governs issues that are "wholly maritime" in nature.[37] Thus, like maritime contracts, maritime liens are a creature of admiralty law and have been historically held as such by the courts.[38] It is a long-held legal principle that an action against a vessel in rem is only cognizable in admiralty.

In cases where the ship owner is indebted to a creditor, the ship is personified both legally and physically.[39] In fact, in early admiralty cases, a writ of attachment was required to be nailed to the ship's mast. Physical delivery of the writ to the ship's master instead of nailing the actual writ to the ship's mast was invalid. Thus, the ship became one with the debt. This process of marrying the ship to the debt is known as the personification doctrine.[40]

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[35] *See* Kenneth H. Volk, *Parsing the Admiralty Clause: Jurisdiction of Marine Insurance Transactions*, 66 TUL. L. REV. 257 (1991) ("Article III of the Constitution provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. The Judiciary Act of 1789, in which Congress implemented the Constitution's grant of Article III jurisdiction, afforded the federal district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, while reserving or "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it.").

[36] Russell M. Olson, *Arrest Process: The Necessity for Swift Seizure in Admiralty*, 6 MAR. LAW. 285, 287-88 (1981) ("The law of admiralty has developed, within constitutional limits, from a separate grant of jurisdiction. The admiralty's in rem jurisdiction exists primarily to enforce the maritime lien, a lien that has little in common with shoreside liens. A maritime lienor under American admiralty law has the right to enforce his lien against the vessel as a juridical entity when it is located physically within the jurisdiction of the court.").

[37] Kenneth H. Volk, *Parsing the Admiralty Clause: Jurisdiction of Marine Insurance Transactions*, 66 TUL. L. REV. 257 (1991) (Admiralty jurisdiction, in a breach of contract action, arises only when the "subject-matter of the contract is 'purely' or 'wholly' maritime in nature.").

[38] *Id.* at 290-91; *See also* THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MARITIME LAW § 3-2, at 61 (2d ed. 1994) (Federal courts have exclusive admiralty jurisdiction in matters concerning in rem actions for the enforcement of maritime liens).

[39] In re Muma Servs., Inc., 322 B.R. 541, 546 (Bankr). D. Del. 2005) (This "personifies a vessel as an entity with potential liabilities independent and apart from the personal liability of its owner," giving the maritime lien claimant the right to seize the vessel and have it sold to satisfy the debt owed); *see generally,* ROBERT FORCE & MARTIN NORRIS, 1 THE LAW OF SEAMEN § 20:3 (5th ed. 2004).

[40] In re Muma Servs., Inc., 322 B.R. 541 (Bankr). D. Del. 2005) (Maritime lien is grounded in legal fiction that ship itself caused lienholder's loss and may be called into court to make good;

PART II: MARITIME LIENS ARE INHERENTLY WITHIN ADMIRALTY JURISDICTION

A maritime lien is a secured right that is unique to maritime law.[41] Thus, in maritime cases, courts have carved out exclusive admiralty jurisdiction to govern claims arising from maritime liens.[42] The lien is a special property right in a vessel which arises at law when a creditor renders service to the ship to facilitate the use of the ship in navigation or from an injury caused by the vessel in navigable waters. A maritime lien on a vessel is a prerequisite to an action in rem. Maritime liens arise by operation of law.[43] Federal courts have original jurisdiction of claims arising under admiralty and maritime jurisdiction.[44] Admiralty jurisdiction extends to maritime liens and various other maritime service claims. As long as the subject matter is maritime in nature, the admiralty jurisdiction governs the claim.[45]

vessel is personified as entity with potential liabilities independent and apart from personal liability of its owner).

[41] Tetley, *supra* note 21 at 6.

[42] Amstar Corp. v. S/S Alexandros T., 664 F.2d 904, 908 (4th Cir. 1981) ("Congress and the Court have always recognized that maritime law differed from the common law. In the Act that granted the Supreme Court its authority to promulgate procedural rules, Congress provided: '(T)he forms of writs, executions and other process ... (in suits of) ... admiralty and maritime jurisdiction, (shall be) according to the principles, rules and usages which belong to courts ... of admiralty ... as contradistinguished from courts of common law ....' Although rule C was promulgated in its present form in 1966, its provisions for the arrest of a vessel in an in rem action can be traced through the Admiralty Rules of 1920 and 1844 with little change. This procedure, moreover, was used long before it was embodied in the rule. Its purpose has always been to provide a means for enforcing a maritime lien, which is the central element of an in rem proceeding. Maritime liens, however, are not created by the rule. They are an integral aspect of substantive, rather than procedural, maritime law.").

[43] Trans-Tec Asia v. M/V HARMONY CONTAINER, 518 F.3d 1120, 1128 (9th Cir. 2008) ("A maritime lien is 'one of the most striking peculiarities of Admiralty law, constituting a charge upon ships of a nature unknown alike to common law and equity." (citing *Maritime Lien*, BLACK'S LAW DICTIONARY 943 (8th ed.2004) (quoting GRIFFITH PRICE, THE LAW OF MARITIME LIENS 1 (1940). It has been defined as: '(1) a privileged claim, (2) upon maritime property, (3) for service done to it or injury caused by it, (4) accruing from the moment when the claim attaches, (5) traveling with the property unconditionally, (6) enforced by means of an action in rem.")).

[44] 28 U.S.C. §1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.").

[45] *See* Frederick W. Swaim, Jr., *Yes, Virginia, There Is an Admiralty: The Rodrigue Case*, 7 LOY. MAR. L.J. 5 (2009) ("The law of admiralty, the term "jurisdiction" denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision

The Federal Maritime Liens Act (FMLA) provides that "any person furnishing necessaries to any vessel, whether foreign or domestic, upon the order of the owner of such vessel or any person authorized by the owner, shall have a maritime lien on the vessel which may be enforced by suit in rem."[46] Thus, an action against a vessel in rem is only cognizable in admiralty. A maritime lien is a device that is designed to prevent the ship from sailing away. A maritime lien attaches to the maritime property from the moment the debt arises.[47] The lien stays with the property notwithstanding any change in ownership until it is extinguished by operation of law.[48]

Jurisdiction in maritime insolvency proceedings is so entrenched in the federal district courts that the Federal Rules of Civil Procedure were enlarged to accommodate rules to govern the process of vessel attachment and arrest.[49]

An in rem action is lodged against the *res*, which under maritime law is the vessel, its cargo, or earned freight. Thus, the *res* is personified and the claims are enforced through an action in rem. Such an action must be brought in a federal district court in admiralty. Even state courts, under the Savings to Suitors clause of the admiralty jurisdictional grant cannot entertain suits in rem. An in rem action lies on the presumption that the *res*, the vessel, is under the court's subject matter jurisdiction and as the defendant, is properly before the court.[50]

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to be applied by those courts considering the controversy. This is so because a court of admiralty sits *solely* to administer and apply the maritime law. Indeed, this is the only law it may constitutionally apply when sitting as an admiralty court.").

[46] 46 U.S.C. § 31342; *see also* Intl. Terminal Operating Co. v. S.S. Valmas, 254 F. Supp. 486, 487 (D. Md. 1966).

[47] *In re* World Imports Ltd., 820 F.3d 576, 583 (3d Cir. 2016) ("Maritime liens are a security device intended 'to keep ships moving in commerce while preventing them from escaping their debts by sailing away' Thus, such a lien attaches to the maritime property from the moment a debt arises, and adheres, even through changes in the property's ownership, until extinguished by operation of law.").

[48] *Id.; see generally* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 588 (Foundation Press, 2d ed. 1975) (the maritime lien can be executed only by an admiralty court acting in rem).

[49] *See* Fed. R. Civ. P. Supp. A – F.

[50] *Amstar*, 664 F.2d, at 909 (4th Cir. 1981) ("These principles were developed to meet the special needs of persons engaged in many aspects of maritime commerce. By enforcing maritime liens through the arrest of vessels in in rem proceedings, admiralty enables people engaged in maritime commerce to obtain redress for certain kinds of injuries caused by the vessel and its crew without seeking compensation abroad from the vessel's owner. The owner, moreover, is not exposed to unlimited liability.").

Although the doctrine of personification is heavily criticized in the literature, the fact is that courts in the United States arrest ships, and a ship once arrested by the court becomes the defendant in an in rem proceeding. [51]

PART III: INTERNATIONAL AND DOMESTIC BANKRUPTCY PROCEDURES

A. The UNCITRAL Model Law on Cross-Border Insolvency

The Model Law on Cross-Border Insolvency (The Model Law) was drafted by the United Nations Commission on International Trade Law (UNCITRAL).[52] The foundation for the Model Law is the European Union Convention on Insolvency Proceedings (EU Convention). The Model Law has been adopted by several countries. In October 2005, the United States incorporated the Model Law on Cross-Border Insolvency (The Model Law).[53] The main purpose for the incorporation of this international treaty law was to streamline the bankruptcy

[51] Russell M. Olson, *Arrest Process: The Necessity for Swift Seizure in Admiralty*, 6 MAR. LAW. 285 (1981) ("Arrest procedure in admiralty is regulated by the Supplemental Rules for Certain Admiralty and Maritime Claims. An in rem proceeding against a vessel or other property subject to a maritime lien is initiated by the filing of a verified complaint which sets forth the particular circumstances out of which the claim arises, describes the vessel, and states that the vessel is within the district, or will be during the pendency of the action. Upon filing, or at a later date, it is within the court's discretion to require security for costs of either the vessel owner or plaintiff. The clerk of court issues the warrant for arrest of the vessel and delivers it to the marshal for service. The marshal must post process conspicuously on the vessel and serve copies of the complaint and process on the vessel owner, or his agent. If within 10 days the vessel is not claimed by the owner and released by special bond, general bond, or stipulation, the plaintiff must provide notice by publication.").

[52] *United Nations Commission on International Trade Law*, UNCITRAL Model Law on Cross-Border Insolvency, Adopted by UNCITRAL at Vienna, May 30, 1997, 30th Sess., retrieved from https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency ("The Model Law is designed to assist States to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency. It focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws. For the purposes of the Model Law, a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place.").

[53] U.S. Courts, *Chapter 15 - Bankruptcy Basics*, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics (last visited May 1, 2021) (Chapter 15 of the U.S. Bankruptcy Code was designed to provide effective mechanisms for dealing with cases dealing with cross-border insolvency).

process where an American multinational corporation or a foreign multinational corporation holds assets in the United States. The Model Law was enacted as part of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 and became the new Chapter 15 of the Bankruptcy Code.[54] Importantly, Chapter 15 was created primarily to govern bankruptcy procedures for multinational or foreign companies' bankruptcy filings. This new Chapter 15 was not intended to displace substantive bankruptcy law.[55]

The Model law applies to the bankruptcy of an American multinational corporation or a foreign multinational corporation with assets or operations in the United States. The preamble to the Model Law provides:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
> (b) Greater legal certainty for trade and investment;
> (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
> (d) Protection and maximization of the value of the debtor's assets; and
> (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

[54] Phoebe Hathorn, *Cross-Border Insolvency in the Maritime Context: The United States' Universalism vs. Singapore's Territorialism,* 38 TUL. MAR. L.J. 239, 248–49 (2013) ("The United States' approach to cross-border insolvency is codified in Chapter 15 of the United States Bankruptcy Code (Chapter 15), appropriately titled 'Ancillary and Other Cross-Border Cases.' Chapter 15 was enacted as a part of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 and entered into effect on October 17, 2005. Chapter 15's stated purpose ''is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency.' This is without question what the provisions of Chapter 15 do. The U.S. legislature adopted the Model Law in text, form, and spirit. The following Subpart will discuss the events leading up to UNCITRAL's adoption of the Model Law, key provisions of Chapter 15, and what Chapter 15 means in the maritime context.").

[55] Seitz, *supra* note 13, at 1341 ("The new chapter has been viewed as primarily procedural in nature and, as applied to foreign bankruptcies and trustees, not mandatory.").

B. Chapter 15 of the US Bankruptcy Code

Chapter 15 serves two primary purposes: (1) it is the vehicle by which a foreign representative in a foreign insolvency proceeding enlists the help of the United States bankruptcy court to protect or administer assets within the United States, and (2) it is the regulatory authority for a representative of a United States bankruptcy case to act in a foreign country.

The Model Law makes universalism the foundation of the United States' international bankruptcy policy. Because of the UNCITRAL source for Chapter 15, the US interpretation must be coordinated with the interpretation given by other countries that have adopted it as internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases. Although Chapter 15 is "primarily procedural," some of its objectives are substantive in practical application as the procedural rules can operate to strip away rights from certain creditors. Section 1501(a) specifically lists the five objectives of Chapter 15: (1) cooperation between US courts and foreign courts; (2) "greater legal certainty for trade and investment"; (3) "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor"; (4) "protection and maximization of the value of the debtor's assets"; and (5) "facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."The Uncomfortable Interactions Between Bankruptcy and Admiralty Law

Maritime lawyers have long believed that the bankruptcy and maritime laws, despite their common origins in antiquity, are opposed in their purpose and application.[56] As such, bankruptcy lawyers have tended to avoid or ignore maritime law. The primary purposes of these two legal regimes often appear to be at cross-purposes and the in rem procedures in maritime law are strongly disfavored among non-maritime lawyers and other scholars.[57] One

[56] *See generally* Rutkowski & Gayda, *supra* note 3 (emphasizing "the awkward intersection of bankruptcy and admiralty law"); *see also* The Honorable Lloyd King, *A Chart of Bankruptcy Jurisdiction for Admiralty Lawyers*, 59 TUL. L. REV. 1264, 1265 (1985). ("Admiralty lawyers and their clients are thought to be uncomfortable in bankruptcy courts.").

[57] Russell M. Olson, *Arrest Process: The Necessity for Swift Seizure in Admiralty,* 6 MAR. LAW. 285, 286-87 (1981) ("The constitutionality of admiralty arrest under Supplemental Rules C and E has often been attacked for its failure to satisfy due process requirements. The issue has been analyzed extensively by commentators and the federal district courts have rendered decisions that

primary purpose of maritime law is to support a strong merchant marine by favoring creditors. In other words, maritime law is creditor-oriented. Conversely, a major goal of bankruptcy law is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Generally, bankruptcy law aims to promote a system of fairness among debtors and creditors by adopting a system of transparency for all the world.[58] Admiralty law on the other hand has no system of recording, and the law of maritime liens differs drastically from the priority system contemplated in bankruptcy law.[59] Maritime liens are secret and are prioritized in the inverse order of attachment, last-in-time/first-in-right, while bankruptcy law is more familiar with land liens, which must be notorious to bind the world and are prioritized in order of their perfection, first-in-time/first-in-right.[60] This stark delineation

conflict on the constitutionality of Rule C. *Merchants National Bank v. The Dredge General G. L. Gillespie* and *Amstar Corp. v. S/S Alexandros T.*, recently held that land-based procedural requirements do not apply in the maritime context and that admiralty arrest procedure satisfies the primary due process requirement of fundamental fairness.").

[58] World Imps., Ltd. V. OEC Grp. NY., 820 F.3d 576, 583 (3d Cir. 2016) ("The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore stricti juris and cannot be extended by construction, analogy or inference.") (citing Vandewater v. Mills, 60 U.S.(19 How.) 82 (1856)).

[59] *In re* Muma Servs., Inc., 322 B.R. 541, 546 (Bankr). D. Del. 2005) ("The perfection of a maritime lien does not require that a creditor record his lien, obtain possession of the vessel, or file a claim against the ship. Rather, the lien attaches and is perfected when the underlying debt or claim arises. For these reasons, maritime liens are often characterized as "secret liens" because third parties may have no notice that they exist. Although maritime liens were created by common law, they have largely been codified in the Commercial Instruments and Maritime Lien Act ('the Maritime Lien Act'). *See* 46 U.S.C. §§ 30101–31343 (1989).") (citations omitted).

[60] John R Ashmead & Bruce G. Paulsen, *Culture Clash: The Intersection of Maritime Law and the United States Bankruptcy Code*, 28 U.S.F. MARITIME L.J. 118, 118-19 (2016) ("In contrast, [admiralty] law, . . . is creditor-oriented, generally permitting aggressive creditor remedies. From a policy point of view, [admiralty] law is intended to encourage international shipping, trade and finance by enabling efficient recourse against defaulting parties to address the issues created by shipping's moving targets."); *see also* United States v. ZP Chandon, 889 F.2d 233, 237 (9th Cir. 1989) ("In the leading treatise on maritime law, it is pointed out that maritime liens have extraordinarily little in common with land liens, including consensual security interests. Land liens and maritime liens are 'two unlike things ... called by the same name.' In particular, it is well-established that maritime liens are secret and unrecorded, that is, they are valid without possession or filing, while Article 9 security interests do require filing or possession. Furthermore, maritime liens generally have priority in *reverse* chronological order, while Article 9 security interests generally have priority in normal chronological order.") (alteration in original) (citations omitted).

between the two bodies of law leaves no question that the two are polar-opposites and are incapable of reconciliation.

The Automatic Stay One of the most glaring differences between bankruptcy law and admiralty law is the automatic stay provision, a primordial provision of bankruptcy law and a weapon against the long arm of the creditor. When a proceeding is filed under the US Bankruptcy Code, the automatic stay is triggered and all creditors of the debtor are precluded from asking the debtor for payment or otherwise reaching the debtor's assets. Even attempts by a debtor to pay off any of her creditors is prohibited and deemed a "fraudulent conveyance."[61] Under the law of admiralty, creditors with a lien on the vessel, including seamen, can arrest and attach a vessel or any property of a maritime debtor. Thus, the automatic stay has no counterpart under the admiralty law because as stated earlier, admiralty law favors creditors and preferred maritime liens can be executed as long as the vessel is in the custody of the district court.[62]

A more important question that arises in the jurisdictional battle is whether the exercise of jurisdiction by a bankruptcy court over a maritime action in rem is constitutional.[63] In the various revisions of the Bankruptcy Code, Congress did not clarify whether the bankruptcy courts had jurisdiction over in rem maritime proceedings. In the 2005 legislation, it appeared as if in rem jurisdiction was permissible in the bankruptcy courts because of the broadly worded language of the statutory provision.[64] However, in cases predating the 2005 legislation, the sharing

[61] 11 U.S.C.A. § 362; *see also* Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 975 (1st. Cir. 1997) ("[Automatic] stay springs into being immediately upon the filing of a bankruptcy petition: 'because automatic stay is exactly what the name implies— "automatic"—it operates without necessity for judicial intervention.'") (quoting Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994)).

[62] *See* Rutkowski & Gayda, *supra* note 3 ("The ability of a debtor to . . . [avoid] liens received by creditors in the time leading up to the bankruptcy filing discourages creditors from 'racing to the courthouse' or taking other action that could worsen the debtor's financial position or disadvantage other, less aggressive creditors. In contrast, admiralty law rewards creditors for aggressive enforcement of their debts against the debtor.").

[63] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion) (holding that section 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. V. Sharif, 575 U.S. 665 (2015).

[64] 28 U.S.C.A. § 1334 (West, Westlaw through Pub. L. 116-259) ("(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11(b) Except as provided in subsection (e)(2), and notwithstanding any Act of

of admiralty jurisdiction with the bankruptcy courts was doubtful when the Supreme Court held that the bankruptcy courts could not constitutionally entertain Article III litigation because bankruptcy judges were not granted life tenure.[65] As a result, a portion of the 1978 Bankruptcy Code was declared prospectively unconstitutional.[66] The modern Supreme Court has qualified the holding in *Northern Pipeline* with the factor of consent.[67] Although Congress has not promulgated any curative legislation since the *Northern Pipeline* decision, the Supreme Court has held that a bankruptcy court may exercise jurisdiction over cases "when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge."[68] In light of this holding, in maritime in rem cases, where parties do not consent to the jurisdiction of the bankruptcy court, the exercise of jurisdiction over those parties by a bankruptcy judge will be improper.

PART IV: THE PREFERRED MARITIME LIENS

Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11. (c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.").

[65] *See N. Pipeline Constr. Co*., 458 U.S. at 52, 87 (holding that "[s]ection 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III" and "that 28 U.S.C. § 1471 (1976 ed., Supp. IV), as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts.").

[66] *Id.* at 76 ("In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply.").

[67] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015) ("Congress' efforts to align the responsibilities of non-Article III judges with the boundaries set by the Constitution have not always been successful. In *Northern Pipeline Constr. Co*, and more recently in *Stern,* this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication.") (citing N. Pipeline Constr. Co., 458 U.S. 50).

[68] *Id.* ("This case presents the question whether Article III allows bankruptcy judges to adjudicate such claims with the parties' consent. We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.").

A petition in bankruptcy or a reorganization under the Bankruptcy Code does not extinguish maritime liens.[69] Moreover, a lien for seamen's wages is a "preferred maritime lien." Congress recodified the Maritime Lien Statute in 1988 and again in 2010 as positive law.[70] Upon recodification, seamen wages are characterized as a "preferred maritime lien." A preferred maritime lien is defined as "a maritime lien on a vessel—(A) arising before a preferred mortgage was filed under this title."[71] In addition, unpaid maintenance and cure creates a maritime lien on the vessel including any appurtenances of the vessel.[72]

The Cases and the "Sacred Liens"

The Ninth Circuit Court of Appeals is known for pronouncing the superiority of maritime liens and for maintaining admiralty jurisdiction wherever there is a maritime nexus. This court has applied United States admiralty jurisdiction in cases as long as a ship has contact with the United States.[73] In the recent line of cases addressing the jurisdictional propriety of the federal bankruptcy courts over maritime claims, the courts are split on the question of whether the automatic stay provision in the Chapter 11 of the Bankruptcy Code and Chapter 15's codification of the Model Law provisions apply to seamen's claims for maintenance and cure. The pertinent question here is whether the bankruptcy court can divest the district courts of in rem jurisdiction over seamen's claims and dispose these sacred liens in favor of vessel owners.

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[69] *In re* Sterling Navigation Co., Ltd. (The Regal Sword), 31 B.R. 619, 624 (S.D.N.Y. 1983) (finding that a maritime lien on subfreights for breach of charter is not subject to Article 9 of the Uniform Commercial Code and has priority over the trustee's lien without the need to file).

[70] Ship Mortgage Laws Codification, ch. 313, 102 Stat. 4735 (1988) (codified as amended at 46 U.S.C. §31301); Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, § 913, 124 Stat. 2905, 3017-18 (2010).

[71] 46 U.S.C. § 31301(5) (A "'preferred maritime lien' means a maritime lien on a vessel (A) arising before a preferred mortgage was filed under 31321 of this title; (B) for damage arising out of maritime tort; (C) for wages of a stevedore when employed directly by a person listed in section 31341 of this title; (D) for wages of the crew of the vessel; (E) for general average; or (F) for salvage, including contract salvage.")

[72] *See* Barnes v. Sea Haw. Rafting, LLC, 358 F. Supp. 3d 1083 (D. Haw. 2018) *reprinted as amended at* Barnes v. Sea Haw. Rafting, LLC, 889 F.3d 517 (D. Haw. 2018).

[73] *See, e.g.*, Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 1126–27 (9th Cir. 2008) ([A] maritime lien might exist on the vessel under United States law, but would not exist under Malaysian law, was a consequence obviously contemplated by the contracting parties, and because the *Harmony* sailed into a United States port, results in no fundamental unfairness.").

Claims for Seamen Wages and Maintenance and Cure

The cases in the Ninth Circuit Court of Appeals trend towards a liberal interpretation of admiralty jurisdiction in maritime insolvency cases. However, in other courts such as the District of Delaware and the courts lying within the Second Circuit, the question regarding the automatic stay as it relates to seamen's liens is either unanswered or analyzed under the bankruptcy code and not admiralty law.

1. The *Barnes* Case

Following its holding in *United States v. ZP Chandon*, the Ninth Circuit reaffirmed in *Barnes* that the Congressional grant of jurisdiction to the bankruptcy courts did not restrict the grant of jurisdiction to the district courts in admiralty in maritime cases.[74] The *Chandon* court held that the automatic stay provision does not expressly refer to seamen's maritime liens which are "sacred liens."[75] The court opined that Congress would not have overruled this "sacred" principle of admiralty law in the Bankruptcy Act sub silentio.[76] Thus, the court held that the automatic stay provisions of the Bankruptcy Act did not apply to a maritime lien for seamen's wages.[77] The reasoning in *Chandon* was then applied to the *Barnes* case, because seamen's wages and claims for maintenance and cure are two sides of the same coin. In the *Barnes* case, the panel held that the district court was not divested of its in rem jurisdiction when a vessel owner declared bankruptcy. Importantly and pertinent to the argument of this article is the court's declaration that the bankruptcy

[74] United States v. ZP Chandon, 889 F.2d 233 (9th Cir. 1989).

[75] *Id.* at 238 (quoting The John G. Stevens, 170 U.S. 113, 119 (1898)).

[76] *Id.* at 237; *see also* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938 (2015) ("Because these protections [of Article III] help to ensure the integrity and independence of the Judiciary, 'we have long recognized that, in general, Congress may not withdraw from' the Article III courts 'any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty.'") (citation omitted); *Id.* at 1945 ("[B]ankruptcy courts possess no free-floating authority to decide claims traditionally heard by Article III courts. Their ability to resolve such matters is limited to 'a narrow class of common law claims as an incident to the [bankruptcy courts'] primary, and unchallenged, adjudicative function.'") (alteration in original) (citation omitted).

[77] *ZP Chandon*, 889 F.2d 233.

court lacked the authority to impose the automatic stay on the maritime lien of a seaman.[78]

Barnes worked as captain and crew member of the *M/V Tehani*, a sight-seeing boat, which took passengers from Honokohau Harbor on sightseeing and snorkeling trips along the Kona coast. On one such trip, there was an explosion on board the vessel, and Barnes was injured when an exploding hatch struck him on the back and hurled him into the ocean. The explosion was caused by a defective fuel tank, which ignited when Barnes started the engine.[79] The company "SHR lacked insurance to cover Barnes' medical expenses and the accompanying physical, psychological, and neurological treatments" that Barnes required.[80]

Barnes filed a complaint in admiralty against the company and the vessel, the *Tehani*, claiming unseaworthiness, various theories of negligence, and intentional infliction of emotional distress. He sought maintenance and cure, damages, and attorney's fees. After a series of filings for summary judgment motions by both sides, SHR and Henry filed for Chapter 7 and 13 bankruptcy relief. Upon the filings, the automatic stay was put in place. After a series of motions and the filing of an amended complaint by Barnes, the district court dismissed the *Tehani* for lack of in rem jurisdiction and dismissed Barnes' amended complaint as late and unable to be entertained while the automatic stay was in effect. The trustee also argued that Barnes' maritime lien was lost because of the late filing of the amended complaint. While Barnes' appeal was pending, the bankruptcy court ordered the sale of the *Tehani* and its trailer to Henry's new company, Aloha Ocean Excursions, LLC for $35,000.[81] On appeal, the court commenced by stating that Barnes had a seaman's lien. In addressing the jurisdictional issue, the court stated that once admiralty jurisdiction is "vested" it cannot be "divested."[82]

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[78] *See Barnes*, 886 F.3d at 773-74 (holding that the automatic bankruptcy stay did not affect Barnes' maritime lien against *Tehani*, and the bankruptcy court had no authority to dispose of the lien through the application of bankruptcy law).

[79] *See id.* at 766.

[80] *Id.* ("Barnes required approximately 12 staples to reattach parts of his scalp. Due to his head injuries, he can no longer drive a car or swim. He cannot afford rent and has been living on friends' couches. He receives approximately $300 per month in disability income from the State of Hawaii.").

[81] *Id.* at 527.

[82] *Id.* at 772. ("It is a 'general principle' of admiralty law that in rem 'jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised." (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 85 (1992))).

A critical question for the court was whether the bankruptcy court had jurisdiction to dispose of Barnes' maritime lien. The court simply stated that "it did not."[83] The court added that Congressional omission of maritime law in the automatic stay provision was "evidence of its intention to limit the reach of [the bankruptcy] statute to land-based transactions where (1) a recording of a lien interest is required and (2) the creditor first in time is entitled to priority."[84] The dispositions of these cases rest on the time-honored fabric that maritime liens when owed to seamen are sacred.[85] Thus, the court declared that the bankruptcy court lacked jurisdiction to adjudicate Barnes' maritime lien because the admiralty court had already obtained jurisdiction over the *Tehani*.[86]

Importantly, the court stated that even if the bankruptcy court had in rem jurisdiction over the *Tehani*, the question still remained as to whether it had the "effective ability to sell a vessel free and clear of maritime liens."[87]

2. United States v. ZP Chandon

The Ninth Circuit's holding in the *Barnes* case represents the court's adherence to the jurisdictional hierarchy when it comes to maritime liens. In cases that predate *Barnes*, the court has declared that the automatic stay provisions of the Bankruptcy Act does not apply to lien for seamens' wages.[88] In *ZP Chandon*, the court held that the automatic stay provisions of Bankruptcy Act did not apply to maritime lien for seamen's wages earned after filing of vessel owner's petition for reorganization and that a claim for seamen's wages had priority over a preferred

[83] *Id.* at 773 ("The automatic bankruptcy stay applies to 'any act to create, perfect, or enforce any lien against property of the estate.' . . . In *United States v. ZP Chandon*, we reversed a district court's similar ruling 'that the automatic stay provisions of the Bankruptcy Act apply to [a maritime lien for] seamens' wages.'" (alteration in original) (citations omitted)).

[84] *Id.* (quoting United States v. ZP Chandon, 889 F.2d 233, 238 (9th Cir. 1989)).

[85] *Id.* at 7774 n.11, "*The John G. Stevens* involved a maritime lien for tort damages from a negligent collision. Although the discussion of 'sacred [maritime] liens' was in the context of liens for seamen's wages, liens for maintenance and cure are given a similarly high priority. In both instances, the reason for favoring a seaman's lien over all others 'is that just as a seaman owes his first duty to his ship, so does she owe the same to him.'" (alteration in original) (citations omitted)).

[86] *Id.* at 774.

[87] *Id.* (quoting 3B Benedict on Admiralty § 43 (7th ed., rev. 2017) (citing Jonathan M. Landers, *The Shipowner Becomes a Bankrupt*, 39, U. CHI. L. REV. 490, 500 (1972))).

[88] United States v. ZP Chandon, 889 F.2d 233, 237 (9th Cir. 1989). ("[I]n determining whether seamen have lien priority over claims of all other creditors, [courts] must look to admiralty and maritime law, not the law that governs transactions occurring on land.").

ship mortgage held by the United States.[89] Importantly, the court held that Congress did not intend to repeal the priority of maritime liens when the Bankruptcy Act was enacted.[90] Thus, the court reinforced this tenet in the *Barnes* case and reaffirmed the axiom that the lien of the seaman predates the Bankruptcy Act.[91]

3. Jurisdiction of Bankruptcy Court by Consent – *In Re Millenium Seacarriers*

Jurisdiction of a bankruptcy court over maritime claims was rejected by the Supreme Court as improper.[92] This holding was qualified in later cases to allow the retention of jurisdiction if the parties consented to the jurisdiction of the bankruptcy court.[93] However, the Second Circuit applied principles of equity to establish consent in the *Millenium Seacarriers* case.[94] Not coincidentally, Justice Sotomayor wrote the opinion in *Millenium Seacarriers* while serving on the Second Circuit Court of Appeals, and also wrote the opinion in *Wellness Int'l Network, Ltd*., the case, which qualified the jurisdictional bar announced in *Northern Pipeline* by the earlier Court. The holding begs the question of whether consent to a court's

[89] *Id.*at 239.

[90] *Id.* at 238 ("We decline to speculate that Congress *may* have intended to include maritime liens for seamen's wages within the words 'any liens' in section 362(a)(4) of the Bankruptcy Act. Maritime liens for seamen wages have priority over a preferred ship mortgage, and are 'sacred liens' entitled to protection 'as long as a plank of the ship remains.' *The John Stevens,* 170 U.S. 113, 119, 18 S.Ct. 544, 547, 42 L.Ed. 969 (1898). To paraphrase our words in *In re Pacific Caribbean Shipping (U.S.A.), Inc.,* it is unlikely that the drafters of the Bankruptcy Act would have casually neglected to express its intention to rewrite a 'sacred' principle of maritime law. We construe Congress' omission of any reference to maritime law in section 362(a)(4) as evidence of its intention to limit the reach of that statute to land-based transactions where (1) a recording of a lien interest is required and (2) the creditor first in time is entitled to priority." (citation omitted)).

[91] *Id.* ("A seaman's lien for wages existed under maritime law long before Congress enacted the Bankruptcy Act.").

[92] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76 (1982) ("In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply.").

[93] Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1939 (2015) ("This case presents the question whether Article III allows bankruptcy judges to adjudicate such claims with the parties' consent. We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.").

[94] Universal Oil Ltd. v. Allfirst Bank (*In re* Millenium Seacarriers, Inc.), 419 F.3d 83 (2d Cir. 2005) (holding that creditors who voluntarily litigate their maritime lien claims before a bankruptcy court have consented to the bankruptcy court's equitable jurisdiction to adjudicate and extinguish their liens).

jurisdiction can be established through principles of equity to circumvent the Congressional grant of jurisdiction to an Article III court.

In *Millenium Seacarriers*, the issue centered upon the constitutionality of the bankruptcy court's jurisdiction over maritime assets in light of *Northern Pipeline v. Marathon Pipe Line. Co*. The *Millenium Seacarriers* application of *Northern Pipeline* seems a bridge too far. The court explained that the *Northern Pipeline Court* "only invalidated the jurisdiction of the bankruptcy court to make final determinations in matters that could have been brought in a district court or a state court."[95] However, a close reading of *Northern Pipeline* reveals that the Court's main concern in that case was that bankruptcy judges were not Article III judges and as such, do not have proper jurisdiction over cases arising in admiralty. Thus, the fact that a claim arises in admiralty is sufficient to remove the claim from the auspices of the bankruptcy judge. The court in *Millenium* further premised its decision on the intent of the framers of the Constitution to alter or amend maritime law.[96] While this may be a correct understanding of the Framers' intent, the fact is that Congress has had several occasions to shift claims arising in admiralty to the bankruptcy judges and has never done so. One explanation for Congress's vacillation is that cases in the admiralty such as preferred maritime liens will not fit into the strictures of bankruptcy law. Traditional bankruptcy tools such as the automatic stay will take away substantive rights enshrined in the admiralty such as seamen's wages and payments for maintenance and cure that enjoy the highest priority under admiralty law.

Interestingly, the *Millenium* court never addressed the question of whether the bankruptcy court exceeded its powers by selling the vessel free and clear of all liens, which is the province of an admiralty court.[97] This omission is problematic

[95] *Id.* at 99 (quoting *In re* Kaiser, 722 F.2d 1574, 1580 (2d Cir. 1983)).

[96] *Id.* at 100 ("To the extent that this grant of jurisdiction is in tension with the putative exclusivity of admiralty jurisdiction, it should be recalled that 'the framers of the Constitution did not contemplate that the maritime law should remain unalterable.... When the Constitution was adopted, the existing maritime law became the law of the United States "subject to power in Congress to alter, qualify or supplement as experience or changing conditions might require."'" (quoting Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934)).

[97] *Id.* at 101-02. ("In the instant case, the bankruptcy court, proceeding in rem over the debtors' estate, purported to deliver the vessels 'free and clear of all ... liens' to the buyer of the vessels. Whatever 'hallmarks of a typical in rem action,' may or may not exist in this context, however, we simply need not address the murky question of whether the bankruptcy court improperly wielded the admiralty power that is 'within the exclusive province of the federal courts.'" (citations omitted)).

because the court goes as far as to acknowledge that the issue is within the exclusive province of the federal courts. This exclusivity means that the actions taken by the bankruptcy courts was improper because expunging maritime liens is within the sole province of the admiralty courts. This encroachment of the bankruptcy court is what the Supreme Court frowned upon in the *Northern Pipeline* case when it held that bankruptcy judges are not Article III judges and should not entertain jurisdiction over maritime issues.

Yet, the *Millenium* court legitimized its holding by analogizing to the shared jurisdiction between state courts and federal courts over admiralty. However, the analogy is false because the jurisdiction is not shared. Rather, there is a slight carve-out for the states under the Savings to Suitors Clause.[98] This clause, however, does not stand for the proposition that the admiralty jurisdiction was delegated to the states or any other legislative courts without the express will of Congress. Cases like *Millenium* serve to darken already murky waters in maritime insolvency cases. The court's conclusion that the lienors in this case "consented" to the bankruptcy court's equitable jurisdiction gives further pause. Compared to the Ninth Circuit's actions in the *Barnes* case, where that court allowed the seaman lienor time to file a verified complaint under the Admiralty rules, the *Millenium* court did not address whether the lienors should be given the opportunity to follow the proper admiralty procedures for arrest of the vessel. Instead, the court concluded that because the lienors had appeared before the bankruptcy court by filing notices of objection, they had also consented to the court's jurisdiction.[99] This analysis strains credulity

[98] *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 446–47 (1994) ("This provision has its modern expression at 28 U.S.C. § 1333(1), which reads (with emphasis added): 'The district courts shall have original jurisdiction, exclusive of the courts of the States, of: "(1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*"' We have held it to be the consequence of exclusive federal jurisdiction that state courts 'may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction.' An *in rem* suit against a vessel is, we have said, distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts. In exercising *in personam* jurisdiction, however, a state court may '"adopt such remedies, and ... attach to them such incidents, as it sees fit" so long as it does not attempt to make changes in the "substantive maritime law."' (citations omitted)).

[99] *In re* Millenium Seacarriers, Inc., 419 F.3d at 102–03 ("We hold that lienors assented to the bankruptcy court's equitable adjudication of their lien claims under principles of admiralty law. They placed their lien claims for adjudication before the bankruptcy court, not only by filing their notices of objection, but by remaining in the action, and by litigating their liens actively through the adversary proceeding. Despite their objection to subject matter jurisdiction, by coming into the court which had statutory jurisdiction over the *res* 'and asking for adjudication upon the lien,' lienors

because filing an objection to jurisdiction and consenting to jurisdiction are polar opposites.

PART V: THE EXTRA-TERRITORIAL APPLICATION OF UNITED STATES MARITIME LAW AND HARMONIZATION OF INSOLVENCY LAW – THE CHINESE COMPARISON

As stated at the beginning of this article, maritime law is *sui generis* internationally. The international character of maritime law means that conflict of laws is inevitable. The goal of harmonization of the law of insolvency seeks to shorten the extra-territorial reach of United States admiralty law through the containment of maritime liens within the jurisdiction of the bankruptcy court. Other than the constitutional issues analyzed earlier in this paper raised by the divestment of jurisdiction from the Article III courts, curbing the extra-territorial reach of the admiralty is easier said than done.[100]

It is axiomatic that international treaties or conventions are only animated if state parties adopt the law through the process of incorporation into their domestic law. Moreover, international uniform laws develop and become established jurisprudence only when the practice of states bring the law to bear upon real transactions.

Specifically, the balance of maritime power has shifted. More and more, China is displaying its maritime strengths in the areas of maritime trade and and overall hegemony through its "Belt and Road Initiative."[101] Importantly,

'should be held to have assented to that jurisdiction for all purposes, including a substitution of the proceeds for the res.'" (quoting Hudson v. N.Y. & Albany Transp. Co., 180 F. 973, 976 (2d Cir. 1910)).

[100] Trans-Tec Asia v. M/V Harmony Container, 518 F.3d 1120, 1131 (9th Cir. 2008) ("Hardly any area of law could be viewed as more extraterritorial than admiralty law. It is well settled that the admiralty jurisdiction of United States courts extends to the high seas: 'The traditional domain of admiralty jurisdiction is, of course, the sea....' Save for inland navigable waters, ports, and a few other locations, admiralty jurisdiction by definition extends beyond United States territorial boundaries. Tethering United States maritime lien law to situations involving only American-flagged vessels, American suppliers, or American ports would threaten the ability of foreign vessels to move freely from port to port without the fear of going without necessaries." (citation omitted)).

[101] Hamilton, *supra* note 22, at 478 ("Many predict China's accession to the World Trade Organization (WTO) will lead to an exponential increase in world trade. The maritime transport services industry will continue to account for the carriage of a significant percentage of that trade.

China is not a signatory to the model law on cross-border insolvency.[4] With China becoming such a formidable player in maritime shipping, cross-border insolvency law will have to tangle with China's maritime law. [102]

Interestingly, China is not a party to the Model Law on Cross-Border Insolvency. Given that China's maritime industry has grown over the last five years through its Belt and Road Initiative, the universality of the model law without China's membership is doubtful.[103] Specifically, where any international convention or other law conflicts with Chinese law, the latter will trump all other law.[104] As it relates to seamen's rights, Chinese maritime law differ from the United States in the characterization of liens for seamen wages.[105]

Unlike the United States, and like most other countries, China's maritime law is based on a comprehensive maritime code. Much of our maritime law is judge-made law or based on the common law tradition. Thus, the incorporation of a model law on cross-border insolvency is more easily "back-doored" into our

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While the maritime transport services industry is important to all nations, it is particularly important to China. China is committed to becoming the world's leading provider of ships and shipping services and has invested heavily in improving its shipyards, ports, and port facilities. The Chinese have also revised their regulatory schemes to answer criticisms questioning the fairness and openness of their laws and procedures, and to facilitate their entry into the WTO.") (footnotes omitted).

[102] Li, *supra* note 24, at 655-56 ("In the last two decades, China has emerged as one of the major maritime nations. In 1980, China had only 955 ships totalling 6 million gross tons. By 1990, China's fleet had increased to 1,948 ships totalling 13 million gross tons; and by 1998, it had swelled to 3,175 ships totalling 16 million gross tons. The rates of growth measured annually are about 13% in number and 7.7% in tonnage, which is much higher than the averages for the world of 1.1% and 1.3% respectively. To deal with the increasing incidence of disputes arising from the shipping trade, China has adopted more than twenty maritime related laws, including in particular the Maritime Code of 1992. Meanwhile, China has ratified most of the important maritime conventions. Together, China's enacted laws and convention obligations constitute a comprehensive maritime legal system that is in line with the practice of maritime nations generally." (footnotes omitted)).

[103] Hamilton, *supra* note 22, at 482 ("In 1949, the Chinese Merchant Marine consisted of only fourteen vessels. Since 1961, when the PRC established the China Ocean Shipping Company (COSCO) to oversee the development of its merchant marine, China has increased its tonnage at an average rate of 13.6% per year, a rate greater than any other country in the world. China currently owns approximately 1500 ocean-going vessels. In 1994, Chinese-owned and registered vessels were sailing to over 1100 ports in 150 countries." (footnotes omitted)).

[104] Li, *supra* note 24, at 659 ("When national laws conflict with treaties concluded or acceded to by China, the latter shall be applied." (citing Mar. Code Art. 268 and Civ. Proc. L. Art. 238)).

[105] Li, *supra* note 25, at 374 ("This case refers to the different nature of crew wages that arise out of working on board and not on board. The former one has Maritime Lien priority, while the latter one is a creditor's right but not a maritime lien.").

maritime jurisprudence than it would be to impose the strictures of the Model Law into the Chinese Maritime Code.[106]

The Development of Maritime Law in China

Although modern scholars view China's current maritime position as nascent, a look at Chinese legal history testifies to the long-held importance of maritime trade.[107] However, Chinese maritime law, which means a system of codes and rules to govern maritime commerce, is recent.[108] As China emerges as a world power, its maritime code will need to develop rapidly to accommodate its ambitions as the new "Lord of the Seas."[109] But, as seen in the torturous history of United States admiralty and maritime law, the birthing process of a well-developed system of maritime rules is arduous. Currently, Chinese maritime law appears to be more focused on the economic benefits of the shipping industry than in promulgating

[106] Huijie Luo & Miao Li, *Reviewing Recent Developments in Chinese Maritime Law*, 41 J. MAR. L. & COM. 403, 403 (2010) ("The Maritime Code of the People's Republic of China (PRC) is basically a merchant shipping law, which mainly covers contractual relationships rather than maritime administrative issues. It has served the shipping industry for 18 years since coming into force in July 1993. There have been no amendments or new enactment of this code up to present day, though various issues have emerged during this period that require answers. Most academics with knowledge of English Common Law may try to find the answers and developments from recent Chinese Maritime cases. However [sic] there is no precedent concept for case law in China. In theory, each case stands as its own decision and will not bind another court. Therefore, these works may not be very useful when researching updates in Chinese Maritime Law, in which the judgements of court do not have broad force of law and are not recognized as a part of Chinese Law." (footnotes omitted)).

[107] Hamilton, *supra* note 22, at (II)(B)(1) ("Contrary to what many believe, China has a lengthy legal tradition and promulgated its first law over 4000 years ago during the *Xia* Dynasty.").

[108] Jon W. Zinke, *Maritime Law and Practice in China. by Liang Zhao and Lianjun Li. Abingdon, Oxon., and New York: Informa Law from Routledge, 2017*, 48 J. MAR. L. & COM. 365 (2017) (reviewing LIANG ZHAO & LIANJUN LI, MARITIME LAW AND PRACTICE IN CHINA (2017))"The People's Republic of China ('PRC') is a relative newcomer to the development of modern maritime law. During the time period marked by the 1949 establishment of the PRC and 1984, the Chinese judicial system did not provide separate maritime courts; those cases were heard as general civil or commercial matters in local people's courts. Starting in 1984, ten maritime courts were established in the coastal cities of Dalian, Tianjin, Qingdao, Shanghai, Ningbo, Xiamen, Guangzhou, Beihai, and Haikou, and in Wuhan on the Yangtze River. There was no maritime code in China until 1992, when the Chinese Maritime Code was promulgated. On December 25, 1999, China adopted the Special Maritime Procedure Law, which was based on experience gained from the handling of maritime cases after the maritime courts were established and also from various international sources.").

[109] Luo & Li, *supra* note 110, at 403. ("In recent years China has invested a lot of effort to put in order a number of problems in the PRC Maritime Code, and to improve the judicial practices for trial of maritime cases.").

laws to govern the various facets of the maritime industry.[110] As a good first step, China has incorporated the precepts of some of the international maritime treaties into its maritime codes. But these treaties do not deal with several of the issues that arise in the industry.[111]

Moreover, trading partners like the United States have not ratified some of these same treaties. Unlike the United States, China's preferred method of dispute resolution is not the courts, but arbitration.[112] Although the arbitration of maritime claims is gaining in popularity in the United States and around the world, fundamental rights such as the rights of seafarers enshrined in US law do not occupy the same space of preeminence as under the admiralty law of the United States. Thus, it is not clear whether in the insolvency arena, the right to wages and maintenance and cure will enjoy the same level of priority in China as in the United States. [113]

CONCLUSION

When the harmonization of international law has the potential to affect substantive rights, that law is never allowed to displace domestic law. The

[110] *Id.* ("The Maritime Code of the People's Republic of China (PRC) is basically a merchant shipping law, which mainly covers contractual relationships rather than maritime administrative issues. It has served the shipping industry for 18 years since coming into force in July 1993. There have been no amendments or new enactment of this code up to present day, though various issues have emerged during this period that require answers." (footnote omitted)).

[111] Hamilton, *supra* note 22, at (III)(B)(1) ("Since China emerged as a major maritime nation, it has faced increasing pressure from trade partners to adopt reasonable laws and regulations. Within the last twenty years, it has enacted over twenty shipping-related laws and regulations including a Code of Maritime Law (Maritime Code or Code). China started drafting a maritime law in 1952 and actually completed a first draft in 1963, but did not have a formal or official Code until 1993. To create its Maritime Code, China borrowed heavily from the Hamburg Rules of 1978 and the Hague/Visby principles regulating the carriage of goods by sea. The Chinese also examined various other international accords, adopting some provisions as written and changing others before incorporating them into the final document. The current Code is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China's unique circumstances.").

[112] *Id.* at (II)(B)(1). ("However, the 'rule of law' was never considered essential to effective government until the introduction of Western civilization during the 18th and 19th centuries prompted significant changes in the structure of Chinese society. Traditionally, the 'rule of law' was viewed as ruinous because it resolved disputes through litigation, and litigation produced discord. One of China's earliest philosophical texts, the *I Ching*, denounced litigation because it often proved disastrous for everyone involved. Centuries of social chaos and discord motivated the Chinese to develop a legal system that relied on alternative forms of dispute resolution.").

[113] *Id.* at (III)(C)(1).

recognition of laws that violate the public policy of a country is always a non-starter, and such laws are either ignored by courts or fall prey to a homeward trend interpretation. Thus, the goal of uniformity becomes subject to different winds of doctrine and have opposite effect of dis-uniformity.[114] This result begs the question of whether uniformity is a desirable goal. Although the globalization of processes in the business and financial sectors is desirable, where substantive rights are concerned such as rights under a maritime lien, the global must give way to the local.[115] This localization of legal rules will remain as a check on harmonization in the maritime sector.[116]

Moreover, the United States has demonstrated a reluctance to change its well-developed system of admiralty and maritime law by its refusal to ratify several international conventions relating to the arrest of ships and maritime liens. The Chinese Maritime Code has incorporated international legal concepts from several Maritime Conventions.[117] The two nations are, therefore, at odds with each other in their adoption of international legal principles in the maritime sector. Where the United States disdains most of the international maritime treaties, China has embraced them.[118] In the area of maritime insolvency, however, China has not yet

[114] Luo & Li, *supra* note 110, at 419. ("Against the background of globalization, international shipping conventions and law have been incorporated into Chinese maritime law. While this process of incorporation has been ongoing several instances of conflict between recent international maritime practice and the PRC Maritime Code have come to light. Although China has solved a number of problems within the PRC Maritime Code, and improved the judicial practices for trial of maritime cases, it is hard to deny that a comprehensive review of the PRC Maritime Code is necessary in the near future.").

[115] *See generally* Geoffrey P. Miller, *The Legal -Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 916 (1997) ("Although the goal of harmonization is sometimes treated as a talisman, without substantial consideration of the possible costs and benefits, economic analysis suggests at least a note of caution about the virtues of harmonization.").

[116] Hamilton, *supra* note 22, at (I). ("The promulgation of new laws and regulations often accompany changes in the physical characteristics of the industry. These sizable investments in time and money intensify competition for market share and ultimately lead to conflict and confrontation. To some extent, the future of international trade will depend on how these disputes are resolved.").

[117] Donglai Yang, *A Comparative Analysis of Maritime Lien Priority Under United States and Chinese Maritime Law*, 23 TUL. MAR. L.J. 465, 471 (1999). "However, due to the lack of a modernized shipping industry and an independent development of maritime legislation in China, most of the maritime law concepts in the Chinese Maritime Code come from international conventions, such as the 1924 Brussels Convention. Those 'borrowed' rules give rise to many problems in the Chinese legal system." (footnote omitted)).

[118] Hamilton, *supra* note 22, at (III)(B)(1). ("To create its Maritime Code, China borrowed heavily from the Hamburg Rules of 1978 and the Hague/Visby principles regulating the carriage of goods by sea. The Chinese also examined various other international accords, adopting some

embarked, while the United States seem to be charting a course in this area even to the detriment of the admiralty courts. What is needed is not a merger of admiralty and bankruptcy law, but a harmonization of maritime law to govern maritime cases where another country is involved.

provisions as written and changing others before incorporating them into the final document.[4] The current Code is a compilation of accepted international standards supplemented by the introduction of special innovative rules adapted to suit China's unique circumstances.") (footnote omitted).