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“TWO HOUSEHOLDS, BOTH ALIKE IN DIGNITY”: THE INTERNATIONAL FEUD BETWEEN ADMIRALTY AND BANKRUPTCY

*Two households, both alike in dignity,
In fair Verona, where we lay our scene,
From ancient grudge break to new mutiny,
Where civil blood makes civil hands unclean.
From forth the fatal loins of these two foes
A pair of star-cross'd lovers take their life;
Whose misadventured piteous overthrows
Do with their death bury their parents' strife.
The fearful passage of their death-mark'd love,
And the continuance of their parents' rage,
Which, but their children's end, nought could remove,
Is now the two hours' traffic of our stage;
The which if you with patient ears attend,
What here shall miss, our toil shall strive to mend.¹*

INTRODUCTION

In 2012, the Japanese shipping firm Sanko Steamship Co. (“Sanko”) unilaterally refused to make lease payments on certain of its commercial shipping vessels.² After Sanko stopped making its payments, multiple creditors, including the Liberian navigation firm Evridiki Navigation, Inc. (“Evridiki”), proceeded quasi in rem³ against the *M/V Sanko Mineral* (“the *Mineral*”) and attached the vessel while it was in port at Baltimore, Maryland.⁴ Sanko refused to post a bond, which would have released the *Mineral*, out of concern that such action would affect its private resolution process with its chief creditors.⁵ The vessel, however, still contained cargo for which Sanko’s customers had already paid.⁶ Several of these customers, some incorporated abroad and others in the United States,

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, prologue.

2. *Evridiki Navigation, Inc. v. Sanko S.S. Co.*, 880 F. Supp. 2d 666, 668 (D. Md. 2012).

3. See discussion *infra* Part I.A.

4. *Evridiki*, 880 F. Supp. 2d at 668.

5. In furtherance of its efforts to avoid a formal bankruptcy filing, Sanko had started a private resolution process with its chief creditors. *Id.* at 669.

6. *Id.* at 668.

intervened in the action in an attempt to vacate the attachment of the *Mineral* so that they could receive their goods.⁷ The vessel remained attached in Baltimore, and one of the cargo owners, ThyssenKrupp Materials NA, Inc. (“ThyssenKrupp”), eventually proceeded in rem⁸ against the *Mineral*.⁹ ThyssenKrupp claimed that it was under contract to have cargo on the *Mineral* delivered to a customer within a certain window of time, that the window had closed, and that ThyssenKrupp therefore held a maritime lien on the *Mineral*.¹⁰ Eventually, Sanko filed for Chapter 15 bankruptcy recognition and protection¹¹ (“Chapter 15”) in the United States, and ThyssenKrupp’s vessel arrest, along with Evidiki’s attachment, was vacated.¹² *Evidiki Navigation, Inc. v. Sanko Steamship Co.* illustrates an evolving conflict—if Chapter 15 bankruptcy can eviscerate a vessel arrest or attachment action so easily, then arrest and attachment cease to be effective tools for the enforcement of maritime liens, which are a vital source of rights in admiralty.¹³

Evidiki is an apt example of cases that follow a similar pattern: bankrupt, foreign companies using U.S. jurisdiction to escape creditor action in maritime claims. When Chapter 15 works to preclude a vessel arrest or attachment, maritime creditors are denied any recovery from the debtor, resulting in the unjust treatment of those creditors during the bankruptcy pro-

7. *Id.*

8. See discussion *infra* Part I.A.

9. *Evidiki*, 880 F. Supp. 2d at 668.

10. *Id.*

11. 11 U.S.C. §§ 1501–1532 (2014) contains the U.S. implementation of the United Nations Commission on International Trade Law’s (“UNCITRAL”) Model Law on Cross-Border Insolvency. This Note discusses Chapter 15 in some depth in Part II.B, but in pertinent part Chapter 15 allows a foreign company, which has already filed for bankruptcy abroad, to petition a U.S. bankruptcy court for recognition of the foreign bankruptcy proceeding. Upon recognition, Chapter 15 further allows a stay of all creditor actions against the foreign debtor.

12. After the Federal Bankruptcy Court recognized Sanko’s foreign bankruptcy, it issued an order to the District of Maryland precluding the decision of any of the myriad issues in the case, except for the determination of Evidiki’s attachment of the *Mineral*. *Evidiki*, 880 F. Supp. 2d at 673–76.

13. WILLIAM TETLEY, *MARITIME LIENS AND CLAIMS* 937 (2d ed. 1998).

ceedings.¹⁴ Not only are the creditors responsible for court costs and filing fees, which can be quite expensive, but they also lose their original investment in the debtor who files for Chapter 15 bankruptcy. As the economies of nations across the globe, developed and developing, become increasingly interdependent, the importance of the shipping industry will only grow.¹⁵ Even with recent advances in air freight and high speed rail, overseas shipping still accounts for “[a]round 80 per cent of global trade by volume and over 70 per cent by value.”¹⁶ Moreover, as the U.S. shipping industry continues to contract, shipping companies will increasingly be foreign in their citizenship.¹⁷ This increase in foreign shippers necessarily means that more future maritime bankruptcies will be foreign, which will, in turn, lead to more Chapter 15 petitions in the United States. Such an increase in Chapter 15 filings will result in an increase in the abuse of creditors’ rights to enforce their maritime liens and claims, by barring the traditional means of executing those liens and claims—arrest and attachment.

This Note suggests a solution to the imbalance between admiralty and bankruptcy drawn from the history of U.S. maritime law and the response of the Commonwealth of Australia,¹⁸ another large shipping nation that has adopted the United Nations Commission on International Trade Law’s (“UNCITRAL”) Model Law on Cross-Border Insolvency (the “Model Law”), to

14. 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, 2620 (1996).

15. See U.S. Dep’t Transp. Mar. Admin., U.S. Waterborne Foreign Trade by Trading Partners, 2003–2012, available at http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited June 21, 2014) [hereinafter U.S. Waterborne Foreign Trade by Trading Partners]; U.S. Dep’t Transp. Mar. Admin., U.S. Waterborne Foreign Container Trade by Trading Partners, 2007–2012, http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited Jun 21, 2014) [hereinafter U.S. Waterborne Foreign Container Trade by Trading Partners].

16. U.N. CONFERENCE ON TRADE & DEV., *REVIEW OF MARITIME TRANSPORT 2013*, at xi, U.N. Doc. UNCTAD/RMT/2013, U.N. Sales No. E. 13.II.D.9 (2013).

17. See U.S. Waterborne Foreign Trade by Trading Partners, *supra* note 15; U.S. Waterborne Foreign Container Trade by Trading Partners, *supra* note 15.

18. See discussion *infra* Part III.A.2.

alleviate some of the tension for both admiralty and bankruptcy sides of the argument.

Part I of this Note examines the relevant admiralty law, including the complexities of maritime liens as well as vessel arrest and attachment provisions. Part II briefly explains the genesis of Chapter 15 as well as its functions pertinent to this Note's argument. As the title of this Note suggests, the policies that inform the goals of bankruptcy and admiralty are often diametrically opposed, such that the tensions between the two are best addressed concurrently. To that end, Part III analyzes laws that grapple with the policy concerns surrounding the intersection of admiralty and bankruptcy from the United States and the Commonwealth of Australia. Part IV discusses the current imbalance between bankruptcy and admiralty, accompanied by a caveat in the form of the Second Circuit's electronic funds transfer cases ("EFT"),¹⁹ warning against tipping the scales too far in admiralty's favor. Part V examines recent U.S. Supreme Court jurisprudence that supports stronger protections for admiralty rights. Ultimately, the solution is not a simple one. This Note argues that investors can be protected from heavy-handed bankruptcy courts, just as debtors can be protected from ravenous creditors, by implementing certain elements of the Australian scheme in the U.S. system.

I. ADMIRALTY: VESSEL ARREST, ATTACHMENT, AND MARITIME LIENS

The three interdependent aspects of admiralty law that are crucial to understanding the tension between admiralty and bankruptcy are vessel arrest, vessel attachment, and maritime liens. Briefly, maritime liens²⁰ are a legal construct that serve as a basis for many causes of action in maritime law.²¹ Maritime liens are, in turn, enforced by vessel arrest and attachment actions. The interplay of maritime liens, vessel arrest, and vessel attachment is complex, but it must be understood in order to clarify the severity of the problem presented by Chapter 15 bankruptcy protections in admiralty suits.

19. See discussion *infra* Part IV.B.

20. A maritime lien is "[a] lien on a vessel, given to secure the claim of a creditor who provided maritime services to the vessel or who suffered an injury from the vessel's use." BLACK'S LAW DICTIONARY 943 (9th ed. 2009).

21. See Alwang, *supra* note 14, at 2629.

A. Arrest and Attachment: The Action in Rem and the Action Quasi in Rem

Vessel arrest and attachment predate the founding of the American republic. Some scholars argue that arrest and attachment have their roots in ancient Greek law, although the earliest extant mention is in the Byzantine emperor Justinian's *Corpus Iuris Civilis*.²² More recently, however, the American implementations of vessel arrest and attachment were developed from the British Imperial system after the American Revolution.²³ Vessel arrests and attachments were, and are, a natural response to the frequently transitory nature of parties to admiralty suits.²⁴

A maritime attachment action is used when a plaintiff has *any* in personam claim in admiralty against another party.²⁵ Because maritime attachment, which directly affects a res, be it a vessel or other maritime property, can occur only when the attaching party has an in personam claim, it is considered a quasi in rem action. Furthermore, the maritime attachment—or quasi in rem action—can be used against *any* property that is owned by the defendant.²⁶

Alternatively, the maritime vessel arrest—or in rem action—is a suit against a physical vessel itself or other maritime property such as cargo or freight. A maritime vessel arrest is only filed in order to foreclose on a maritime lien.²⁷ One may bring

22. TETLEY, *supra* note 13, at 7–11.

23. “After renouncing British suzerainty in 1776, the United States retained the Admiralty attachment, which is similar, but not identical, to the *saisie conservatoire*. Admiralty law in the United States has since advanced, giving American law its own particular cachet, flavor and much more.” *Id.* at 37.

24. “Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places.” *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890).

25. FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS B. In Personam Actions: Attachment and Garnishment; *see* *Orbis Marine Enterprises, Inc. v. TEC Marine Lines, Ltd.*, 692 F. Supp. 280, 284–85 (S.D.N.Y. 1988).

26. FED. R. CIV. P. SUPP. B.

27. Additionally, the property named in the in rem action must be the subject of the same maritime lien that the plaintiff is seeking to enforce. *See* FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS C. In Rem Actions: Special Provisions; *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Chelentis v. Lucken-*

an in rem action by itself, or together with a quasi in rem action, but maritime attachment is not an alternative to the vessel arrest action.²⁸ U.S. admiralty law is unique in its use of maritime attachment and vessel arrest, as many other common law nations only allow a vessel arrest action.²⁹ The strength of U.S. arrest and attachment provisions can be traced to the colonial period, when a poor quality road network forced the early American colonists to rely heavily on shipping.³⁰

Maritime attachment has two primary ends: "first, to compel appearance; [second], to condemn for satisfaction."³¹ That is to say, maritime attachment first gains the libellant³² jurisdiction and second guarantees recovery in the event of a favorable decision. Maritime attachment has relatively simple procedural steps, of which only one is necessary to expound upon in depth.³³ There is a requirement in the U.S. maritime attachment procedure that "the defendant cannot be found within the district."³⁴ This step in the maritime attachment test is particularly important to the discussion here because the provision allows foreign libelees to be haled into U.S. courts. Unfortunately, the state of being absent from the district is not defined

bach S.S. Co., 247 U.S. 372 (1918); *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866).

28. William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1934-35 (1999).

29. *Id.* at 1899.

30. FRANK L. MARAIST, THOMAS C. GALLIGAN, JR., & CATHERINE M. MARAIST, *CASES AND MATERIALS ON MARITIME LAW* 1 (2d ed. 2009).

31. *Manro v. Almeida*, 23 U.S. 473, 489 (1825); see *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 693 (1950).

32. In admiralty suits, the plaintiff is referred to as the libellant, while the defendant is referred to as the libelee. See BLACK'S LAW DICTIONARY 999 (9th ed. 2009).

33. Tetley, *supra* note 28, at 1936.

Procedurally, Supplemental Rule B requires the plaintiff to file a detailed complaint, accompanied by an affidavit. The plaintiff must show: (1) that he has an *in personam* claim against the defendant; (2) that the defendant cannot be found within the district where the action is commenced; (3) that property belonging to the defendant is present, or soon will be present, in the district; and (4) there is no statutory or general maritime law proscription to the attachment.

Id.

34. FED. R. CIV. P. SUPP. ADMIRALTY & MAR. CLAIMS B. In *Personam* Actions: Attachment and Garnishment.

in the statute, a lacuna that has led a specific test to arise from the case law.³⁵

The two-pronged subtest that has developed from a want of a statutory definition is “based upon jurisdiction and the service of process.”³⁶ First, the jurisdictional element of the test depends upon the same “minimum contacts” reasoning that the U.S. Supreme Court used in *International Shoe Co. v. Washington*.³⁷ If the libelee is found to have “minimum contacts” “within the district,” then maritime attachment is not viable. If the libelee is found not to have “minimum contacts” “within the district,” then the action proceeds to the notice, or service of process, prong of the test, which requires that the libelee not have an “office or authorized agent in the district where or through whom legal process may be served upon him.”³⁸ If both of these prongs are found in the affirmative, then the libelee is considered “found within the district” and the maritime attachment of his property is considered inappropriate. If either of the prongs is found in the negative, then the libelee is considered absent from the district and maritime attachment is considered proper, subject to the other statutory requirements in the provision.³⁹

Maritime attachment is one of the most envied U.S. admiralty tools in the world, and it is not available in many other

35. Tetley, *supra* note 28, at 1935.

36. *Id.*

37. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

Id.

38. TETLEY, *supra* note 13, at 939–40.

39. *Oregon v. Tug Go Getter*, 398 F.2d 873, 874 (9th Cir. 1968) (libelee considered within the district where he had minimum contacts within that district); *W. Bulk Carriers, Pty. v. P.S. Int’l*, 762 F. Supp. 1302, 1308 (S.D. Ohio 1991) (“[I]t is clear that defendant could not have been found within this district at the time of the attachment for purposes of service of process.”); *LaBanca v. Ostermunchner*, 664 F.2d 65, 67–68 (5th Cir. 1981) (interpreting “within the district” to mean a state’s individual district; where service on libelee was available in the Northern District of Florida but not the Southern District of Florida, maritime attachment was allowed).

common law countries precisely because it is so liberal and powerful when compared with vessel arrest.⁴⁰ Indeed, “[t]he United States has . . . led the world in developing and implementing effective constitutional protections of the private property rights of shipowners with respect to . . . [vessel] arrest. In that domain in particular, U.S. maritime law can well serve as a model for other nations.”⁴¹ It should come as no great surprise, then, that when bankruptcy courts can nullify an attachment, it throws the U.S. maritime legal system dangerously off course.

B. Maritime Liens: The Complex Source of Admiralty Rights

“Maritime liens are the product of the evolution of custom, statute, and judicial decisions. To understand them, one must understand the history of maritime law.”⁴²

The creation and use of maritime liens to advance public policy at sea is of ancient vintage, dating to the *lex maritima*⁴³ of ancient Rome and Byzantium.⁴⁴ As admiralty law developed around the world, it was necessary to develop a legal construct that could “enforce financial obligations acquired internationally.”⁴⁵ This construct is the maritime lien, and it is so important to the operation of admiralty law that some exposition about the convoluted and technical nature of these liens is necessary.

A traditional maritime lien is a secured right peculiar to maritime law (the *lex maritima*). It is a privilege against property (a ship) which attaches and gains priority without any court action or any deed or any registration. It passes with the ship when the ship is sold to another owner, who may not know of the existence of the lien. In this sense the maritime lien is a

40. See Tetley, *supra* note 28, at 1939–40.

41. *Id.* at 1940.

42. TETLEY, *supra* note 13, at 60. For an exhaustive explanation of the history of maritime liens, Professor Tetley’s book is an outstanding resource. Unfortunately, there is no space in this Note to give that history anything more than a cursory glance.

43. *Lex maritima* is “[t]he body of customs, usage, and local rules governing seagoing commerce that developed in the maritime countries of medieval Europe.” See BLACK’S LAW DICTIONARY 931 (9th ed. 2009).

44. See also TETLEY, *supra* note 13, at 1–56. (providing an extensive discussion of the history of maritime liens accompanied by explanations of how they relate to the operation of the modern shipping industry).

45. Alwang, *supra* note 14, at 2630.

secret lien which has no equivalent in the common law; rather it fulfills the concept of a “privilege” under the civil law and the *lex mercatoria*.⁴⁶

Maritime liens are undoubtedly complicated, and the order in which they rank in court can be arcane. The procedure of balancing a general lien on a vessel’s freight with a preferred maritime lien or a secured lien, while difficult, can be done.⁴⁷ Despite the inherent complexities, over the centuries, admiralty law has developed a system of ranking liens in the order in which they must be fulfilled by a ship’s master or the party responsible for the ship’s operation.⁴⁸ These rankings differ between nations, but only slightly.⁴⁹ More important to this analysis, former British territories rank their maritime liens in a similar manner, making a comparison much simpler.⁵⁰ Conveniently, however, neither the ranking methods nor the rankings themselves are salient for the purposes of this Note; only the fact that the liens are ranked is important to the argument here.

Maritime liens are vital to the operation of admiralty law because they provide the causes of action for a large number of suits.⁵¹ Admiralty causes of action are based in maritime liens for disputes ranging from collision damage caused by a ship to preferred ship’s mortgages, to marine insurance premiums.⁵² “In addition to recognizing a larger number of maritime liens than any other nation, U.S. maritime law is uniquely rich in affording admiralty claimants both the attachment and arrest in rem as mechanisms for asserting their claims and obtaining pre-judgment security.”⁵³ In fact, the most common remedy to

46. TETLEY, *supra* note 13, at 59–60. “For example, a sailor who suffers an injury on ship has a lien which arose and attached to the vessel automatically upon the injury.” Alwang, *supra* note 14, at 2630.

47. For a detailed discussion of the prioritization of maritime liens, see George L. Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 753 (1973).

48. See TETLEY, *supra* note 13, at 855–58.

49. See generally *id.* at 858–912 (extensive discussion of systems used to rank maritime liens in several nations).

50. See *id.*

51. See Alwang, *supra* note 14, at 2629–31.

52. See TETLEY, *supra* note 13, at xii–xiii.

53. Tetley, *supra* note 28, at 1939.

suits for the enforcement of maritime liens is vessel arrest.⁵⁴ In U.S. courts, however, the interaction of maritime liens, and hence vessel arrests, with bankruptcy proceedings are confounded because, despite the fact that “bankruptcy judges have no specific grant of admiralty jurisdiction,” bankruptcy judges “may exercise jurisdiction over the validity and priority of maritime liens.”⁵⁵ This intrusion by bankruptcy courts into admiralty disputes is the crux of the problem that this Note attempts to address.

II. BANKRUPTCY: THE U.N.’S MODEL LAW AND CHAPTER 15

Bankruptcy is a complex legal system, with a pedigree nearly as venerable as admiralty’s. International bankruptcy,⁵⁶ while a much younger variant of bankruptcy, is relatively easily understood once a basic framework has been established. This section will establish that framework before laying out the problem created by the current international bankruptcy regime’s effects on admiralty law. It will also propose a solution to that problem in the United States based on a fortuitous confluence of Australian law.⁵⁷

54. See John S. Rogers, *Enforcement of Maritime Liens and Mortgages*, 47 TUL. L. REV. 767, 767 (1973).

55. 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 520–22 (2d ed. 1994);

While one heard of complaints from the admiralty bar that judges without tenure and the other perquisites of article III judges could not constitutionally exercise admiralty jurisdiction, the validity of the grant of admiralty jurisdiction to bankruptcy courts seems to have never been authoritatively determined in a published opinion. As previously noted, however, the Supreme Court’s 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, invalidated title 11’s grant of comprehensive jurisdiction to the bankruptcy courts.

Frank Kennedy, *Jurisdictional Problems Between Admiralty and Bankruptcy Courts*, 59 TUL. L. REV. 1182, 1198 (1985).

56. “Bankruptcy” is synonymous with “insolvency.” Which word is used depends upon the lexicon of the legislature writing a particular statute. See *Cross Border Insolvency Act 2008* (Cth) s 1 (Austl.); U.N. COMM’N ON INT’L TRADE LAW, *UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION*, at 3–4, U.N. Sales No. E.14.V.2 (2014).

57. See discussion *infra* Part III.A.2.

A. *The Model Law*

As commerce in the late twentieth century became increasingly globalized, it was clear to UNCITRAL⁵⁸ and the international legal apparatus that some regularization and uniformity would be helpful both in the business of trade and in the business of law.⁵⁹ One of UNCITRAL's efforts to create a blanket international bankruptcy scheme is the Model Law.⁶⁰ Although the Model Law has only been accepted by a handful of U.N. states,⁶¹ and despite its relative youth, it has already had significant legal and economic effects in at least two member nations—the United States and Australia.⁶²

B. *Chapter 15*

Chapter 15 of the United States Code replaced the old Section 304 of the Bankruptcy Code and is the United States' implementation of UNCITRAL's Model Law.⁶³ Chapter 15 has five stated purposes, which are derived from its international origin.⁶⁴ First, any interpretation of Chapter 15 “must be coordinated with the interpretation given by other countries that have adopted it as an internal law to promote a uniform and coordinated legal regime for cross-border insolvency cases.”⁶⁵ The goal of normalization in Chapter 15's first stated purpose is further supported by the other enumerated purposes, which are as follows:

- (2) greater legal certainty for trade and investment; (3) fair and efficient administration of cross-border insolvencies that

58. *Welcome*, UNCITRAL, <http://www.uncitral.org/uncitral/en/index.html> (last visited June 21, 2014).

59. *Id.* at 1997; *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*.

60. UNCITRAL, *supra* note 56.

61. Nineteen nations, to be exact. *Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_stat_us.html (last visited Apr. 26, 2014).

62. *See* discussion *supra* text accompanying notes 11–18; *see* discussion *infra* Part III.A.1.

63. 11 U.S.C. § 1501 (2014).

64. *Id.* § 1501(a).

65. Administrative Office of the U.S. Courts, *Chapter 15*, U.S. COURTS (last visited June 21, 2014), <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx>.

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.⁶⁶

A Chapter 15 bankruptcy case is typically filed in order to protect a foreign debtor's assets that exist or are contemporaneously located in the United States.⁶⁷ The threshold that a party must meet to gain Chapter 15 protections is relatively low.⁶⁸ The party seeking bankruptcy protections must petition the court for "recognition of a foreign proceeding."⁶⁹ The statute defines a foreign proceeding as follows:

[A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.⁷⁰

This petition process leads to what has come to be known professionally as the "Chapter 15 gap period."⁷¹ This "gap period" occurs between the filing of the petition for recognition and the recognition hearing before the bankruptcy court. Although the debtor is not automatically protected by the Bankruptcy Code after petitioning for recognition, if he fears that a creditor may take action against him before the recognition hearing, then the debtor may move for provisional protections after the filing and before the hearing.⁷² These protections are injunctive and terminate after the recognition hearing takes place.⁷³ Furthermore, this temporary relief differs from the permanent relief offered after the hearing in that only debtor property that is "perishable, susceptible to devaluation, or otherwise in jeop-

66. 11 U.S.C. § 1501(a).

67. Administrative Office of the U.S. Courts, *supra* note 65.

68. 11 U.S.C. § 1504.

69. *Id.*

70. 11 U.S.C. § 101(23) (2014); see *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009).

71. Bruce Nathan & Eric Horn, *Demystifying Chapter 15 of the Bankruptcy Code*, BUS. CREDIT, June 2009, at 1, 2.

72. 11 U.S.C. § 1519(a)(1) (2014).

73. *Id.* § 1519(b)–(e). The temporary relief terminates unless extended under Section 1521(a)(6), which allows for such an extension.

ardy” is given to the debtor.⁷⁴ As the UNCITRAL Legislative Guide on Insolvency Law eloquently states:

The reason for the availability of collective measures, albeit in a restricted form, is that relief of a collective nature may be urgently needed already before the decision on recognition in order to protect the assets of the debtor and the interests of the creditors. Exclusion of collective relief would frustrate those objectives. On the other hand, recognition has not yet been granted and, therefore, the collective relief is restricted to urgent and provisional measures.⁷⁵

Once a foreign proceeding is recognized by the court, the court must then determine whether that proceeding is “main” or “non-main.”⁷⁶ A main proceeding is “a foreign proceeding pending in the country where the debtor has the center of its main interests.”⁷⁷ A non-main proceeding is “a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.”⁷⁸ While the statute defines a debtor’s establishment as “any place of operations where the debtor carries out a nontransitory economic activity,” it does not define a debtor’s center of main interests.⁷⁹ The Bankruptcy Code, however, does contain a rebuttable presumption that “the debtor’s registered office . . . is presumed to be the center of the debtor’s main interests.”⁸⁰ After an order granting recognition of a foreign proceeding, many of the protections granted by the other chapters of the Bankruptcy Code are afforded to the Chapter 15 debtor.⁸¹ These protections de-

74. *Id.* § 1519(a)(2).

75. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW, at 341, U.N. Sales No. E.05.V.10 (2005).

76. 11 U.S.C. § 1517(b) (2014).

77. *Id.* § 1502(4).

78. *Id.* § 1502(5).

79. *Id.* § 1502(2).

80. *Id.* § 1516(c). Much ink has been spilled over how to determine a debtor’s center of main interests. The case law seems to accept the European rule that the debtor’s center of main interests is “the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.” *In re Tri-Cont’l Exch. Ltd.*, 349 B.R. 627, 634 (Bankr. E.D. Cal. 2006). *Cf. In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 336 (S.D.N.Y. 2008) (citation omitted) (listing factors that could be taken into consideration in determining a center of main interests).

81. 11 U.S.C. §§ 1520–1521.

pend, naturally, upon whether the foreign proceeding is found to be main or non-main. If the foreign proceeding is found to be non-main, then the protections granted depend upon the bankruptcy judge's discretion and the relief requested by the foreign company's representative.⁸² Types of relief include the staying of proceedings against debtor assets, suspension of the right to transfer or dispose of debtor assets, granting administration of debtor assets to the debtor's foreign representative, and extension of the provisional relief granted after filing by Section 1519(a).⁸³ In the event that a proceeding is recognized as a foreign main proceeding, Section 1520 imparts the protections granted by the more general chapters of the Bankruptcy Code, including automatic stay of proceedings against debtor assets,⁸⁴ avoidance of post-petition transactions,⁸⁵ and security of after-acquired property,⁸⁶ among others.⁸⁷

The only bulwark opposite the many debtor protections provided by Chapter 15 is the paltry Section 1522, which provides for the discretionary protection of creditor interests in the debtor.⁸⁸ This section states, in pertinent part, that all of the protections granted by Chapter 15 are at the judge's discretion.⁸⁹ That is, if the protections granted by the Bankruptcy Code would unjustly harm the interests of creditors or other parties to the bankruptcy proceedings, it is within the judge's discretion to modify or terminate that relief as he sees fit.⁹⁰ With judicial oversight as the only defense for creditors in a

82. *Id.* § 1521(a).

83. *Id.* § 1519(a).

84. *Id.* § 362.

85. *Id.* § 549.

86. *Id.* § 552.

87. *Id.* § 1520.

88. *Id.* § 1522.

89. *Id.*

90. *Id.* For a brief look at when courts have considered the application of Section 1522, see *In re Tri-Cont'l Exch. Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006) (court withheld debtor assets from foreign representative in order to protect U.S. creditors); *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 571 (E.D. Va. 2010) (court remanded case where "the Bankruptcy Court did not, as required by §1522, adequately balance the parties' respective interests"); *In re Int'l Banking Corp. B.S.C.*, 439 B.R. 614, 626-27 (Bankr. S.D.N.Y. 2010); *SNP Boat Serv. S.A. v. Hotel Le St. James*, 483 B.R. 776 (S.D. Fla. 2012).

vessel arrest action, it should come as no surprise that Chapter 15 has confounded admiralty suits in the United States.

III. "FROM ANCIENT GRUDGE BREAK TO NEW MUTINY":
CONFLICTS OF POLICY BETWEEN ADMIRALTY AND BANKRUPTCY

The differing goals of maritime law and bankruptcy cause a great deal of conflict when both regimes coexist in the same case.⁹¹ The two legal regimes are at constant odds with one another because "[a]lthough the scope of admiralty jurisdiction over contracts may be in flux, the freedom and sanctity of the contract is sacred in maritime law. Bankruptcy law turns contracts on their heads as it allows debtors to reject contracts or avoid contractual transactions."⁹² Maritime law has been steadily losing the battle with bankruptcy law in the United States because bankruptcy courts are given broad powers to take jurisdiction in cases related to bankruptcy. While practitioners of admiralty law may rankle at the infringement of bankruptcy onto admiralty jurisdiction, there are good policy reasons for the expansive and wide-reaching nature of U.S. bankruptcy law.

The most important reason for bankruptcy protections, arguably, is the defrayment of risk among entrepreneurs, producers, and employers.⁹³ Innovation and production are foundational principles of capitalist economies, but innovators and producers will not be willing to take the risks necessary to compete in such an economy without some manner of a safety net.⁹⁴ Businesses have inherent value, and when they become insolvent, there is often societal interest in helping them continue to function.⁹⁵ A prime example of the benefits of bankruptcy protection is obvious from a basic analysis of the Bethlehem Steel bankruptcy.⁹⁶ When businesses fail, the goods and

91. See Graydon S. Staring, *Bankruptcy—An Historical View*, 59 TUL. L. REV. 1157, 1166 (1985); Gary F. Seitz, *Interaction Between Admiralty and Bankruptcy Law: Effects of Globalization and Recurrent Tensions*, 83 TUL. L. REV. 1339, 1359 (2009).

92. Seitz, *supra* note 91, at 1352.

93. *Id.* at 1353.

94. *Id.*

95. *Id.*

96. *Id.* at 1353–54.

services that they produce are no longer available for consumption, their workers lose their employment, and their creditors are unable to recover their full investment.⁹⁷ Aside from avoiding these societal evils, the purpose of bankruptcy as a legal regime is threefold: to provide the debtor with a “fresh start,”⁹⁸ to distribute a debtor’s remaining assets to his creditors, and to allow debts to be reorganized in order to allow a debtor to continue operating.⁹⁹

While the protection of debtors and the creation of an economic safety net for business owners are noble and necessary functions of bankruptcy law, they conflict intrinsically with the rights of creditors in admiralty suits.¹⁰⁰ Those rights in admiralty suits have been called “aggressive” primarily because they favor creditors.¹⁰¹ Maritime law, with its focus on protecting creditors’ rights at the expense of the debtor,¹⁰² is in apposition with bankruptcy’s orderly procession of creditors that is designed to protect the debtor and nurture him back to health as a functional, profitable company.¹⁰³ Admiralty law, however,

Bethlehem Steel was at one time one of the largest shipbuilding companies in the world and one of the most powerful symbols of American industrial manufacturing leadership. Bethlehem Steel “failed”: they were no longer paying their debts as they became due. Liabilities exceeded assets and the company had a negative net worth. The company listed inexpensive steel imports and numerous high pension payments as causes of its bankruptcy. Would we be better off if Bethlehem Steel disappeared from the face of the earth? Tens of thousands of people would be out of work. The nation would lose a major source of steel, an important component of national industrial production. Finally, recovery by creditors would be limited.

Id.

97. *Id.*

98. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 566 (2005) (quoting President George W. Bush from his signing ceremony address, “[the bankruptcy laws] give those who cannot pay their debts a fresh start”).

99. Seitz, *supra* note 91, at 1354–55.

100. *Id.* at 1357–58.

101. *Id.*

102. “[A] primary purpose of maritime law is to support a strong merchant marine by favoring creditors.” Seitz, *supra* note 91, at 1352 (alteration in original) (quoting John A. Edginton, 3B BENEDICT ON ADMIRALTY 1–21 (2008)).

103. Bankruptcy is designed to protect debtors by giving them “a new opportunity in life and clear field for future effort, unhampered by the pressure

was developed over centuries to deal with the complex maritime industry as it matured globally; an industry that must face the difficulties posed by property that is singularly expensive and internationally mobile—seagoing vessels.¹⁰⁴ Maritime liens, as mentioned previously,¹⁰⁵ are the solution to the innate complications involved in securing rights in maritime commerce. Likewise, vessel arrest and attachment actions are the primary, effective means of enforcing the rights created by maritime liens.¹⁰⁶ If the vessel arrest and attachment actions, or the maritime lien they guarantee, are not protected, the already beleaguered U.S. shipping industry will be irrevocably damaged. Additionally, admiralty was the original international law¹⁰⁷ and, as such, lacks many of the underpinnings of state or nationally centered interests that other legal regimes, like bankruptcy, naturally possess.¹⁰⁸ As the U.S. shipping industry continues to contract,¹⁰⁹ large shipping corporations will increasingly be foreign in their citizenship,¹¹⁰ which will lead to

and discouragement of preexisting debt.” *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

104. Alwang, *supra* note 14, at 2628–29.

105. See discussion *supra* Part I.B.

106. See discussion *supra* Part I.A.

107. See generally William W. Adams, *Constitutional History—Development of Admiralty Jurisdiction in the United States*, 8 W. NEW ENG. L. REV. 157 (1986) (discussing early interpretations of the U.S. Constitution, Article III, Section 2, which grants admiralty jurisdiction to federal courts); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993) (providing a historical account of early admiralty jurisprudence); *Hertz v. Treasure Chest Casino, LLC*, 274 F. Supp. 2d 795 (E.D. La. 2003) (featuring Judge Fallon’s excellent analysis of the evolution of admiralty jurisdiction in the United States).

108. Alwang, *supra* note 14, at 2629.

109. See U.S. Dep’t Transp. Mar. Admin., U.S. Waterborne Foreign Trade by U.S. Custom Districts, 2003–2012, available at http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm (last visited June 21, 2014) [hereinafter U.S. Waterborne Foreign Trade by U.S. Custom Districts].

110. See U.S. Dep’t Transp. Mar. Admin., Top 25 Flag of Registry (September 27, 2013), available at http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm [hereinafter Top 25 Flag of Registry].

an increase in the use of Chapter 15 bankruptcy by debtors to escape creditors in the United States.¹¹¹

A. The Land Down Under: Australia's Serendipitous Solution to the Problem

While the United States wrestles with the difficulties imposed by the Model Law's interaction with admiralty law, an analysis of another nation's implementation of the Model Law is informative. It should be noted that a meager number of U.N. member states have only recently adopted the Model Law.¹¹² The combination of a lack of adherents and recent acquiescence translates to a paucity of case law in the few nations that have implemented the Model Law, and a particular want of case law within the realm of admiralty. One may, however, still draw inferences about the way that vessel arrests would interact with the Model Law in these states, based on what little case law exists. This Note chose a state for comparison out of the group of nations that were once British colonies or territories for a number of reasons. The foremost of those reasons is that most former British territories share a common heritage of admiralty law.¹¹³ This common legal heritage¹¹⁴ means that the law of the comparison nation is similar enough

111. A comparison of the rise in U.S. imports, a decline in U.S. exports, and a steadily shrinking U.S. private fleet reveals contraction within the U.S. merchant marine that will likely continue in the future. As such, many, if not most, future maritime bankruptcies will be foreign in nature, leading to increasing conflicts between U.S. admiralty law and the tenets of U.N. solutions to cross-border insolvency represented by Chapter 15 of the U.S. Code.

112. *Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited June 21, 2014) (listing states that have adopted the Model Law together with the dates of their various adoptions).

113. *The Siren*, 80 U.S. 389, 393 (1871) ("From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities."); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. 191, 198 (1815) ("The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances.").

114. See TETLEY, *supra* note 13, at 1265–1410 (discussing states that have a developed vessel arrest codex).

to make such a comparison both possible and fruitful.¹¹⁵ The second reason is that due to the British Empire's nature as a maritime power, and as a part of its imperial heritage, many, if not all formerly British nations have developed a virile merchant marine, making the shipping industry of great economic significance to those states.¹¹⁶ The maritime tradition of these states is important simply because it ensures that the state selected will have enough case law and statutory law, although certainly not a surplus of either, to facilitate an analysis. The third and final reason is a simple one; many formerly British nations share the English language as their mother tongue, making research and analysis much easier.

The Commonwealth of Australia is one of the best examples of a state with a strong maritime heritage¹¹⁷ that has also adopted the Model Law.¹¹⁸ While Australia did adopt the Model Law largely without reservation via the Cross Border Insolvency Act of 2008,¹¹⁹ the Australian Parliament has added some helpful interpretation to guide the implementation of the law.¹²⁰ Although Australia has a different legal regime, which informs their deployment of the Model Law in relation to admiralty, it still offers an example that may allow the U.S. legal system to achieve a middle path between the powerful, creditor centric tools of admiralty law and the equally robust debtor protections of bankruptcy law.

1. The Australian Adoption of the Model Law and *Yu v. STX Pan Ocean*

The Australian statute delimits some specific types of bankrupts, insolvent individuals or entities in the Australian statu-

115. See *Status*, *supra* note 112.

116. See Top 25 Flag of Registry, *supra* note 110.

117. See BUREAU OF INFRASTRUCTURE, TRANSP. & REG'L ECON., STATISTICAL REPORT: AUSTRALIAN SEA FREIGHT 2-3 (2012).

118. *Cross Border Insolvency Act 2008* (Cth) s 1 (Austl.)

119. The Parliament of Australia went so far as to attach the Model Law on Cross-Border Insolvency as a schedule to its own statute and insert it into existing Australian law "with as few changes as are necessary to adapt it to the Australian context." *Id.* sch 1.

120. The Australian Parliament wrote an explanatory memorandum to accompany its adoption of the Model Law and guide the implementation of the Model Law. Explanatory Memorandum, *Cross Border Insolvency Act 2008* (Cth) 6 (Austl.).

tory language, who are not protected by certain elements of the Cross Border Insolvency Act 2008 ("Cross-Border Insolvency Act"). This approach essentially creates an exception to the Model Law for particular types of debtors.¹²¹ While this is an attractive option for parties interested in placing some constraints on the implementation of the Model Law, it is not without its faults. The first of those faults is the fact that such a system of exceptions would grant the enacting government power to favor certain industries¹²² or institutions that are considered systemic.¹²³ Such favoritism in a free market economy is unsavory, at best, as it allows the government to choose "winners and losers" on an economic level. A second fault of the exceptions approach is the possibility of a slippery slope. Once a legislature begins to generate exceptions to the protections of the Model Law, it may continue to create exceptions until the law is so diluted as to be useless.

Despite the risks inherent in the creation of exceptions to the Model Law, the Federal Court of Australia has done just that in its recent decision in *Yu v. STX Pan Ocean Co Ltd*.¹²⁴ In *Yu*, the court held that vessel arrests made in pursuance of certain maritime liens would be exempt from the exclusive protections offered to the debtor under the Cross-Border Insolvency Act, which imports the Model Law into Australian law.¹²⁵ In a somewhat confusing nexus of parliamentary acts, the only arrests protected are those that are made to enforce maritime liens that impart to the lienor the status of a "secured creditor."¹²⁶ These liens are protected because of a clause in another

121. "It is proposed to exclude corporate entities that are currently subject to special insolvency regimes at the Commonwealth level (including financial institutions) from the scope of the Model Law. Views of States and Territories will be sought on exclusion of further types of entities under special insolvency frameworks." CORPORATE LAW ECON. REFORM PROGRAM, CROSS-BORDER INSOLVENCY: PROMOTING INTERNATIONAL COOPERATION AND COORDINATION, PROPOSALS FOR REFORM: PAPER NO. 8, at 26 (2002) [hereinafter CLERP].

122. See *The Decline and Fall of General Motors: Detroitosaurus Wrecks*, ECONOMIST, Jun. 6, 2009, at 78.

123. See *AIG: Cheque Mate*, ECONOMIST, Nov. 5, 2008, at 22.

124. *Yu v STX Pan Ocean Co.*, (2013) FCR 680 (Austl.).

125. *Id.* ¶¶ 41–42.

126. Security rights are created in a maritime lien when the lien involves claims for salvage, claims for collision damages caused by a ship, claims for wages of a ship's master or crew, and claims for a master's disbursement. *Admiralty Act 1988* (Cth) s 15 (Austl.).

parliamentary act, the Corporations Act 2001 (“Corporations Act”), which provides in pertinent part that the stay of proceedings allowed by the Australian Model Law shall not affect “a secured creditor’s right to realise or otherwise deal with [a] security interest.”¹²⁷ Thanks to this protection of secured creditors’ interests¹²⁸ in the Corporations Act and the Model Law’s reservation that local laws, such as the Corporations Act, are allowed to survive its implementation,¹²⁹ the Honorable Justice J. Buchanan was able to rule that bankruptcy law could not trump admiralty law at every turn, and that in certain cases, admiralty actions must be allowed to proceed.¹³⁰ Justice Buchanan succinctly explains the problem between the two legal regimes of admiralty and insolvency in Australia:

Criticism has been made of the terms of the Model Law by reason of its failure to recognise and take appropriate account of international maritime law and the operation in Australian jurisdictions of the Admiralty Act. I do not propose to take up those matters in the present judgment, but those criticisms draw attention to the fact that, for centuries, international maritime law developed its own security regimes for reasons which remain generally observed around the world, including in Australia.¹³¹

He goes on to illustrate that maritime liens, by their very nature as an action in rem, are securities as discussed in Section 471C of the Corporations Act.¹³² Justice Buchanan also establishes a rule for other judges exercising their discretion in the granting of bankruptcy protections, stating that “[w]hether an arrest would issue would depend on the circumstances, the reason why the arrest was sought and the interest sought to be vindicated by the [arrest].”¹³³

The astute analyst will note, however, that the combination of Australian statutes allowed for the Federal Court of Austral-

127. *Corporations Act 2001* (Cth) s 471C (Austl.).

128. “Nothing in section 471A or 471B affects a secured creditor’s right to realise or otherwise deal with the security interest.” *Id.*

129. *Yu v STX Pan Ocean Co.*, (2013) FCR 680, ¶ 36 (Austl.) (“Article 20(2) preserves the operation of local insolvency laws.”); *see also* UNCITRAL, *supra* note 56, at 20(2).

130. *Yu*, (2013) FCR at ¶¶ 41–42.

131. *Id.* at ¶ 39.

132. *Id.* at ¶ 40.

133. *Id.* at ¶ 41.

ia's decision *by accident*. Although there is some indication¹³⁴ in the legislative record that the Australian Parliament intended Corporations Act Section 471C to protect security interests from the implementation of the Model Law, there is no evidence that the parliament thought it would be protecting vessel arrest provisions in admiralty.¹³⁵ Interestingly, an examination of the security interests created by maritime liens that are protected from the Australian implementation of the Model Law leads one to the conclusion that these exceptions are quite adventitious. There are only four types of maritime liens that create a security interest that is free from the Model Law in Australian jurisdictions.¹³⁶ More importantly, each of the four types of liens covers an area of maritime commerce and an operation of admiralty law that is essential to the success of shipping at sea.¹³⁷ The public policies that benefit from the liens are still vital today as a part of the modern shipping industry.

2. The Security Interests Guaranteed by Australian Maritime Liens

The first Australian maritime lien that creates a security interest is the maritime lien arising from a claim of salvage.¹³⁸ It is good policy that whenever and wherever one ship finds another in distress, the first ship lends assistance.¹³⁹ The assisting ship is said to be the salvor of the distressed ship, and, as the High Court of Admiralty stated in *The Two Friends (M'Dougal, Master)*, "every person assisting in rescue has a lien on the thing saved. He has, as it has been argued, an action *in*

134. See CLERP, *supra* note 121, at 35; *Cross Border Insolvency Act 2008* (Cth) s 20 (Austl.).

135. *Corporations Act 2001* (Cth) s 471C (Austl.).

136. "A reference in subsection (1) to a maritime lien includes a reference to a lien for: (a) salvage; (b) damage done by a ship; (c) wages of the master, or of a member of the crew, of a ship; or (d) master's disbursements." *Admiralty Act 1988* (Cth) s 15(2) (Austl.).

137. The ranking of these liens among one another is conveniently irrelevant for the purposes of this Note, because all four types of lien vest security rights in the creditor.

138. As previously mentioned, admiralty law is very much *sui generis*, and an additional article could be written discussing the intricacies of the right of salvage. For more information on salvage as a doctrine see W.R. KENNEDY, *LAW OF SALVAGE* (5th ed. 1985).

139. TETLEY, *supra* note 13, at 329-40.

personam also; but his first and his proper remedy is *in rem*.¹⁴⁰ This right of salvage is designed to make it lucrative for ships to aid one another and to prevent “embezzlement” or piracy.¹⁴¹ If this lien from salvage rights is not defended against bankruptcy stays granted by the Model Law, then the impetus to aid ships in distress begins to erode, which would be contrary to public policy.¹⁴² It is true that the law could simply require ships to assist one another, but that would be inherently difficult to enforce on the open sea.¹⁴³ Even though the Australian statutes only accidentally protect maritime liens based on salvage rights, it is a fortuitous coincidence, as the shipping industry would be greatly harmed if the institution of salvage were undermined by the Model Law.¹⁴⁴

The second of the four security interests created by Australian maritime liens is the security interest arising from collision damage done by a ship.¹⁴⁵ For obvious reasons, a collision or allision can cause extensive damage to the vessel and its surrounding environs.¹⁴⁶ The policy reason for the priority of this lien type over others is based on the size of seagoing vessels

140. *The Two Friends (M'Dougal, Master)*, (1799) 165 Eng. Rep. 174 (Admty) 176; 1 C. Robinson 271.

141. See *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869).

142. KENNEDY, *supra* note 138, at 43.

143. See *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 266 (1804)

If the property of an individual on land be exposed to the greatest peril, and be saved by the voluntary exertions of any person whatever; if valuable goods be rescued from a house in flames, at the imminent hazard of life by the salvor, no remuneration in the shape of salvage is allowed. The act is highly meritorious, and the service is as great as if rendered at sea. Yet the claim for salvage could not, perhaps, be supported. It is certainly not made. Let precisely the same service, at precisely the same hazard, be rendered at sea, and a very ample reward will be bestowed in the courts of justice.

Id.

144. Justin S. Stern, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 FORDHAM L. REV. 2489, 2492 (2000).

145. In the modern context, this category includes damage from collisions with the ship and damage caused directly by the ship's actions, called ship tort liens. TETLEY, *supra* note 13, at 387–91.

146. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 757 (5th ed. 2012).

and their capacity to cause massive amounts of damage.¹⁴⁷ This is an especially salient point given the size of modern bulk carriers, tankers, and container ships.¹⁴⁸ A shipwreck close to a port, even of a relatively small, noncommercial vessel, can have an enormous cost in terms of both economic loss and lives, as demonstrated by the wreck of the *Costa Concordia*.¹⁴⁹ This is to say nothing of other types of maritime disasters, an obvious example being the *Deepwater Horizon* debacle.¹⁵⁰ It is good public policy to hold the masters of vessels responsible for such maritime catastrophes that take place under their command.¹⁵¹ It is difficult to imagine Carnival Cruise Lines, operator of the *Costa Concordia*, or BP, an operator of the *Deepwater Horizon*, escaping from liability for damages caused by the vessels under their control simply by filing for bankruptcy. Yet, if either corporation had filed for bankruptcy abroad, the validity of maritime claims against them would have been at issue.¹⁵² Once again, the Australian statute, albeit accidentally, protects the security interests in maritime liens created by collision damage and ship torts, which are traditional maritime liens essential to maritime commerce and the safe operation of seagoing vessels.¹⁵³

147. TETLEY, *supra* note 13, at 387–90.

148. In the trial following the *Exxon-Valdez* oil spill, the jury awarded US\$5 billion for punitive damages, which were later reduced to US\$507.5 million, in addition to US\$507.5 million for actual damages. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008).

149. The recent *Costa Concordia* disaster is evidence of this and, even though the loss of life takes clear precedence, the long-term economic loss to the pleasure cruise industry should not be forgotten when tabulating damage. Gaia Pianigiani, *Search Is On for Survivors From Cruise Ship That Ran Aground*, N.Y. TIMES, Jan. 15, 2012, at A10.

150. On April 20, 2010, a drillhead blowout on the *Deepwater Horizon* oil rig resulted in a large explosion. The oil rig burned for a day and a half before it sank, but the damage to the oil well resulted in a spill of about 4.9 million barrels of oil into the Gulf of Mexico between April 20 and July 15, 2010. See Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, Apr. 22, 2010, at A13; U.S. COAST GUARD, ON SCENE COORDINATOR REPORT *Deepwater Horizon OIL SPILL*, (2011) available at http://www.uscg.mil/foia/docs/DWH/FOSC_DWH_Report.pdf.

151. See generally TETLEY, *supra* note 13, at 387–416 (discussing the policy behind and function of collision damage maritime liens).

152. See discussion *supra* text accompanying notes 11–18.

153. See TETLEY, *supra* note 13, at 387–90.

The third type of maritime lien held in Australia to create a security interest is a lien for the “wages of the master, or of a member of the crew, of a ship.”¹⁵⁴ The importance of ensuring the pay of seamen and ships’ masters cannot be understated.¹⁵⁵ In an economic analysis, if seamen are not reliably paid for their work, they will leave the shipping industry to seek jobs where they are more regularly reimbursed. Without captains and crews, the shipping industry ceases to function for obvious reasons. All of that is to say nothing of the human rights issues and labor struggles that plagued seamen in the past that have only recently, in the grand scale of admiralty law, been mollified by legislative and judicial action.¹⁵⁶ Another facet of the wage problem is the potential for criminal activity if seamen and masters are not paid.¹⁵⁷ Shipping vessels are mobile, expensive, and often filled with valuable cargo.¹⁵⁸ Piracy is a very real risk on modern shipping lanes, and if seamen and ship masters are not adequately compensated, desperados may not be confined to operating dinghies off the coast of Somalia.¹⁵⁹ As such, the Australian protection of the security interest in a maritime lien for seamen’s and ship masters’ wages conveniently serves the interests of the public.

The fourth and final type of Australian maritime lien that is protected from a stay granted by the Model Law is a lien for a ship master’s disbursements.¹⁶⁰ This is similar to a lien for necessities¹⁶¹ but applies to purchases made by the ship’s master from his own money or on his own credit in the pursuance of his duties to the ship and crew.¹⁶² The logic behind this type of lien is similar to that of the lien for wages mentioned above.

154. *Admiralty Act 1988* (Cth) s 15(2)(c) (Austl.).

155. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160–61 (5th Cir. 1985) (“Seamen, of course, are wards of admiralty whose rights federal courts are duty-bound to jealously protect.”).

156. 46 U.S.C. § 50101 (2014).

157. See TETLEY, *supra* note 13, at 267–69.

158. See U.S. Waterborne Foreign Trade by U.S. Custom Districts, *supra* note 109.

159. Jeannette Catsoulis, *Stolen Seas*, N.Y. TIMES, Jan. 18, 2013, at C10. (discussing a recent documentary on Somali Pirates).

160. *Admiralty Act 1988* (Cth) s 15(2)(d) (Austl.).

161. Necessities are things purchased on credit by a ship underway that the ship requires to continue its voyage: for example, food and water for the crew, medical supplies, fuel oil, and repairs. TETLEY, *supra* note 13, at 551–52.

162. *Id.* at 419.

Without the assurance of reimbursement, a ship's master may, at best, be required to unjustly pay the price of the shipowner's default. At worst, the ship's master may either shirk his duty by not purchasing the necessities required for the safe and successful operation of his vessel, or even turn to crime in order to make up his shortfall.¹⁶³ This maritime lien is so zealously enforced that in one case a commercial shipping vessel was sold in a Canadian small claims court to pay a mere CA\$251.00 master's disbursement.¹⁶⁴ Once again, the Australian exception protects those most at risk of unjust treatment in a bankruptcy action under the Model Law—secured creditors.

Based upon the Australian case law and the lucky congruity of Australian statutory law, the most important types of maritime liens—those for salvage, collision damage, master's or crew's wages, and master's disbursements—are protected in Australian jurisdictions from the Model Law's ham-fistedness. There is a solution to the battle between vessel arrest and bankruptcy in the United States that can be distilled from the Australian solution to the same conflict.

IV. RESTORING BALANCE TO THE SCALES

Ultimately, bankruptcy and admiralty are "both alike in dignity."¹⁶⁵ Both regimes protect valuable economic interests and both have their place in the legal system. Under Chapter 15, bankruptcy's protection of debtors has expanded significantly, while it simultaneously constricted admiralty's protection of creditors. This imbalance causes a great deal of harm to maritime commerce. One should not forget, however, exactly how powerful the vessel arrest and attachment provisions of U.S. maritime law can be if not kept reasonably in check. An example of maritime attachments getting out of control and subsequently being reigned in is readily available in the EFT line of cases, which will be discussed at the end of this section.¹⁶⁶ Additionally, a discussion of recent Supreme Court jurisprudence

163. See *Epstein v. Corporacion Peruana de Vapores*, 325 F.Supp. 535 (S.D.N.Y. 1971) (ship's master bought 2.2 million cigarettes and forty cases of liquor intending to smuggle them internationally).

164. *Osborn Refrigeration Sales & Services Inc. v. The Atlantean I*, [1979] 2 F.C. 661 (Fed. Ct. of Can.).

165. SHAKESPEARE, *supra* note 1.

166. See discussion *infra* Part IV.B.

evinces a trend of U.S. courts increasing the difficulty with which foreign parties can gain access to the U.S. judicial system.¹⁶⁷ Once these final issues have been addressed, this Note will then move on to the proposed solution to the conflict between bankruptcy and admiralty.

A. The Weight: Bankruptcy Has Waxed Full

Proponents of stronger admiralty protections have argued that “any international insolvency treaty should include a provision recognizing the primacy of admiralty law over maritime assets.”¹⁶⁸ While the effectiveness of Chapter 15 could be compromised if Congress begins to carve out exceptions, it is clear that the chapter, as it stands now, is dysfunctional if not actively harmful in cases of maritime bankruptcy. Other nations that have adopted the Model Law have no specific provision protecting maritime assets in maritime insolvencies,¹⁶⁹ but many of the larger shipping nations that have implemented the Model Law also lack the robust tools of the U.S. admiralty system.¹⁷⁰ Furthermore, Australia, at least, has recognized that the lack of protection for maritime assets from the Model Law has created significant difficulties in admiralty actions.¹⁷¹ The nations that possess maritime capabilities similar to those of the United States have started to adjust their implementations of the Model Law in an effort to level the playing field between admiralty and insolvency once again.¹⁷² Furthermore, there is strong precedent in favor of treating admiralty disputes differently from other actions in the United States.¹⁷³ Aside from the

167. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1677 (2013) (holding that the threshold for foreign parties to bring suit in the United States required “the presence of some distinct American interest”).

168. Alwang, *supra* note 14, at 2617.

169. See CROSS-BORDER INSOLVENCY: A COMMENTARY ON THE UNCITRAL MODEL LAW (Look Chan Ho ed., 2d ed. 2009) (examining the implementation of the Model Law in various countries; nowhere, however, does it mention any reservations or exceptions for admiralty actions).

170. Tetley, *supra* note 28, at 1928. (“Another hallmark of U.S. maritime procedures is that both maritime attachment and arrest in rem are subject to certain constitutional safeguards rooted in the ‘due process’ clauses of the Fifth and Fourteenth Amendments of the United States Constitution.”)

171. *Yu*, (2013) FCR at ¶ 38.

172. *Id.*

173. Admiralty is one of few disciplines specifically protected in the Constitution. U.S. CONST. art. III, § 2, cl. 1.

Constitution's explicit treatment of admiralty jurisdiction,¹⁷⁴ there is a long history of Supreme Court jurisprudence that recognizes admiralty as being separate from the common law.¹⁷⁵ Therefore, bankruptcy courts cannot determine admiralty suits. Even if bankruptcy courts had the proper jurisdiction, bankruptcy, as a discipline, looks at suits through a lens that focuses on land-based, national concerns.¹⁷⁶ Admiralty disputes are inherently focused on the unquities of maritime commerce and should be adjudicated with that focus in mind.¹⁷⁷

B. Admiralty Ascendant

Admiralty, however, should not be permitted to run roughshod over debtor rights, as it was in the EFT line of cases. In these cases, the Second Circuit successfully stopped an abuse of maritime attachment procedure.¹⁷⁸ Beginning with *Winter Storm Shipping, Ltd. v. TPI*,¹⁷⁹ the Southern District of New York allowed a creditor to use a maritime attachment to seize a shipper's electronic funds transfer.¹⁸⁰ Over the course of the next seven years, the Second Circuit was inundated with maritime attachment claims on EFTs. Indeed, four years after the *Winter Storm* decision, the Second Circuit questioned the veracity of that decision in *Aqua Stoli Shipping Ltd. v. Gardner*

174. *Id.*

175. "Admiralty courts proceed according to the principles, rules, and usages which belong to the admiralty as contradistinguished from the courts of common law." *United States v. Ames*, 99 U.S. 35, 35–36 (1878) (quoting *Manro v. Almeida*, 23 U.S. 473 (1825)). See also *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Chelentis*, *supra* note 27; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239 (1942).

176. See, e.g., GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 589 (2d ed. 1975) ("[M]aritime liens and land liens have little in common.").

177. Alwang, *supra* note 14, at 2642–45.

178. *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 68 (2d Cir. 2009) (discussing the difficulties created by its decision to allow EFTs to be attached in maritime claims).

179. *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002).

180. EFTs are electronic monetary transactions that take place during the regular course of business. Due to the high concentration of financial institutions in New York City, it became very common for creditors to attach the EFTs of a debtor involved in contracts that were just barely maritime in nature, as required by the procedural rules. *Jaldhi*, *supra* note 162, at 62.

*Smith Pty Ltd.*¹⁸¹ In 2009, the Second Circuit specifically overturned *Winter Storm*, holding that “*Winter Storm’s* reasons [are] unpersuasive and its consequences untenable.”¹⁸² The EFT cases are a prime example of the problems created when the powerful tools of admiralty are allowed to go unchecked, similar to the way in which Chapter 15 has gone unchecked since its adoption from the Model Law.¹⁸³ Just as powerful admiralty provisions had to be brought back under control in the EFT cases, the ability of current bankruptcy law to disrupt vessel arrest and attachment actions must also be brought to heel.

V. *KIOBEL* AND THE SUPREME COURT’S DISINTEREST IN FOREIGN AFFAIRS

Admiralty law, as mentioned above, is international by its very nature.¹⁸⁴ When admiralty combines with international bankruptcy, it is almost inevitable that one party will be foreign to the United States. The Supreme Court, however, recently moved away from U.S. judicial involvement in foreign suits.¹⁸⁵ In its decision in *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court raised the bar for access to American courts, and it is likely that the Court would do the same in a maritime bankruptcy if given the opportunity.¹⁸⁶ While it may appear at first glance that strict application of Chapter 15 protections would keep foreign matters out of U.S. courts by relegating the procession of creditors to foreign proceedings, there are several problems with that assumption.¹⁸⁷ First, the Court’s decision in *Kiobel* explicitly stated that some “distinct Ameri-

181. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434, 447 n.6 (2d Cir. 2006) (“The correctness of our decision in *Winter Storm* seems open to question . . .”).

182. *Jaldhi*, *supra* note 178, at 68.

183. See discussion *supra* text accompanying notes 11–18.

184. See *Adams*, *supra* note 107, at 165 (“Nowhere does it appear that a grant of admiralty jurisdiction to the federal government was founded on anything other than considerations of international comity.”).

185. *Kiobel*, *supra* note 167, at 1669.

186. *Id.*

187. One may arrive at the assumption that Chapter 15 protections will result in fewer foreign suits in U.S. courts because one of the purposes of Chapter 15 is to relegate foreign bankruptcies to foreign courts. § 1501 *supra* note 50.

can interest” had to be implicated in order for foreign parties to gain access to the U.S. legal system via the Alien Tort Statute.¹⁸⁸ In the vessel arrest actions with which this Note concerns itself, the creditors are always American in their citizenship, because if they were not, they would not have access to U.S. maritime remedies. Surely citizenship can satisfy *Kiobel*'s requirement of “American interest” for access to U.S. courts. Additionally, foreign companies have been using the Chapter 15 bankruptcy provisions to protect their assets located in the United States.¹⁸⁹ Indeed, the whole purpose of Chapter 15 is to protect local assets of distant debtors.¹⁹⁰ While such usage may not involve U.S. courts in certain types of bankruptcy litigation, it would take advantage of the U.S. system to serve foreign interests, which seems to be precisely what the Supreme Court seeks to avoid by its holding in *Kiobel*.¹⁹¹ Hence, based on the stated aims of the Court, the conflict between admiralty and bankruptcy must be solved by stronger protections for the powers of vessel arrests and attachments.

CONCLUSION

“What here shall miss, our toil shall strive to mend.”¹⁹²

The combination of Supreme Court trend, maritime bankruptcy dysfunction, and a preexisting, creditor-centric corpus of admiralty law, demands a resolution in the current feud between Chapter 15 bankruptcy protections and admiralty actions. A curative amendment to Chapter 15 could be based on the Australian model, which protects a very limited but vital set of maritime liens and rights of action. By reserving admiralty arrest and attachment proceedings to courts sitting in admiralty, this solution would go a long way toward ameliorating the destructive effects that the deployment of the Model Law has had on maritime commerce in the United States.¹⁹³ Moreover, as U.S. imports from the developing world rise and the number of U.S.-based shipping companies falls, there will be a corresponding increase in foreign companies filing for

188. *Kiobel*, *supra* note 167, at 1677–78.

189. *See Evidiki*, *supra* note 2, at 669; discussion *supra* at 1–2.

190. 11 U.S.C. § 1501(a)(4).

191. *Kiobel*, *supra* note 167, at 1669.

192. SHAKESPEARE, *supra* note 1.

193. *See Evidiki*, *supra* note 2, at 669; discussion *supra* at 1–2.

Chapter 15 recognition of their bankruptcies in an effort to escape creditors in the United States.¹⁹⁴ As these creditors continue to lose money in the shipping business, they will cease to invest in it, leading to a further contraction of the already reeling industry.

The importance of bankruptcy protections, however, cannot be denied. Bankruptcy protections are part of the reason that the modern United States economy, and indeed the international economy, is as vibrant as it is.¹⁹⁵ The ability of bankruptcy to lower the barriers to entry into the economy for entrepreneurs is of extreme importance to overall economic health, and that is to say nothing of bankruptcy's ability to keep large corporations running, their products and services flowing into the marketplace, and their employees working and earning.¹⁹⁶ But, as in all things, moderation is critical. Chapter 15 has administered a crash course, at least in the United States and Australia, on the problems associated with overbroad, one-size-fits-all international laws, especially such laws that govern legal regimes as disparate and diametrically opposed as bankruptcy and admiralty.¹⁹⁷ In the instance of vessel arrest, admiralty law requires either a statutory protection of its jurisdiction, created by the legislature, or a judicial interpretation of Chapter 15 that protects admiralty jurisdiction from bankruptcy courts similar to the interpretation in *Yu*.¹⁹⁸ Australia provides an excellent example of a nation with a robust merchant marine possessing tools on par with U.S. vessel arrest, if not attachment, provisions.¹⁹⁹ Furthermore, Australia has encountered an identical problem in its own implementations of the Model Law in admiralty cases.²⁰⁰ Australia has responded in an appropriate fashion by recognizing the importance of maritime liens to the operation of maritime commerce and creating protections for vessel arrest and attachment, the only effective tools that creditors have to enforce those liens.²⁰¹ Such protec-

194. See Top 25 Flag of Registry, *supra* note 110; U.S. Waterborne Foreign Trade by U.S. Custom Districts, *supra* note 109.

195. Staring, *supra* note 91, at 1164.

196. Jensen, *supra* note 98, at 566–67.

197. See discussion *supra* Part III.

198. See *Yu*, (2013) FCR at ¶ 41–42.

199. See *Admiralty Act 1988* (Cth) s 15 (Austl.).

200. *Yu*, (2013) FCR 680.

201. *Id.*

tions will be vital to the health of the United States' shipping industry in the future. Congress must take a cue from the Federal Court of Australia and craft a provision into Chapter 15 to counteract the current abuse of the chapter by debtors seeking to sabotage the rights of their creditors.

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