Steering the Most Appropriate Course Between Admiralty and Insolvency: Why an International Insolvency Treaty Should Recognize the Primacy of Admiralty Law over Maritime Assets

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NOTES

STEERING THE MOST APPROPRIATE COURSE BETWEEN ADMIRALTY AND INSOLVENCY: WHY AN INTERNATIONAL INSOLVENCY TREATY SHOULD RECOGNIZE THE PRIMACY OF ADMIRALTY LAW OVER MARITIME ASSETS

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INTRODUCTION

Many experts on international insolvencies have called for an international insolvency treaty to resolve the problems encountered by the increasing number of transnational businesses facing bankruptcy under multiple and often conflicting national laws. Such an insolvency treaty may well call for universalism: a single primary bankruptcy forum which will control all of the debtor's assets, regardless of location, and adjudicate the creditors' claims under a single bankruptcy law. When an insolvent company's operations span several countries, the company may be subject to conflicting national bank-

* This Note would not have been possible without the never ending patience and support of Wesley Alwang and Linda and Larry Scharer, and the sweet smiles of Augusta Alwang to keep me going.

1. If a debtor cannot pay his obligations to creditors he may become insolvent. Merriam-Webster's Collegiate Dictionary 605 (10th ed. 1993). Once the court finds the debtor insolvent, that court will adjudicate the creditors' claims against the insolvent debtor's estate under bankruptcy law. See 1 I.H. Dalhuisen, Dalhuisen on International Insolvency and Bankruptcy, § 1.02[4], at 2-35 to 2-39 (1984) (discussing the requirement of a finding of insolvency to trigger various national bankruptcy laws). In this Note, the term "bankruptcy" refers to any adjudication under bankruptcy law unless otherwise specified.


3. Martin N. Flics & Michael J. Ireland, Bankruptcy and the Problems of Multi-Jurisdictional Workouts, in International Commercial Agreements 415, 420 (PLI Com. L. & Practice Course Handbook 1991); Gitlin & Flaschen, supra note 2, at 322; MIICA, supra note 2, at 323 ("[U]niversality . . . envisions a single administration of the

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ruptcy laws. This conflict may lead one judicial system to refuse to defer to a foreign bankruptcy proceeding conducted under a law based on opposing principles. Additionally, a court may refuse to enforce the judgments reached by a court applying conflicting law. Moreover, when an insolvency spreads across several nations, different courts may not treat creditors equally, creditors may not realize the highest possible returns from the sale of assets, and the parties may be unable to realize the benefits of reorganization. A universalist international insolvency treaty would resolve these problems by ensuring cooperation and mutual recognition of bankruptcy proceedings involving various nations' courts.

Despite the benefits of a universal insolvency system, a treaty implementing such a system would have an adverse impact on another specialized area of law, admiralty. Both admiralty and bankruptcy laws apply when a shipowner becomes insolvent. Admiralty laws, unlike bankruptcy laws, are substantially similar internationally. Moreover, the decisions of a court, exercising admiralty jurisdiction

4. See infra notes 75-78 and accompanying text (discussing how the refusal to defer leads to duplicative proceedings).

5. See infra notes 69-74, 79-81 and accompanying text (discussing how nonrecognition can deter international business both through a lack of finality in bankruptcy judgments and by increasing risk and transaction costs).

6. See infra notes 84-86 and accompanying text (discussing how the pooling of assets under a unified distribution scheme provides for equal treatment of creditors).

7. See infra notes 87-89 and accompanying text (discussing how both duplication and piecemeal distribution of a company's assets may result in lower returns to creditors).

8. See infra notes 91-95 and accompanying text (discussing how reorganization benefits both creditors and debtors by maintaining the company's value).

9. See infra notes 64-96 and accompanying text (discussing how cooperation among courts will create a superior bankruptcy system).

10. This Note uses the terms admiralty and maritime interchangeably to refer to the general law of the maritime industry.


12. Edward M. Keech, Problems in the Liquidation and Reorganization of International Steamship Companies in Bankruptcy, 59 Tul. L. Rev. 1239, 1255-56 (1985); see
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pursuant to an arrest\textsuperscript{13} in rem,\textsuperscript{14} receive international recognition.\textsuperscript{15} Admiralty law enforces maritime financial obligations through the creation of maritime liens. Maritime liens arise from the operation of admiralty law rather than as a result of the agreement of two parties.\textsuperscript{16} Maritime liens arise in response to, among other things, torts involving the ship or its cargo, salvage operations, agreements to lease the vessel (in maritime terms "charter parties"), supplies, repairs, mortgages on the ship, and wages owing to the crew.\textsuperscript{17} The lien gives the holder the right to proceed in rem against an appropriate vessel or the pending freights and subfreights.\textsuperscript{18} The maritime lienor can request that a court arrest the vessel against which he has a lien. Admiralty law will not permit the release of the vessel until the creditor is satisfied.\textsuperscript{19}

A conflict arises when the owner of the arrested vessel is also a party to a bankruptcy proceeding and the vessel is not in the same country as the bankruptcy proceeding. Bankruptcy law regards the vessel as part of the debtor's estate\textsuperscript{20} and thus subject to the jurisdic-

\textsuperscript{13} Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 45 (2d ed. 1975) (describing admiralty law as an existing valid law prior to any national legislation).

\textsuperscript{14} The term arrest under admiralty law refers to a court's physical seizure or attachment of the vessel. See infra notes 140-45 and accompanying text.

\textsuperscript{15} In rem jurisdiction arises upon the arrest of a vessel. 1 Thomas J. Schoenbaum, Admiralty and Maritime Law 517 (2d ed. 1994). "In rem" is "[a] technical term used to designate proceedings or actions instituted against the thing, in contradistinction to personal actions, which are said to be in personam." Black's Law Dictionary 793 (6th ed. 1990).

\textsuperscript{16} A conflict arises when the owner of the arrested vessel is also a party to a bankruptcy proceeding and the vessel is not in the same country as the bankruptcy proceeding. Bankruptcy law regards the vessel as part of the debtor's estate and thus subject to the jurisdiction of the bankruptcy court.

\textsuperscript{17} The term arrest under admiralty law refers to a court's physical seizure or attachment of the vessel. See infra notes 140-45 and accompanying text.

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\textsuperscript{20} The term arrest under admiralty law refers to a court's physical seizure or attachment of the vessel. See infra notes 140-45 and accompanying text.
tion of the court administering the insolvency. Nevertheless, if the vessel arrives in a port of a foreign jurisdiction that does not recognize another nation’s bankruptcy law, the court in that foreign jurisdiction may arrest the vessel to enforce maritime liens pursuant to admiralty law. The vessel and the creditors who seek satisfaction from its sale are therefore subject to proceedings in two nation’s courts under two different bodies of substantive law. The simultaneous adjudication of a single debt by two systems creates problems.

While nations typically recognize an admiralty decision of another country’s court, they will not always recognize a bankruptcy adjudication by a foreign court. A bankruptcy treaty between countries can provide that each country will accept and enforce the bankruptcy judgments rendered by courts of other signatory nations. Therefore, a universally accepted international insolvency treaty should, in theory, achieve universal acceptance and enforcement of bankruptcy judgments. Universal accord is, however, an unrealistic goal. Insolvency experts agree that a treaty that creates a truly universal bankruptcy system is not feasible, and proposals for treaties concentrate on resolving practical conflicts between bankruptcy laws and establishing a consistent approach to jurisdictional questions. Because bankruptcy law is closely allied to a nation’s social and political goals, even an international insolvency treaty with less ambitious goals than true universality can achieve, at best, only partial interna-

the applicable laws of the United Kingdom, France, Italy, Germany, Belgium, the United States, and the Netherlands); see, e.g., 28 U.S.C. § 1334(e) (1994) (“The district court . . . shall have exclusive jurisdiction of all of the property, wherever located, of the debtor . . . .”); 1 & 2 International Loan Workouts and Bankruptcies 137, 173, 224, 273, 379, 428, 456, 541, 568, 595, 674, (Richard A. Gitlin & Rona R. Mears eds., 1989) [hereinafter International Loan Workouts] (noting that the extent of the debtor’s estate under the laws of Argentina, Brazil, Canada, Egypt, Germany, Israel, Italy, Mexico, the Netherlands, Switzerland, and Venezuela includes all available assets of the debtor).

21. See infra notes 34-38 and accompanying text.
24. See id. at 903-05.
25. See infra notes 97-114 and accompanying text.
26. See, e.g., Gaa, supra note 23, at 885-98 (discussing the many barriers to harmonization of international bankruptcy law); Westbrook, Theory and Pragmatism, supra note 2, at 461 (advocating the concentration of efforts on pragmatic, rather than theoretical, goals).
27. Gitlin & Flaschen, supra note 2, at 312 (acknowledging that the drafters of the European Union Treaty realized that the goal of a single law was “far too ambitious”’); see generally Michael J. Bonell, International Uniform Law in Practice—Or Where the Real Trouble Begins, 38 Am. J. Comp. L. 865 (1990) (discussing the obstacles to uniformity in bankruptcy laws); Westbrook, Theory and Pragmatism, supra note 2, at 457 (“Pragmatism dominates the worldwide effort to find a solution to the problem of transnational business bankruptcy.”).
tional acceptance; only countries who are major trading partners or who have similar social and political goals will sign. This Note refers to this phenomenon of partial acceptance, when some but not all countries agree to an international insolvency treaty which is drafted to achieve some measure of universality, as "partial universality."

Because of its contrast to the partially universal recognition of bankruptcy law, the universal recognition of judgments under admiralty law should be of great significance to the framers of an international insolvency treaty. The present international insolvency treaty discussions should recognize the unique status accorded to the adjudications of a court acting under admiralty law.

This Note argues that the drafters of any international insolvency treaty should include a provision recognizing the primacy of admiralty law over maritime assets because of the particular concerns of the maritime industry and the nature of maritime law. Such a provision will eliminate the problems that arise when the two areas of law overlap. Moreover, such a provision will not prejudice any of the parties involved in the bankruptcy. Part I of this Note gives a brief summary of bankruptcy law and explains why, although universality is a laudable goal, an international insolvency treaty is unlikely to achieve it. Part II provides a brief summary of admiralty law and explores how a partially accepted insolvency treaty will not successfully preclude a foreign court applying admiralty law from arresting vessels that are part of the debtor's bankruptcy estate and selling them outside of the bankruptcy proceeding. Part III details the problems that result when admiralty and bankruptcy law intersect. Part IV argues that a provision in an international insolvency treaty recognizing the primacy of admiralty law over vessels and maritime lienors would eliminate the problems arising from the application of the two laws without prejudice to any of the parties to the bankruptcy process. This Note concludes that the drafters of an international insolvency treaty should include an express provision recognizing admiralty law as the exclusive body of law governing vessels and guaran-

29. Id. at 896. Countries with similar cultural goals will have similar bankruptcy laws; thus, their laws will be easier to harmonize. Westbrook, Theory and Pragmatism, supra note 2, at 471. For example, an insolvency treaty in force between the Scandinavian nations but includes no non-Scandinavian nation, and the Bustamante Code harmonizes the insolvency law of 15 Latin American nations. Kurt H. Nadelmann, Bankruptcy Treaties, 93 U. Pa. L. Rev. 58, 70-71 (1944). The European Union Convention on Insolvency Proceedings applies only to member states. Convention on Insolvency Proceedings, 1995, European Union (Initialed Draft) (on file with the Fordham Law Review). These countries have acknowledged the commonality of their interests by joining the Union in the first place. See George A. Bermann et al., Cases and Materials on European Community Law 29-30 (1993).

30. The same lien attaches to a vessel as well as to its pending freights and subfreights (essentially the accounts receivable). Schoenbaum, supra note 14, at 487-88. The issue of whether the freights and subfreights should also be subject to the exclusive jurisdiction of the admiralty court is beyond the scope of this Note.
teeing the right of maritime lienors to pursue their claims in admiralty.31

I. BANKRUPTCY AND THE PURSUIT OF AN ELUSIVE IDEAL OF UNIVERSALITY

Bankruptcy law developed on a national level, to adjudicate claims relating to local land-based assets.32 Consequently, the mechanics of bankruptcy law are best suited to that type of asset.33 This section first offers a brief analysis of bankruptcy law. Next, it explores why bankruptcy practitioners and commentators view universality as an ideal goal. Finally, this part demonstrates why universal acceptance of an international insolvency treaty is unlikely.

A. Bankruptcy Law Basics

Bankruptcy law empowers the court to adjudicate all claims against the estate of an insolvent debtor.34 Once a bankruptcy proceeding begins, the court administering the bankruptcy claims authority over all of the debtor's assets35 and all of the creditors within the reach of the court's process.36 Many courts have broadly construed the reach of their nation's bankruptcy laws.37 The United States Code, for example, states, "The district court . . . [has] exclusive jurisdiction of all of the property, wherever located, of the debtor."38

Bankruptcy law developed in response to matters of local concern.39 Thus, each nation's bankruptcy laws reflect that nation's social and political goals.40 For example, the United States, "a society which

31. International insolvency commentators have acknowledged that different types of property demand different legal treatment. Westbrook, Theory and Pragmatism, supra note 2, at 470.
33. Gilmore & Black, supra note 12, at 597.
34. Dalhuisen, supra note 1, § 1.01[1], at 2-11 to 2-12, § 1.02[4], at 2-35 to 2-39.
35. Id. § 2.02[2], at 3-156.1 to 3-160.
38. 28 U.S.C. § 1334(e) (1994); see supra note 20 (defining the debtor's estate under the laws of various nations).
39. See DeSieno, supra note 32, at 331.
40. See Dalhuisen, supra note 1, § 1.01[3], at 2-18 (explaining how each country's public policy affects its conception of equal treatment for creditors); Gaa, supra note 23, at 885 ("[B]ankruptcy laws . . . embody fundamental social and economic policies."); Douglass G. Boshkoff, Some Gloomy Thoughts Concerning Cross-Border In-
prides itself on a philosophy and practice of equal opportunities . . . does not tolerate a debtor's being reduced to an inferior position only because of misfortune. Therefore, in the United States, bankruptcy law ensures the debtor the opportunity for a fresh start. In France, preserving employment is a dominant concern of the bankruptcy law; thus French bankruptcy law favors maintaining a business as a going concern. Countries less sympathetic to the debtor's predicament and the economic welfare of employees, such as Germany and the Netherlands, view bankruptcy laws merely as the expression of the state's power to enforce the debtor's private obligations to his creditors. As a result, Germany and the Netherlands continue to permit the imprisonment of debtors. An international insolvency treaty would displace these national laws—laws serving a particular nation's social and political goals—in favor of an international law, which by its nature can serve no single nation's goals. Thus, any change in a nation's bankruptcy law brought about by an international treaty will affect that nation's sovereign interest in the advancement of its social and political goals.

Despite the variety of social and political views embodied in the bankruptcy laws of various nations, all bankruptcy laws resolve the debtor-creditor relationship through one of two processes. Liquidation is the process by which the bankruptcy trustee collects the debtor's property, converts it to cash, and distributes the cash to creditors. The second process, reorganization, allows the debtor to retain its assets and continue in operation while paying creditors over an ex-

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41. Dalhuisen, supra note 1, § 3.10, at 1-118.
42. Gaa, supra note 23, at 885.
43. 1 International Loan Workouts, supra note 20, at 340.
44. See Dalhuisen, supra note 1, § 1.01[3], at 2-16 (discussing how some countries view liquidation as “procedure of a private law nature within the context of a public law execution device”).
45. Dalhuisen, supra note 1, § 1.01[1], at 2-11.
46. Almost all western bankruptcy systems give title of a bankrupt's estate to an administrator or trustee and empower that individual to compel the return of all the bankrupt's assets, prevent further collection efforts, void preferences, and distribute assets equally among creditors. Keech, supra note 12, at 1241.
47. See 11 U.S.C. §§ 701-726 (1994) (codifying the administration, collection, and liquidation of the debtor's estate); see generally Dalhuisen, supra note 1, § 1.06[1]-[2], at 2-124 to 2-132.1 (describing liquidation provisions in the bankruptcy laws of Belgium, Luxembourg, France, Italy, West Germany, the Netherlands, England, and the United States); 1 & 2 International Loan Workouts, supra note 20 (describing the bankruptcy processes of Argentina, Brazil, Canada, Egypt, France, England, Mexico, The Netherlands, Switzerland, Venezuela, Israel, Italy, Japan, Germany, and the United States).
tended period of time. Some countries, such as the Netherlands and Mexico, do not permit reorganization.

A moratorium on creditor action, often called a stay, is one of the tools used by courts to administer the estate of an insolvent debtor. The court administering the bankruptcy needs time to ascertain the full scope of the debtor's situation before adjudicating a resolution. Thus, the stay serves essentially as an injunction, enabling the court to stop any other actions on the debtor's estate, freeze the status quo, and examine the problems that need resolution. Once the court declares a moratorium on creditor action, creditors within its jurisdiction cannot pursue any alternative collection efforts.

Bankruptcy law categorizes creditors into classes to organize the bankruptcy process. "Secured" and "unsecured" are two broad classes of creditors. A secured creditor is one who has an interest in a debtor's property to "secure repayment of a debt contractual in its origin." This securing interest may take the form of a lien. An unsecured creditor, as the name implies, is a creditor who does not have such an interest in a debtor's property to secure repayment of the debt. Under bankruptcy law, the court will satisfy the claims of secured creditors before unsecured creditors. A bankruptcy code

48. See 11 U.S.C. §§ 1101-1129 (1994) (codifying the administration and filing of a reorganization plan); In re Ross, 95 B.R. 509, 510 (Bankr. S.D. Ohio 1988) (explaining how reorganization allows the debtor to defer payments to creditors); Dalhuisen, supra note 1, § 2.06[1], at 2-193 to 2-203 (describing the process of reorganization under the laws of Belgium, Luxembourg, France, Italy, Germany, the Netherlands, England, and the United States).

49. See Flics & Ireland, supra note 3, at 424 (noting that the Netherlands and Mexico "simply do not rehabilitate debtors").

50. Graydon S. Staring, Bankruptcy—An Historical View, 59 Tul. L. Rev. 1157, 1175-76 (1985). Many bankruptcy laws provide for some sort of restraint on creditor collection activities. Westbrook, Developments, supra note 2, at 754; see, e.g., 11 U.S.C. § 362 (1994) (providing for an automatic stay in United States bankruptcy proceedings); Dalhuisen, supra note 1, § 2.03[1], at 2-164 to 2-166 (explaining and citing the stay provisions of the bankruptcy laws of France, Belgium, Italy, and Germany); 1 International Loan Workouts, supra note 20, at 125, 161, 215 (providing explanations of the stay provisions of Argentine, Brazilian, and Canadian laws by practitioners in those nations).

51. Westbrook, Developments, supra note 2, at 754. The court adjudicating the bankruptcy may also use the moratorium to promote agreement among creditors. Id.

52. Staring, supra note 50, at 1176.

53. Westbrook, Developments, supra note 2, at 754.

54. Id.; see, e.g., Cunard S.S. Co. v. Salen Reefer Servs., 49 B.R. 614, 618 (S.D.N.Y.) (explaining and deferring to Swedish stay provision), aff'd, 773 F.2d 452 (2d Cir. 1985).

55. Gilmore & Black, supra note 12, at 586.

56. Id.

57. Dalhuisen, supra note 1, § 1.06[1] at 2-124 to 2-125; see also id. § 1.06[2], at 2-125 to 2-132.1 (describing the specific distribution procedures and priorities of England, the United States, France, Belgium, Luxembourg, Italy, West Germany, and the Netherlands).
will use more specific classes in its statutory hierarchy to refine further
the order in which funds are distributed.\textsuperscript{58}

Bankruptcy law relies on "land-based liens" to determine the rights
of secured creditors.\textsuperscript{59} Such liens are intended to apply to land-based
assets.\textsuperscript{60} Several creditors may have liens on the debtor's property.
The first lien on a land-based asset has priority over later liens be-
cause a later creditor has the ability to ascertain the presence of prior
liens on the asset.\textsuperscript{61} Once attached to an asset, the lien remains "in-
delible" until the payment of the obligation it secures.\textsuperscript{62}

While these few general concepts, liquidation, reorganization, in-
junctive stays, and liens, can be found in most nations' bankruptcy
laws, the laws differ significantly in specific implementation depending
upon the particular nation's social and political goals.\textsuperscript{63} An insolvent
transnational business and its creditors may proceed in several courts
under several conflicting national bankruptcy laws. As discussed be-
low, a bankruptcy proceeding is more efficient and just when the en-
tire bankruptcy is adjudicated by a single court rather than by a
multitude of countries examining piecemeal aspects of the insolvency.

B. Universality as an Ideal Goal

The universality theory of bankruptcy advocates that each interna-
tional bankruptcy proceeding should take place within a single na-
tion's court under a single universal bankruptcy law.\textsuperscript{64} This section
first addresses how a universal law would eliminate the problems that
result from the nonrecognition of foreign bankruptcy proceedings and
the nonenforcement of foreign bankruptcy decrees.\textsuperscript{65} This section
then examines the benefits of universality, including the equal treat-

\textsuperscript{58} For example, in France the rules governing priority are extremely complex,
including special categories for salary claims, pledgees, general preferences, and spe-
cial preferences. \textit{See} 1 International Loan Workouts, \textit{supra} note 20, at 352-53. In
Japan, creditors can be secured, generally preferred, unsecured, or subordinate un-

\textsuperscript{59} Land-based liens are usually known simply as liens. As other commentators
have, this author refers to such liens as land-based liens to distinguish them from
maritime liens. \textit{See}, \textit{e.g.}, Gilmore & Black, \textit{supra} note 12, at 589 ("[M]aritime
liens and land liens have little in common.").

\textsuperscript{60} \textit{Id.} at 597.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{See id.} at 596. The lien is "indelible" because it remains attached to a piece of
property even though the property itself may change ownership. \textit{Id.}

\textsuperscript{63} \textit{See supra} notes 39-45 and accompanying text.

\textsuperscript{64} \textit{See} Flies & Ireland, \textit{supra} note 3, at 420. For over 100 years, commentators
have lauded the ideal that an entire insolvency should be subject to resolution in a
of Laws as Applied to Assignments for Creditors}, 1 Harv. L. Rev. 259, 264 (1888)); \textit{see
supra} note 2 (listing articles calling for a universal insolvency treaty).

\textsuperscript{65} Gaa, \textit{supra} note 23, at 886-87 (discussing the problems of nonrecognition and
nonenforcement of foreign bankruptcy adjudications).
ment of creditors,\textsuperscript{66} the maximization of asset return,\textsuperscript{67} and the facilitation of attempts to reorganize an ailing debtor.\textsuperscript{68}

1. Problems Arising from the Absence of International Cooperation

A universal bankruptcy law would solve many problems that currently plague international bankruptcies, including the nonrecognition of foreign discharges,\textsuperscript{69} the duplication of bankruptcy proceedings,\textsuperscript{70} and the increased costs of international business transactions.\textsuperscript{71} Conflicts over the exercise of extraterritorial jurisdiction and differing substantive laws will often prompt a nation’s courts to refuse to recognize or enforce the bankruptcy adjudication of a foreign court.\textsuperscript{72} One type of adjudication not uniformly recognized between courts is a foreign discharge.\textsuperscript{73} If a court has discharged the debtor in one bankruptcy proceeding and that debtor has assets in another country that does not recognize the first proceeding, creditors whose claims remain unpaid after the first adjudication will reassert those claims in the nonrecognizing country.\textsuperscript{74} The court in the nonrecognizing country may then seize the debtor’s assets in that country to satisfy the claims of such creditors. Such a result inhibits the debtor from doing future business in any country that does not recognize his prior bankruptcy discharge.

Another problem arising from the nonrecognition of foreign bankruptcy proceedings is the duplication of bankruptcy proceedings. Creditors can proceed against the debtor or the debtor can file for bankruptcy protection in each country in which the debtor has assets.\textsuperscript{75} Such duplication is a problem because multiple bankruptcy

\textsuperscript{66} Westbrook, \textit{Theory and Pragmatism}, supra note 2, at 466. The equitable distribution of assets is one of the goals common to many bankruptcy laws. Dalhuisen, \textit{supra} note 1, § 1.01[3], at 2-17 to 2-18.

\textsuperscript{67} Westbrook, \textit{Theory and Pragmatism}, supra note 2, at 465-66.

\textsuperscript{68} See Flics & Ireland, \textit{supra} note 3, at 420 (noting that the ideal method of adjudicating a bankruptcy in a single universal proceeding offers “a much greater chance of rehabilitation”).


\textsuperscript{71} Westbrook, \textit{Theory and Pragmatism}, supra note 2, at 460-61.

\textsuperscript{72} See Gaa, \textit{supra} note 23, at 885-91.

\textsuperscript{73} Honsberger, \textit{supra} note 69, at 665-66; \textit{see also} Westbrook, \textit{Developments}, \textit{supra} note 2, at 757 (discussing the theoretical problem of nonrecognition of discharge).

\textsuperscript{74} See Westbrook, \textit{Developments}, \textit{supra} note 2, at 756-57.

\textsuperscript{75} See Flics & Ireland, \textit{supra} note 3, at 420-21; Gaa \textit{supra} note 23, at 904-05.
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proceedings often necessitate extensive duplicate filings as well as repetitive litigation in different jurisdictions. Moreover, such duplication encourages forum shopping by allowing the creditors and debtors to pursue multiple adjudications to get the result they want.

A final problem is that the nonrecognition of foreign bankruptcy proceedings increases the cost of each international transaction by creating excess risk and higher transaction costs. A creditor, at the time it extends credit, cannot predict with certainty which country will adjudicate a future insolvency or which country's law will apply. Thus, the parties involved cannot accurately predict the results of default and need to compensate for the extra risk involved in the commercial transaction. Transaction costs increase because the lawyers involved need to negotiate specific provisions at each stage of the transaction and bankruptcy processes to control the result for their client. If all courts recognized a universal bankruptcy law, such problems would cease to exist.

2. Benefits of Universality

A universal bankruptcy system would do more than resolve the present problems faced by insolvent transnational businesses; it would also provide new benefits, including equal treatment of creditors, maximization of returns to creditors, and facilitation of international reorganization. Universality would ensure the equal treatment of creditors within a particular class because a universal law would empower a single forum to control all of the debtor's assets. A single forum would then pool all the debtor's assets, enabling the court to satisfy all creditors from a single fund. Creditor satisfaction from a single pool ensures the equal treatment of creditors of the same class because all creditors will have the same access to the debtor's assets.

76. See Flics & Ireland, supra note 3, at 454 (noting the extensive filing requirements for bankruptcy proceedings).
77. Booth, supra note 70, at 136.
78. Gaa, supra note 23, at 904-05; see Flics & Ireland, supra note 3, at 419 (noting that debtors and creditors will have a preference for jurisdictions most favorable to their own interests).
79. See Flics & Ireland, supra note 3, at 421.
80. Westbrook, Theory and Pragmatism, supra note 2, at 460.
81. See Flics & Ireland, supra note 3, at 450-61 (giving specific advice for maximizing creditor return during drafting, prebankruptcy workout, and formal bankruptcy stages).
82. The universal law would provide for a method of choosing one forum from all of the nations in which the debtor has assets. See Westbrook, Theory and Pragmatism, supra note 2, at 464.
83. See Booth, supra note 70, at 138; Keech, supra note 12, at 1239-40. Bankruptcy laws distribute assets according to a hierarchy of defined classes of creditors. Dalhuisen, supra note 1, § 1.06[1]-[2], at 2-124 to 2-132.1; see supra notes 55-58 and accompanying text.
84. See Westbrook, Developments, supra note 2, at 755-56 (detailing a coordinated claims procedure).
and will be subject to the same class definitions. Without a single forum, if the bankruptcy proceedings take place in two countries, creditors in the same class may recover different amounts. For example, the debtor may have many assets in country A but only a few assets in country B. If each country conducts an independent bankruptcy proceeding, the creditors of a given class X may recover in country A and not in country B because the many assets in country A may be enough to satisfy all the creditors, while the few assets in country B may not be sufficient. Thus, unless the class X creditor is willing to pursue recovery in country A, he may receive less than he would have had the assets been pooled in a single forum. Moreover, creditors who would be part of one class under one bankruptcy law may be part of a different class under the law of a second country. This change in class status may push a creditor into a position of lower priority. Similarly, even if the creditor falls into the same class in both proceedings, dual proceedings may affect an individual creditor's recovery because the class in country A may have a high priority, while the same defined class in country B may have a low priority.

Universality would maximize returns to creditors for two reasons: the cost of the action in a single court is lower because of the elimination of duplicative proceedings, and proceeds from the sale of assets are higher when a trustee can take advantage of natural economic units of sale. The latter advantage will not be available if a local bankruptcy proceeding can claim jurisdiction over an asset of the debtor that would be more valuable if sold as a package with the debtor's other assets that are located in other nations. For example, a vertically integrated business may mine raw materials in one country to use in products it manufactures in another. Sale of the integrated business will likely yield more than the sum of the proceeds from selling the manufacturing and mining operations separately. The sale of the entire multinational business, however, often requires the cooperation of sovereign nations.

From both the debtor's and creditor's viewpoints, reorganization works best if a single forum can protect all of a debtor's assets. Reorganization often requires that a business keep all its vital assets to-
Reorganization is unlikely if foreign creditors can attach, in multiple countries, the assets necessary for the debtor to continue operating. For the debtor, a successful attempt at reorganization allows it to repay its debts over an extended period of time while remaining in control and possession of its property. For the creditors, if the reorganization fails, the sale of the debtor’s business as a going concern rather than as a collection of individual assets may maximize their returns.

Despite the clear advantages of universality to creditors collectively, each individual creditor will not necessarily cooperate toward achieving a universal bankruptcy system. An individual creditor would prefer nonuniversality—multiple fora and multiple laws—whenever his chances of recovery would be greater under that approach. Therefore, all the participants in the bankruptcy process will not realize the benefits of universality unless a universal insolvency treaty compels them to take part in a single proceeding under a unified law.

C. Obstacles to Achieving Universal Bankruptcy Law

An international insolvency treaty may aspire to universality—a universal bankruptcy law and a single controlling forum for each international bankruptcy. Commentators and drafters of international treaties realize, however, that true universality is unattainable. Not all nations will sign a treaty, that true universality is unattainable. Not all nations will sign a treaty because nations will not agree to a treaty that creates a uniform law that is unresponsive to the important policy

92. See Benjamin Weintraub & Alan N. Resnick, Bankruptcy Law Manual § 8.10, at 8-19 (rev. ed. 1986) (identifying the need of a business undergoing reorganization to use all of its assets in ongoing operations free from financial pressures); Robert A. James & J. David Kirkland, Jr., Adequate Protection Through Augmented Interests in Reorganization Plans, 58 Am. Bankr. L.J. 69, 82 (1984) (noting that reorganization is thwarted if the assets necessary for the business to continue in operation are transferred out of the debtor’s estate).

93. Keech, supra note 12, at 1247.
95. James S. Rogers, The Impairment of Secured Creditors’ Rights In Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause, 96 Harv. L. Rev. 973, 975 (1983) (stating that “[t]he central assumption of the reorganization ... is that the value of an enterprise as a going concern will often exceed the liquidation value of the enterprise’s assets.”); Westbrook, Theory and Pragmatism, supra note 2, at 465.
96. Keech, supra note 12, at 1241 (“Equality of treatment for creditors is a fine principle, but few creditors have been known to subscribe to it voluntarily if it meant paying back the fruits of vigorous collection activity ... .”).
97. See Gitlin & Flaschen, supra note 2, at 322-23.
98. See supra note 27 and accompanying text; see also Westbrook, Theory and Pragmatism, supra note 2, at 461 (noting that although general agreement exists on the principle of universality, the principle is frustrated in practice).
99. See Gitlin & Flaschen, supra note 2, at 322-23 (noting that international uniformity is realistically unobtainable); Kurt H. Nadelmann, International Bankruptcy Law Its Present Status, 5 U. Toronto L.J. 324, 344 (1944) (noting that all prior efforts to achieve a treaty acceptable to all nations have failed).
variations among signatories. The wide variety of policies underlying national bankruptcy laws is a significant barrier to any insolvency treaty.

Bankruptcy laws are inherently national laws; nations created bankruptcy laws in response to local social and political goals. These policies may differ radically among nations and are not easily harmonized. A treaty can attempt to resolve such differences by either forging a single bankruptcy law or creating choice-of-law provisions that require the application of a particular nation's law in specific circumstances. Nevertheless, a nation will not agree to a treaty that substantially alters its present law and requires it to undermine the economic and social interests of the local population. Similarly, a nation will not agree to choice-of-law provisions if the result under the chosen law might compel a nation's bankruptcy court to act counter to that nation's own social and political goals.

Moreover, bankruptcy treaties historically have been successful only where the signatory nations have shared social or economic goals. Thus, only three multilateral international insolvency treaties

100. See Gaa, supra note 23, at 905 (noting the inflexibility of the universal approach in accommodating the varying policy differences).
101. See id. at 893; supra notes 39-45 and accompanying text.
102. Desierno, supra note 32, at 331; see supra notes 39-45 and accompanying text (giving examples of social and political goals and the bankruptcy laws that resulted).
103. See Gaa, supra note 23, at 893; see supra notes 39-45 and accompanying text (discussing how the United States favors debtor rehabilitation, while France favors maintaining employment, and Germany and the Netherlands seek to compel the debtor to pay his debts by criminal penalties, if needed).
104. Gaa, supra note 23, at 897.
105. See Boshkoff, supra note 40, at 936 ("Any attempt at harmonizing insolvency law strikes at the heart of deep-seated cultural differences and legal codes founded on quite different principles." (quoting Harmonizing European Insolvency Laws - A British Perspective, reprinted in Wkly. News & Comment, Bankr. Ct. Dec., Dec. 10, 1992, at A3)); Gaa, supra note 23, at 897 (noting that nations are more likely to agree on narrow issues such as jurisdiction than a unified bankruptcy law that would require changes to the long legal traditions of each nation).
106. See Booth, supra note 70, at 136 (noting that cooperation among bankruptcy courts has been limited by each nation's protection of domestic interests); David C. Cook, Prospects for a North American Bankruptcy Agreement; Les Prospects Pour Une Convention De La Faillite En Amerique Du Nord; Los Prospectos Para Un Convenio De Quiebra De Notre America, 2 Sw. J.L. & Trade Am. 81, 89 (1995) (describing how the European nations' "refus[al] to sway from their philosophical and political beliefs" presented a barrier to the creation of an international insolvency treaty); cf. id. at 93 (describing how under the Bustamante Code courts could "still favor local creditors by not enforcing the treaty or creating exceptions"); MIICA, supra note 2, at 326, § 4 cmt. (noting that "the constraints of public policy" may require the modification of a universalist system).
107. See Nadelmann, supra note 29, at 61, 92 (noting that insolvency treaties have been concluded between neighboring states or otherwise geographically united areas or between countries sharing a common language). Shared economic goals are, however, only a starting point. Gaa, supra note 23, at 896 (noting that "economic integration and commercial ties alone do not assure success in harmonizing bankruptcy laws").
exist today: the Bustamante Code, among fifteen Latin American nations;\(^{108}\) the European Union Treaty, limited to Europe;\(^{109}\) and the Scandinavian Convention, binding Denmark, Finland, Iceland, Norway, and Sweden.\(^{110}\)

Despite the individual differences among nations' policies, one constant is present: A nation's courts favor creditors within that nation's borders.\(^ {111}\) The corollary of that constant is that a nation's courts will not cooperate with foreign courts if that cooperation will harm the financial interests of local creditors.\(^ {112}\) Nations may predicate cooperation on a quid pro quo. Only major trading partners,\(^ {113}\) countries that believe that cooperation will as often favor their local creditors as it will disadvantage them, or countries that tend to "offer each other reciprocal treatment," are likely to sign an insolvency treaty.\(^ {114}\)

Therefore, an international insolvency treaty that attempts to create a universal bankruptcy system will achieve only partial acceptance, and thus only "partial universality."

Although bankruptcy law claims complete control over the adjudication of an insolvent debtor and its creditors, it is not the only law which may apply. Admiralty law provides a parallel system for enforcing certain claims relating to maritime creditors. Admiralty law arose from a different confluence of circumstances than bankruptcy

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108. The 15 signatories in 1928 were Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela. Nadelmann, supra note 29, at 70-71.


110. See Gaa, supra note 23, at 883 n.6. Both the Scandinavian and Latin American treaties have existed for some time, while the European Union Treaty is of recent vintage. See Gitlin & Flaschen, supra note 2, at 311.

111. See Dalhuisen, supra note 1, § 1.02[1], at 3-9 (describing how the recognition of foreign judgments is limited by the states’ "desire to protect their own economic life" and "give their own subjects particular advantages at the expense of others"); Gaa, supra note 23, at 894-95 (noting that "[d]iscriminatory treatment of foreign creditors imposes a fundamental barrier" to cooperation); Mary Elaine Knecht, Comment, The "Drapery of Illusion" of Section 304—What Lurks Beneath: Territoriality in the Judicial Application of Section 304 of the Bankruptcy Code, 13 U. Pa. J. Int'l Bus. L. 287, 298 (1992) (characterizing § 304 of the United States Bankruptcy Code as protecting the interests of United States claimholders).

112. See Westbrook, Theory and Pragmatism, supra note 2, at 460 (noting that cooperation with foreign courts is limited to the "rare case where local assets more than satisfy local claimants"). At present, the United States bankruptcy courts appear to cooperate with foreign bankruptcy proceedings only when United States creditors will not be adversely affected by such cooperation. Knecht, supra note 111, at 300.

113. See Gaa, supra note 23, at 896. Reciprocity is often the basis for extending comity. See, e.g., Felixstowe Dock & Ry v. United States Lines Inc., 1989 Q.B. 360, 389 (refusing to grant comity because "if the boot were on the other leg" the United States court would not release assets to England).

114. See Westbrook, Theory and Pragmatism, supra note 2, at 467-71 (arguing that reciprocity is crucial because countries will agree to cooperate based on a rough wash of results and that similarity of laws makes it easier for countries to accept the risk that their law may not be applicable in a particular instance).
laws and thus enforces creditors' rights in a different manner than bankruptcy laws.

II. Admiralty Law: A Universally Recognized System

Admiralty law applies to financial claims on vessels.\textsuperscript{115} Bankruptcy and admiralty laws overlap when a shipowner becomes bankrupt. A vessel is one of the debtor's assets and maritime lienors are a discrete class of creditors in a larger bankruptcy proceeding. While theoretically a court of general jurisdiction may apply both bankruptcy and admiralty law to the disposition of land-based and maritime assets, a single court is unlikely to be both the forum administering the bankruptcy and to be in possession of the maritime assets pursuant to an arrest \textit{in rem}. Further, under some legal systems, a single court may be unable to exercise both admiralty and bankruptcy jurisdiction. Portugal, for example, provides for separate admiralty courts,\textsuperscript{116} while the United States system includes separate bankruptcy tribunals.\textsuperscript{117}

Bankruptcy and maritime laws are, moreover, distinct. First, unlike bankruptcy laws, admiralty laws are substantially similar among nations.\textsuperscript{118} Moreover, a court's judgment under admiralty law, pursuant to an arrest \textit{in rem}, receives international recognition.\textsuperscript{119} These two distinctions result from several factors. Maritime law is not directly linked to the sovereign interests of a nation, because unlike bankruptcy law, which developed with an eye to national social and political goals,\textsuperscript{120} maritime law arose in response to the needs of international commerce.\textsuperscript{121} Additionally, bankruptcy law developed under the assumption that the assets and creditors involved would be within the same local area.\textsuperscript{122} The reverse is true of admiralty law. The maritime industry geared admiralty law to the highly mobile nature of the maritime assets involved.\textsuperscript{123}

This part first provides a brief summary of admiralty law. It then explores how a partially accepted international insolvency treaty will not prevent all courts from arresting and selling vessels pursuant to admiralty law, regardless of a foreign bankruptcy proceeding that theoretically has jurisdiction over the vessels.

\begin{footnotes}
\footnotetext{115. See Gilmore & Black, supra note 12, at 586-89.}
\footnotetext{116. See Berlingieri, supra note 17, at 135 (describing the 1986 Portugese law that created separate admiralty courts).}
\footnotetext{117. See Weintraub & Resnick, supra note 92, § 6.04[2], at 6-15 to 6-16.}
\footnotetext{118. See Keech, supra note 12, at 1255-56.}
\footnotetext{119. See Gilmore & Black, supra note 12, at 787-88.}
\footnotetext{120. See supra note 39-45 and accompanying text.}
\footnotetext{121. Gilmore & Black, supra note 12, at 4-5, 8-11 (discussing factors influencing the development of maritime law).}
\footnotetext{122. See supra notes 59-62.}
\footnotetext{123. See Keech, supra note 12, at 1242-44.}
\end{footnotes}
A. Admiralty Law Basics

Unlike bankruptcy law, which embodies a variety of national social and political principals, admiralty law arose in the context of international maritime commerce.\(^{124}\) Admiralty law is the system of law for the maritime industry.\(^{125}\) Participants in the industry had to develop a system of credit that would be effective for internationally mobile property.\(^{126}\) The system relies on maritime liens to determine maritime creditors' claims on a vessel.\(^{127}\) Maritime liens are internationally recognized\(^{128}\) as giving the lienor\(^{129}\) the ability to arrest a vessel and hold it as security until an admiralty court can enforce a judgment on the merits.\(^{130}\)

Admiralty did not require "express or implied legislative action on the part of any one nation to make it valid."\(^{131}\) The law developed out of the general maritime custom in England and Western Europe which spread by colonization around the globe.\(^{132}\) Thus, in the United States, a body of maritime law already existed at the time of the drafting of the Constitution.\(^{133}\) Chief Justice Marshall commented in 1828 that a "case in admiralty does not... arise under the Constitution or

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124. See Gilmore & Black, supra note 12, at 4-5, 8-11.
125. Id. at 1.
126. Id. at 597.
127. Id.
128. Id. at 787-88. While nations differ as to what gives rise to a maritime lien, such distinctions do not affect the recognition of the admiralty adjudication. Id.; Schoenbaum, supra note 14, at 515-19. For example, United States law provides for the creation of liens in more circumstances than is usual in international practice. Id. at 518. Nonetheless, the decisions of a United States court exercising admiralty jurisdiction receive full recognition internationally. Gilmore & Black, supra note 12, at 787-90. Further, the differences among laws regarding maritime liens have been successfully harmonized by international treaty. 1952 Arrest Convention, supra note 17, art. 1 (conforming the laws of signatory nations concerning what constitutes a maritime claim). Where different standards apply, the country in which the ship is located may only arrest a vessel if the events giving rise to a lien created in a foreign port would also give rise to a lien in the country where the ship is presently located. Schoenbaum, supra note 14, at 518-19.
129. The lienor can be anyone who holds a maritime lien, including the materialman (the supplier of goods to the ship), a sailor injured while on board, a sailor owed wages, or a bank holding a mortgage on the vessel. 1952 Arrest Convention, supra note 17, art. 1; see also Schoenbaum, supra note 14, at 483-84 (describing the situations that give rise to a maritime lien under United States law). Maritime liensors may also obtain their liens as a result of assignment. See id. at 486.
130. Berlingieri, supra note 17, at 38. The maritime lien represents both a *jus in re* (a right in the property) and a *jus in rem* (a right against the property). Schoenbaum, supra note 14, at 481. This situation gives rise to the admiralty maxim:

- No *jus ad rem*
- Will comfort them
- Whose *jus in re*
- Has gone away.

Gilmore & Black, supra note 12, at 589 n.1b.
132. Id. at 10.
133. Id. at 45.
laws of the United States. These cases are as old as navigation itself; and the law . . . as it has existed for ages, is applied by our Courts."134

Because the common needs of the industry rather than particular circumstances of each individual nation influenced the creation of the law, admiralty laws are substantially similar among nations.135 Commentators call maritime law "the law of nations," regarding it as a universal law.136

The maritime industry required a single law to enforce financial obligations acquired internationally. Maritime law fulfills this need by the creation of maritime liens on a vessel.137 Maritime liens are legal rather than contractual in nature.138 For example, a sailor who suffers an injury on ship has a lien which arose and attached to the vessel automatically upon the injury.139 Admiralty law provides that maritime creditors who hold maritime liens on a vessel are entitled to direct a local court to arrest that vessel while it is in any port.140 The maritime lien thus allows the creditor to enforce a financial obligation that arose under the admiralty law of one nation in the court of another nation.141

Once a maritime lienor decides to enforce his lien, the arrest of the particular vessel in a port allows the local court to exercise admiralty jurisdiction over that vessel.142 Any maritime lienor may direct a local court to arrest the vessel to which his lien attaches; maritime law does not require the arresting lienor to be the last in time or the highest in rank. The process of arrest, however, varies internationally as to both

135. Keech, supra note 12, at 1256 ("Mortgages are usually enforceable, . . . the rights of crew members can be protected, and contracts can be enforced almost wherever the ship sails."); see Gilmore & Black, supra note 12, at 45; see, e.g., ABC Shipbrokers v. The Ship "Offi Gloria," 3 N.Z.L.R. 576, 579 (H.C. 1993), available in LEXIS, Intlaw Library, NZCAS File ("Counsel are . . . agreed that the law of Cyprus is . . . the same as the law of the United Kingdom and that the law of New Zealand . . . [is] the same as the law of the United Kingdom.").
137. Schoenbaum, supra note 14, at 481-82.
138. See Gilmore & Black, supra note 12, at 587 ("[T]he parties cannot by agreement confer lien status on a claim which is not by nature a lien claim or waive the conditions for attachment.").
139. See Schoenbaum, supra note 14, at 490 ("A maritime lien arises from the moment of the . . . occurrence that provides its basis.").
141. Schoenbaum, supra note 14, at 517-18.
142. In common law countries, like the United Kingdom, the arrest of a vessel creates jurisdiction. Berlingieri, supra note 17, at 166-70. Civil law countries, like Italy, often require some other additional link to the arresting forum to create jurisdiction to adjudicate the maritime dispute. Id. at 167 & n.315. Under the 1952 Arrest Convention, presence is enough for arrest. Id. at 166-67 (noting that the 1937 Paris Conference reached a consensus that arrest is a means of obtaining jurisdiction).
the mechanics and the extent to which a lienor must prove his underlying claim.\textsuperscript{143} The differences in procedural laws do not affect the universal recognition granted decrees under admiralty law because the grant of recognition arises from the \textit{in rem} arrest.\textsuperscript{144} The differences are further resolved by treaty; under the 1952 Arrest Convention, the "law of the Contracting State in whose jurisdiction the arrest was made" governs the rules of procedure.\textsuperscript{145}

The debtor-owner\textsuperscript{146} has three options once a creditor has arrested the ship pursuant to a valid maritime lien. The first option is to pay the creditor and secure the release of the ship.\textsuperscript{147} The debtor may also post a bond or some other security to free the arrested vessel.\textsuperscript{148} Finally, if the debtor will not pay or post a bond or other security, the local court may sell the vessel and distribute the proceeds to the maritime lienors.\textsuperscript{149} In each case, the vessel sets sail again only after the debtor satisfies the claims of the maritime lienors.\textsuperscript{150}

The maritime lien is designed to facilitate international commerce. For example, contracts between suppliers in port and a shipowner are difficult to create and enforce because the ship is often in a different country than its owner. To ameliorate this problem, a maritime lien for supplies to a vessel attaches to that vessel automatically upon the

\textsuperscript{143} See id. at 120-26. Generally, the law regarding arrest of ships differs between civil and common law systems. \textit{Id.} at 6. In civil law systems any creditor, maritime or not, may have a court arrest a vessel to prevent the possessor from absconding with a valuable asset, while in common law countries a court may arrest a ship only where the creditor has a maritime lien specifically entitling him to proceed \textit{in rem}. \textit{Id.}

\textsuperscript{144} See Keech, supra note 12, at 1259.

\textsuperscript{145} 1952 Arrest Convention, supra note 17, art. 6.

\textsuperscript{146} The vessel is, by means of a legal fiction, often technically considered the debtor although the debt itself may be an obligation incurred by either the owner or a third party. Gilmore & Black, supra note 12, at 594-96. Thus, to prevent sale of his vessel, the owner may have to pay the maritime liens incurred by a charterer. See \textit{id.} at 615. The personification of the vessel is an eroding anomaly of admiralty law and has been subject to criticism. See George K. Walker, \textit{The Personification of the Vessel in United States Civil In Rem Actions and the International Law Context}, 15 Tul. Mar. L.J. 177, 180-82 (1991).

\textsuperscript{147} See Gilmore & Black, supra note 12, at 588.

\textsuperscript{148} 1952 Arrest Convention, supra note 17, art. 5; Berlingieri, supra note 17, at 138 (noting that bail or other security can be exchanged for the ship); Gilmore & Black, supra note 12, at 796.


\textsuperscript{150} See Gilmore & Black, supra note 12, at 588 (stating that the decision of the district court exercising admiralty jurisdiction "scrapes the ship free of claims").
The supplier cannot know what other liens are already attached to the vessel because no local record can keep track of all the liens an internationally traveling vessel has accumulated. To encourage the supplier to extend credit, maritime law provides that the last lien on the vessel has the highest priority; new liens supersede existing liens. Additionally, if the lienholder does not enforce the lien promptly by directing a court to arrest the vessel, the lien may be lost through laches.

Foreign courts recognize each other's admiralty decrees pursuant to an arrest in rem. The court must have in rem jurisdiction over the vessel for a decree to enjoy this international recognition. Once a creditor asserts a lien and arrests a ship, he cannot assert the same lien in a second arrest proceeding even if the debt remains outstanding. If the arrested vessel is sold by the court, the sale of the vessel extinguishes all maritime liens on the vessel, even those claims of lienors who did not participate in the admiralty sale and had no notice of it. Upon leaving the court, the newly sold ship is thus universally recognized as free of all liens.

B. Maritime Obstacles to Universal Bankruptcy Law

Bankruptcy works best when all the debtor's assets and all parties with an interest in the insolvency are under a single court's jurisdiction.
When a partially accepted international insolvency treaty enters the picture, only signatory nations will be able to harmonize bankruptcy proceedings. A bankruptcy that involves maritime assets, however, is highly likely to involve the courts of nations whose only connection with each other is a floating vessel. Such nations will not necessarily be major trading partners or share similar social and political goals. For example, the collision of two vessels off the coast of Aruba was adjudicated in the District Court of Delaware because the two injured ships had limped into Delaware. The maritime law of Aruba applied, the plaintiff shipowner was Dutch, and the defendants were Bahamian and Japanese; the crews were South Korean, Dutch, and American. All of these nations are unlikely to sign the same international insolvency treaty. In a New Zealand case, while the shipowner was undergoing an insolvency proceeding in Texas, the vessel, registered under the flag of Cyprus, was arrested in New Zealand (after aborted attempts to arrest it in Indonesia, Hong Kong, and Singapore), and plaintiffs were Greek and American. Again, these radically different nations are unlikely to sign an international insolvency treaty.

The effect of nonsignatories is critical in the maritime context because a ship travels internationally and exposes itself to arrest in any nonsignatory country. Three ways exist in which a ship can risk arrest when an international shipping company declares bankruptcy. First, the ship is in a nonsignatory nation when the action begins. In the case of international shipping companies, at the time of the bankruptcy filing the vessels are likely to be scattered around the globe.

159. See supra note 64 and accompanying text.
161. Prior successful treaties have been between major trading partners or similar nations. See supra notes 107-10 and accompanying text.
163. Id. at 144-45, 148.
164. Id. at 149.
165. See supra notes 97-114 and accompanying text (explaining the types of common interests that will lead nations to agree on an insolvency treaty).
167. Id. at 584.
168. See id. at 579 (describing plaintiff as having a registered office in Greece).
169. Id. at 584.
170. See Keech, supra note 12, at 1247 (noting that vessels "which may have been kept free from attachment at home, [are] dispatched abroad into the clutches of foreign creditors").
171. See, e.g., id. at 1244 n.31 (noting that in one case vessels were scattered in the Philippines, Japan, and the United States). Similarly, airplanes may not be located in the nation where the owner will file bankruptcy. Airplanes, however, can speedily
For example, when Hellenic Lines172 declared bankruptcy in the United States it had a fleet of twenty-eight vessels; six were arrested in the United States and eleven in foreign ports.173 In the second scenario, the ship travels to a nonsignatory nation while the debtor attempts reorganization.174 Finally, the vessel may travel to a nonsignatory nation after the signatory nation's court has sold the vessel as part of a liquidation. In each of the three scenarios, the vessel may eventually arrive at a nation that is not a signatory to an international insolvency treaty. Once in such a nation, maritime lienors unrestrained by the bankruptcy court’s stay may arrest the ship and disregard the bankruptcy adjudication.175 Thus, both the diversity of nations involved in maritime disputes and the necessity of continual international movement for an operating vessel mean that unification of bankruptcy procedures is inadequate to ensure equal treatment of all maritime creditors.

Admiralty law is already universal; it applies to maritime disputes all over the world.176 An international insolvency treaty is unlikely to achieve the same global recognition of bankruptcy adjudications. A country in possession of a vessel subject to maritime liens will adjudicate claims under admiralty law unless it recognizes a national or foreign bankruptcy proceeding involving the ship.177 Thus, when a debtor is involved in a bankruptcy proceeding in a nation which is part of a partially accepted insolvency treaty and the country in possession of the ship is not part of that same treaty, the possessing country will

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173. Id. at D6.
174. See Keech, supra note 12, at 1247 (noting the potential for seizure of a vessel during each trip it makes beyond the jurisdiction of the bankruptcy court); see also Kevin Done, Creditors of Collapsed Swedish Group Act to Settle Debts, Fin. Times, Dec. 21, 1984, at 1-2 (discussing how the local court administering the bankruptcy released vessels against the wishes of local creditors).
175. See Keech, supra note 12, at 1245-46 (noting that lienors outside the jurisdiction of the bankruptcy court will not be "restrained from enforcing their liens"). If the bankruptcy adjudication is proceeding at the time the vessel is arrested, the lienors within the bankruptcy court's jurisdiction would, presumably, face sanctions for disobeying the court’s moratorium on creditor action. This Note assumes that the bankruptcy court has the power to order effective sanctions to deter foreign actions by creditors subject to the bankruptcy court's jurisdiction. In the United States, whether the bankruptcy court or only the district court has contempt powers is the subject of debate. William S. Parkinson, The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues, 65 Am. Bankr. L.J. 591, 597-600 (1991).
176. See Gilmore & Black, supra note 12, at 8-11 (describing how maritime law spread through colonization); Keech, supra note 12, at 1255-56 (noting that admiralty lawyers expect international uniformity).
apply admiralty law to the vessel and maritime lienors, and ignore the bankruptcy proceeding. At this point, the two bodies of law apply simultaneously to the same asset. Maritime lienors will be caught in the middle as each court will attempt to adjudicate the rights of the parties.

III. PROBLEMS THAT ARISE WHERE ADMIRALTY AND A PARTIALLY UNIVERSAL BANKRUPTCY LAW INTERSECT

Both bankruptcy and admiralty law can apply when the owner of a vessel becomes insolvent. The bankruptcy law created by a partially accepted international insolvency treaty would, presumably, share certain of the present attributes of individual national bankruptcy laws. Under a treaty, the court in a signatory nation would have the power to control all creditors who are subject to jurisdiction in other signatory nations. Additionally, the court acting under an insolvency treaty would claim jurisdiction over the vessel, wherever located, just as national bankruptcy laws now provide jurisdiction over the estate of the debtor, including all assets wherever located. The vessel and the maritime lienors, however, would also remain subject to adjudication under admiralty law. A maritime lienor seeking to enforce his claim would direct a court to arrest the vessel pursuant to admiralty law, and the arresting court would claim jurisdiction over the vessel because possession of the vessel creates jurisdiction. Moreover, when the arresting court sold a vessel, admiralty law would dictate that the sale extinguished all maritime claims on the vessel, even those claims of nonparticipating maritime lienors.

This part will examine three problems arising from the concurrent jurisdiction of the two bodies of law over a single asset. First, the maritime lienors' rights to enforce their claims are placed at risk. Second, even if the court administering the bankruptcy ultimately releases these lienors to protect their interests, the initial bankruptcy proceeding creates unnecessary expense. Finally, the increased risks and expenses incurred by lienors will make the capital available for shipbuilding more expensive.

178. See Rutherglen, supra note 177, at 532-33.
179. See Nadelmann, supra note 29, at 69 (describing how understanding the 1889 Treaty on International Commercial Law requires understanding the individual bankruptcy laws of the signatories).
180. See id. at 71.
181. See supra notes 34-38 and accompanying text.
182. See Berlingieri, supra note 17, at 166-67 (noting that the 1937 Paris Conference reached a consensus that arrest is a means of obtaining jurisdiction).
184. Landers, supra note 153, at 510.
A. Maritime lienors' rights at risk

A bankruptcy moratorium on creditor action fundamentally conflicts with admiralty law. While the moratorium is in place, bankruptcy law prevents creditors from acting to enforce their liens. A vessel, however, continues to accumulate maritime liens. Under admiralty law, the last lien in time has the highest priority. Thus, the last lien will be first to receive the proceeds from the sale of an arrested vessel. If the lienor does not act promptly to enforce the lien, the lien will lose priority and will eventually become unenforceable through laches.

In the United States, no court will enforce existing or new maritime liens if the ship is under the control of a bankruptcy court in the United States. Similarly, courts in nations under an international insolvency treaty would probably not enforce maritime liens while a bankruptcy action was proceeding in one of the signatory nations. Courts outside of those signatory nations, however, would retain the ability under admiralty law to recognize and enforce maritime liens. Upon the request of a lienor, a foreign court can arrest a ship in its port and, if the debtor does not remit the money owed, force a sale of the vessel. The sale of the ship will extinguish all maritime liens on it, including those of lienors who did not participate in the sale. Thus, the bankruptcy proceeding's restraint of maritime lienors from signatory countries may result in the total loss of those creditors' liens when a court in a nonsignatory nation sells the vessel to which they

185. See Staring, supra note 50, at 1179. As one commentator has stated: "The peculiar admiralty rule that the last maritime lien in time takes priority [over other maritime liens] and [a] concomitant rule that a maritime lienor must act promptly to foreclose his liens in order to protect his rights, conflict fundamentally with the bankruptcy court's policies . . . ." Id.

186. Keech, supra note 12, at 1246. Some maritime liens, such as liens for the wages due the ship's master and crew, would arise automatically on a daily basis. Schoenbaum, supra note 14, at 483, 490.

187. See Gilmore & Black, supra note 12, at 588; Landers, supra note 153, at 510.

188. See Gilmore & Black, supra note 12, at 588; Landers, supra note 153, at 510.

189. See Gilmore & Black, supra note 12, at 586; Landers, supra note 153, at 510.


191. Under an international insolvency treaty, nations would harmonize their bankruptcy proceedings and act as one. See Nadelmann, supra note 29, at 77 (describing how a treaty gives extraterritorial effect to all decisions by the bankruptcy court); see supra notes 64-96 and accompanying text (describing the advantages of a universal bankruptcy system).

192. Rutherglen, supra note 177, at 527-28 (discussing the unique problems faced by maritime lienors when an international shipping company attempts reorganization).

193. See supra note 149 and accompanying text.

194. Gilmore & Black, supra note 12, at 787; Landers, supra note 153, at 510; see, e.g., Morgan Guar. Trust Co. v. Hellenic Lines Ltd., 38 B.R. 987, 999 (S.D.N.Y. 1984) (noting that a court's admiralty sale of a vessel "delivers it free and clear of all liens").
are attached.\textsuperscript{195} The stay on creditor action thereby disadvantages maritime lienors subject to the bankruptcy proceeding’s restraint.\textsuperscript{196}

B. \textit{Needless Costs Related to the Bankruptcy Adjudication}

Bankruptcy law traditionally favors local creditors.\textsuperscript{197} A nation’s bankruptcy procedures are unlikely to restrain that nation’s creditors from participating in a foreign admiralty action because to do so would prejudice those creditors. Thus, the judge will probably eventually release the vessel and maritime creditors from that court’s bankruptcy proceedings to pursue adjudication under admiralty law.\textsuperscript{198} The intrusion of bankruptcy law into the dispute is, therefore, temporary and unnecessary.

Maritime creditors subject to the jurisdiction of the bankruptcy court suffer adverse effects from the temporary involvement of the bankruptcy court. Once a foreign court has arrested the vessel, the maritime lienor restrained by the bankruptcy proceeding’s stay on creditor action cannot immediately join in the foreign admiralty proceeding. The maritime lienor has the unnecessary expense of petitioning the bankruptcy court to release him from the stay.\textsuperscript{199} Once released, the maritime lienor must go to the foreign arresting court to protect his lien. This foreign proceeding may take place in a less convenient—and thus more expensive—forum than the lienor would have chosen had he been unconstrained by the bankruptcy court’s stay and thus able to arrest the ship in a port of his choosing.\textsuperscript{200}

Moreover, the delay imposed by the bankruptcy proceeding is expensive for maritime lienors. The bankruptcy court resolves issues at

\textsuperscript{195} Presumably, those creditors under the jurisdiction of the bankruptcy court will be effectively deterred from violating the moratorium. \textit{See supra} note 175.

\textsuperscript{196} \textit{See} Rutherglen, \textit{supra} note 177, at 517.

\textsuperscript{197} \textit{See} supra notes 111-14 and accompanying text (surveying literature describing this phenomenon).

\textsuperscript{198} \textit{See}, e.g., Brittain v. United States Lines, Inc. (\textit{In re} McLean Indus.), 884 F.2d 1566, 1567-68 (2d Cir. 1989) (describing how the bankruptcy court modified the stay to release the banks that held mortgages on the vessels); United States v. ZP Chandon, 889 F.2d 233, 234 (9th Cir. 1989) (releasing crew members to enforce their maritime liens for wages owed).

\textsuperscript{199} \textit{See}, e.g., 11 U.S.C. § 362(d) (1994) (providing for relief from the stay under United States law if certain conditions are met); \textit{I International Loan Workouts}, \textit{supra} note 20, at 125, 215 (describing the exceptions to an automatic stay under Argentine and Canadian bankruptcy law). Ordinarily, “[t]he secured creditor must seek relief from the stay by written motion.” Rutherglen, \textit{supra} note 177, at 519.

\textsuperscript{200} The maritime lienors must assert their claims where the ship has been arrested. \textit{See McLean Indus.}, 884 F.2d at 1568-69 (releasing maritime lienors from the bankruptcy court’s jurisdiction to pursue their claims in Singapore). The maritime lienor who is constrained by his local bankruptcy court from arresting the ship in his local port must therefore travel to the foreign port where unconstrained creditors arrested the vessel. \textit{See} supra notes 170-75 and accompanying text.
a slower pace than a court acting under admiralty law.\textsuperscript{201} The bankruptcy court's intervention can temporarily halt the operations of a shipping company, leaving its ships stalled in port. Absent the bankruptcy court's interference, a creditor would have immediately directed a court to arrest the vessel under admiralty law.\textsuperscript{202} At least two strategically located courts exercising admiralty jurisdiction can arrest, sell, and get the ship out of port within four to six weeks.\textsuperscript{203} The industry relies on such a speedy sale to preserve the value of the asset because vessels held in port may physically deteriorate.\textsuperscript{204} Additionally, a swift sale minimizes expenses.\textsuperscript{205} A shipping business is not generating income when its vessels lie in port; rather, idle ships in port are only accumulating custodial expenses.\textsuperscript{206} If the shipowner is insolvent, these expenses are a drain on the estate. Thus, even the temporary interference of the bankruptcy court harms the maritime lienor's financial position.

The supervision of maritime lienors under the stay is unnecessary if the bankruptcy court will eventually exempt them from bankruptcy

\textsuperscript{201} See Landers, \textit{supra} note 153, at 492. The bankruptcy process is notoriously slow moving. In Italy, bankruptcy proceedings can be as brief as four to six months or as long as a few years. 1 & 2 International Loan Workouts, \textit{supra} note 20, at 460. In Brazil, the process takes between two and ten years. \textit{Id.} at 176. In the United Kingdom, bankruptcy takes, on average, two to three years. \textit{Id.} at 316. In the United States proceedings can take three or more years. \textit{Id.} at 643. Some bankruptcies exceed even the lengthy averages. The bankruptcies of LTV and the Johns-Manville Corporation are two well-known lengthy cases. The Johns-Manville bankruptcy lasted six years. See Kane v. Johns-Manville Corp. (\textit{In re} Johns-Manville Corp.), 843 F.2d 636, 639-41 (2d Cir. 1988) (describing the history of the Johns-Manville bankruptcy proceedings); Edward A. Adams, \textit{Parties Reach Settlement in Manville Trust Cases}, N.Y. L.J., July 28, 1994, at 1, 2. LTV took seven years to emerge from bankruptcy. John Holusha, \textit{Singing the Steelworker Blues: A Mini-Mill Deal at LTV Leaves Union Feeling Jilted}, N.Y. Times, Dec. 13, 1995, at D1, D4; see also LTV Aerospace & Defense Co. v. Thomson-CSF, S.A. (\textit{In re} Chateaugay Corp.), 186 B.R. 561, 564-66 (Bankr. S.D.N.Y. 1995) (giving the history of the LTV bankruptcy proceedings).

\textsuperscript{202} See Landers, \textit{supra} note 153, at 492-93 (describing maritime creditors' preference for an expedited admiralty proceeding).

\textsuperscript{203} See Baglietto, \textit{supra} note 149 (describing the priority that the courts of Gibraltar give admiralty cases and the disposition of uncontested admiralty cases within a few weeks); \textit{South Africa}, \textit{supra} note 149 (describing the proliferation of vessel arrests in South Africa because of its strategic location and efficient arrest process).


\textsuperscript{205} Expenses incurred while a vessel is in the custody of the court can exceed 40\% of the ship's value. Steven E. Psarellis et al., \textit{Bet Your Lien and Roll the Dice: Maritime Liens and Riverboat Gambling}, 6 S.F. Mar. L.J. 49, 71 (1993). In 1986, the cost for keeping a vessel in custody was $1300 a day. \textit{Prudential Lines}, 69 B.R. at 442.

\textsuperscript{206} Costs may include "wharfage and other expenses necessary to preserve the ship, including beneficial caretaking expenses of the master and crew." Schoenbaum, \textit{supra} note 14, at 507-08.
law and allow them to proceed under admiralty law. The bankruptcy court will probably eventually release maritime lienors because to do otherwise would harm the interests of those lienors under the bankruptcy court’s control.207 This release is not immediate, however. For example, when United States Lines filed for bankruptcy, the bankruptcy court issued the stay on November 24, 1986208 and did not release the maritime lienors until June 10, 1987.209 Prior to the release, supervision is difficult because the court needs to monitor international creditors and assets.210 The costs of supervising the maritime lienors under the stay might outweigh the benefits of enforcing it because of the probability of eventual release from the stay.211

The bankruptcy court will also expend resources in litigation as a result of creditors’ attempts to circumvent the automatic stay.212 For example, in In re McLean Industries,213 a creditor tried to avoid enforcement of the automatic stay by assigning his claims to a third party.214 The court had to decide the legality of the assignment and then enforce its decree which held the assignment invalid.215 Creditors may also try to circumvent the stay by contesting the bankruptcy court’s jurisdiction.216 The bankruptcy court may have a broad conception of its jurisdiction.217 For example, Judge Paskay of the Middle District of Florida asserted that his court’s order was binding on all “citizens of the United States or foreign entities which have property in the United States [or] which maintain an office or do business in the United States” and on foreign subsidiaries or agents of U.S. corporations.218 Similarly, Judge Buschman of the Southern District of New York forbade “‘all persons . . . including those located outside the United States’” from pursuing “‘judicial . . . action’” or any other act to “‘exercise control over property of the debtors’ estates . . . within or outside the United States.’”219 Thus, the court may spend considera-

207. See supra part III.A and accompanying text (describing how the arrest of ships abroad may jeopardize maritime lienholder’s rights).
210. See Rutherglen, supra note 177, at 532.
211. Id.
214. Id. at 292.
215. Id. at 292-93.
217. See supra notes 37-38 and accompanying text.
ble time and effort monitoring parties’ compliance with bankruptcy law when the disposition of the maritime assets will ultimately be subject to admiralty law.

C. Vessel Finance

Because the vessel finance market depends on the lenders’ ability to collect debt freely under admiralty law, the risk placed on maritime lienors and the extra delay and expenses caused by the unnecessary intrusion of bankruptcy law have a detrimental effect on vessel financing. Admiralty collection methods are simple and encourage investment in shipping. Because the maritime industry bases its financing system on prompt vindication of a lienor’s rights through the arrest of the vessel, a bankruptcy proceeding’s interference with those methods, either by placing the rights at risk or by delaying the sale of a vessel, affects the vessel finance system. Capital for vessel replacement or repair will be more expensive because the lender must take into account the added risks faced by the maritime lienor and the costs associated with delay.

The effect on maritime finance is important because the maritime industry is currently rebuilding and needs capital investment. The world shipping fleet requires replacement both because of age and new environmental regulations. Replacement costs are estimated at $200 billion before the year 2000. The fleet, produced primarily by a surge in shipbuilding during the period 1973-1980, has a typical lifespan of twenty years and is now due for replacement. Moreover, the world fleet must rebuild to meet the requirements of the Oil

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221. Id. ("[Arrest is] particularly attractive because . . . [it] enhance[s] the overall efficiency of the market for credit in maritime commerce.").

222. See id.

223. Under a partially universal bankruptcy law, a maritime lender faces uncertainty as to whether admiralty or bankruptcy law would apply because the lender would not know what country the vessel would be in when insolvency occurred. The risk inherent in this inability to predict the result of default is similar to the risk faced by international land-based creditors who cannot predict which nation’s bankruptcy law will apply in the case of default. See supra note 79 and accompanying text.


225. Id.


227. Hong Kong: Sohmen Takes Over as Chairman of New ICAC Watchdog, South China Morning Post, Feb. 27, 1994, at 14, available in LEXIS, Nexis Library, Reuter Textline File (quoting Dr. Sohmen, a Chinese shipping baron, predicting that in 1996 when the existing fleet is 20 years old, repair prices will be quite high); Why Ship-Owners Must Change Tack, supra note 224.
Pollution Act of 1990, which limits the types of vessels that the United States permits in its waters.

Despite a clear need for new vessels, banks are very hesitant to lend money to the industry due to the many defaults and bankruptcies that occurred in the 1980s. The maritime community has recognized the need for capital and has taken steps to attract investment by increasing lender security. Lenders who are willing to invest may well require that they retain the ability to “react quickly and forcibly to deteriorating credit situations” to stem any losses. Nonetheless, the maritime industry is often not an attractive investment because of the low profit margin and high likelihood of failure. Any tightening of the credit market as a result of the needless intrusion of bankruptcy law will have an adverse effect on the industry at this crucial rebuilding time.

The subjection of maritime assets to two bodies of law and two courts poses problems for the maritime industry. While maritime law

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231. The mid-1980s were disastrous years for the shipping industry. See Dorinda Elliott, Will Debt Sink Another Asian Fleet?, Bus. Wk., Dec. 2, 1985, at 48 (describing the financial difficulties of the Tung group, then one of the world’s largest shipping concerns); Andrew Fisher, Anxious Days for the Banks: World Shipping Finance, Fin. Times, Nov. 27, 1985, at 25 (describing the financial difficulties of large shipping lines); Willoughby, supra note 226, at 116 (characterizing shipping as the “latest lending disaster area”).
232. Recognizing the need to attract investment through increased lender security, the United Nations Conference on Trade and Development and the International Maritime Organization held a convention to unify further the priority of maritime liens. Christina M. Krescanko, Maritime Liens, in Recent Developments in Maritime Law, 18 Tul. Mar. L.J. 259, 294-95 (1994). The 1993 International Convention on Maritime Liens and Mortgages limits the number of liens payable before a ship mortgage to five. Id. at 295. The five are: “(1) claims due to the master and crew; (2) claims for loss of life and personal injury; (3) salvage rewards; (4) port, canal, waterway, and pilotage dues; and (5) claims for physical loss or damage caused by the operation of the vessel other than damage to cargo, containers, and passengers' effects.” Id.
234. Liner shipping has “high fixed costs and low marginal costs, relatively inelastic and divisible demand, indivisible supply,” and shippers must regularly schedule sailings “irrespective of the amount of cargo available.” Hearings on S. 1356 Ocean Shipping Reform Act Before the Senate Comm. on Commerce, Science and Transportation, 104th Cong., 1st Sess. (1995) (statements of Murray Graham, Deputy Secretary General of the Council of European and Japanese National Shipowners' Association), available in LEXIS, Legis Library, CNGTST File. Thus, shippers “inexorably drive rates down below average costs to noncompensatory marginal cost levels in order to seek cargo to fill empty space.” Id.
is tailored to the needs of the maritime industry, bankruptcy law is not. The application of both laws appears unnecessary and avoidable.

IV. ANY INTERNATIONAL INSOLVENCY TREATY SHOULD RECOGNIZE THE PRIMACY OF ADMIRALTY LAW OVER MARITIME ASSETS

The drafters of any future international insolvency treaty should recognize the primacy of admiralty law over maritime assets. This part first examines how such a provision will eliminate the problems presented by the application of two potentially conflicting bodies of law. It then argues that such a provision would not prejudice any of the parties to the bankruptcy proceeding.

A. Reconciling the Two Bodies of Law

A partially accepted international insolvency treaty that recognizes the primacy of admiralty law over maritime assets would prohibit a bankruptcy proceeding from interfering with an admiralty action. The court exercising admiralty jurisdiction would have exclusive jurisdiction over the maritime assets. The lienors would be able to protect their rights to the full extent of maritime law, free of restraint by the bankruptcy proceeding. Additionally, the exclusive application of admiralty law to maritime assets would eliminate the unnecessary intrusion of bankruptcy law. The maritime lienor would save the expense of petitioning the court for relief from the automatic stay. Moreover, the maritime lienor would be able to pursue his claim swiftly in the most convenient forum available. Under a bankruptcy treaty that provides for the exclusive application of admiralty law to maritime assets, a court would not waste its efforts in needless supervision of maritime lienors under bankruptcy law or needless litigation about the reach of its personal jurisdiction over them. Finally, the primacy of admiralty law will protect the market for vessel finance. Thus, recognition of the primacy of admiralty law will eliminate the problems arising from the application of both admiralty and bankruptcy law.

B. The Exclusive Application of Admiralty Law to Maritime Assets Would Not Prejudice Maritime Interests

The maritime industry already has in place a system that accomplishes the theoretical goals of an international insolvency treaty. Thus, an international insolvency treaty that provided for the exclu-

235. See supra notes 185-96 and accompanying text.
236. See supra note 199 and accompanying text.
237. See supra notes 200-04 and accompanying text.
238. See supra notes 212-19 and accompanying text.
239. See supra part III.C.
sive application of admiralty law to maritime assets would not prejudice the maritime industry. Bankruptcy practitioners seek an international insolvency treaty to resolve problems arising from the refusal to defer to foreign bankruptcy proceedings and the nonenforcement of foreign bankruptcy judgments. The problems that a treaty addresses and the benefits that a treaty provides, however, are not really applicable to the maritime industry.

While many jurisdictions do not always recognize foreign bankruptcy decrees, they do grant universal recognition to the decrees reached by application of admiralty law. Moreover, a treaty can only achieve partial acceptance, while admiralty law already enjoys universal acceptance. Thus, an international insolvency treaty does not provide anything to the maritime industry that admiralty law itself does not already provide. The drafters of an international insolvency treaty, therefore, will not prejudice the maritime industry by exempting it from such a treaty.

Additionally, the provisions of an international insolvency treaty would not particularly benefit the maritime industry. First, an international insolvency treaty would promote the equal treatment of bankruptcy creditors because it would pool all the debtor’s assets and rank all of the creditors under a unified system in a single forum. Because the adjudication of all maritime liens on a single vessel takes place in a single forum under a single nation’s ranking system, admiralty law already treats maritime creditors fairly by classifying them according to their expectations. Second, a treaty would maximize asset return by minimizing the costs of duplicative proceedings and realizing enhanced values related to economic units of sale. Maritime parties, however, do not benefit from such a treaty because the creditors already have the capability to assert their maritime liens in a single proceeding. Finally, a treaty will facilitate the reorganization of a debtor. The maritime industry does not benefit from this result of an international insolvency treaty as the reorganization of an inter-

240. See supra notes 64-96 and accompanying text.
241. See Gaa, supra note 23, at 887.
242. See supra notes 152 and accompanying text. The decree must be pursuant to an arrest in rem. See, e.g., Todd Shipyards Corp. v. F/V Maigus Luck, 243 F. Supp. 8, 9 (D. Canal Zone 1965) (refusing to recognize a Panamanian court decree because the vessel was never within the territorial waters of Panama).
243. See supra notes 100-16 and accompanying text.
244. See supra notes 154-58 and accompanying text.
245. See supra notes 82-86 and accompanying text.
246. See supra part II.A (describing admiralty as an ancient, internationally consistent body of law that developed in response to industry needs). Maritime creditors’ willingness to extend credit reflects their expectations under admiralty law.
247. See supra notes 88-89 and accompanying text.
248. See Berlingieri, supra note 17, at 108 (noting that no ship “may be arrested more than once in respect to the same maritime claim”); Gilmore & Black, supra note 12, at 788 (noting how single admiralty proceeding discharges all liens on a vessel).
249. See supra notes 91-95 and accompanying text.
national shipping company is unlikely for two reasons.\footnote{250}{Rutherglen, supra note 177, at 532; see Keech, supra note 12, at 1246; see, e.g., Morgan Guar. Trust Co. v. Hellenic Lines Ltd., 585 F. Supp 1227, 1228 (S.D.N.Y. 1984) (detailing how Hellenic originally tried to reorganize but eventually underwent liquidation). But see Landers, supra note 153, at 509 n.79 (stating that a shipping company might successfully reorganize). At present, if the creditors believe a shipping company can successfully reorganize, they may rely on private agreements to do so. The Ten Most Lawyer-Intensive Deals of 1986: Herbert Smith, White and Case, Stephenson Harwood and Lo and Milbank Tweed Hadley and McCloy: The Restructuring of Wah Kwong Shipping, Euromoney Int'l Fin. L., Jan. 20, 1987, available in LEXIS, Nexis Library, Reuter Textline File ("[T]he plan . . . mark[s] a new approach to international non-sovereign restructurings outside the ambit of court-approved procedures.").} The condition of the shipping market, a surplus in vessels, and a decline in demand for cargo are usually the source of the shipping company’s financial failure and those general market conditions will continue to exist during the reorganization.\footnote{251}{See Rutherglen, supra note 177, at 525.} Additionally, reorganization is unlikely to succeed because foreign courts may arrest vessels in violation of the bankruptcy court’s stay.\footnote{252}{Id. at 532.}

C. The Effect on Other Bankruptcy Participants Is Neutral

An insolvency treaty provision ensuring the exclusive application of admiralty law to maritime assets would not affect the nonmaritime parties to a bankruptcy proceeding. Neither the creditors other than maritime lienors nor the bankruptcy court itself would suffer significant adverse effects as a result of a treaty’s express recognition of what is currently a practical reality. The primacy of admiralty law over maritime assets would not prejudice these parties because it merely takes the vessel and maritime lienors out of the bankruptcy court’s control at the very beginning of a bankruptcy proceeding rather than later in the process. Under a partially accepted international insolvency treaty, a foreign court would be likely to take control over the maritime assets and adjudicate them pursuant to admiralty law apart from the international bankruptcy proceeding anyway.\footnote{253}{See supra notes 170-75 and accompanying text.}

Nonmaritime creditors will not be prejudiced by the exclusive application of admiralty law. Under an international insolvency treaty, a bankruptcy proceeding would treat creditors of the same class equally by ensuring that those creditors would receive equal recoveries from a pool of assets.\footnote{254}{See Dalhuisen, supra note 1, § 2.03[3], at 3-186 to 3-187 & n.34; see also Westbrook, Theory and Pragmatism, supra note 2, at 755-56 (detailing a coordinated claims procedure).} Removing the vessel from that pool of assets by providing for its disposition under admiralty law would theoretically decrease the total amount in the pool. The bankruptcy court, however, would be unlikely to include a vessel in that pool of assets. Creditors located in a nonsignatory nation, and thus outside the bankruptcy
court's jurisdiction, would have arrested the vessel, thus precluding its inclusion in the bankruptcy court's asset pool. Moreover, maritime lienors are traditionally favored over unsecured creditors. The bankruptcy court, under an international bankruptcy treaty, will most likely treat maritime lienors as secured creditors, although their exact position in the priority of distribution cannot be predicted. Thus, even if the vessel was sold in the bankruptcy proceeding, the proceeds from the sale would have first gone to satisfy the claims of maritime lienors as secured creditors. If the foreign court sells the vessel under admiralty law, after maritime lienors are paid, any remaining proceeds can be returned to the bankruptcy court. One commentator has argued that bankruptcy laws should not treat maritime lienors as secured creditors because the seemingly arbitrary special treatment of maritime lienors gives them unwarranted preferred status. This preferred status, however, has existed under the law in most maritime nations for centuries and has become ingrained in the daily business of the maritime industry. A provision recognizing the primacy of admiralty law over maritime assets merely maintains the status quo.

Under an international insolvency treaty that provides for the exclusive application of admiralty law to maritime assets, a bankruptcy court would give up control of a portion of the debtor's assets over which it would have exercised control absent such a provision. If vessels and maritime lienors are not subject to separate treatment, a bankruptcy proceeding can theoretically adjudicate the entire bankruptcy process in accordance with the universal goals of such a treaty. Even under an international insolvency treaty, however, the bankruptcy court would probably have eventually released both the vessel and the maritime lienors from its control. Providing for the disposition of maritime assets under admiralty law simply expressly recog-

255. Under an international insolvency treaty, the bankruptcy court's jurisdiction would effectively extend to all signatory nations because all the courts involved would cooperate in a unified procedure. See Nadelmann, supra note 29, at 77.

256. See supra notes 159-75 and accompanying text.

257. Staring, supra note 50, at 1178. See David W. Skeen, Liens and Liquidation: Preferences, Strong Arm Clause, Fraudulent Transfers, Equitable Subordination, Priorities and Other Limitations on Liens Claims, 59 Tul. L. Rev. 1401, 1402 (1985); In Re Aro Co., 1980 1 All E.R. 1067, 1068 (C.A.). Significant complications would arise from individual international bankruptcy courts’ application of their own bankruptcy laws to alter the secured status of a maritime lien because the lienor would not know at the time the lien arose whether he could enforce it in the future. See Gilmore & Black, supra note 12, at 813; Skeen, supra, at 1402-03.

258. See supra notes 55-58 and accompanying text (discussing how secured creditors are paid before unsecured creditors).


260. See generally Michael J. Ende, Note, Adrift on a Sea of Red Ink: The Status of Maritime Liens in Bankruptcy, 11 Fordham Int'l L.J. 573, 585-86 (1988) (describing how the person who paints the ship gets a lien, but the person who paints the dock does not).

261. See supra notes 197-98 and accompanying text.
nizes the unique status of maritime assets and makes the disposition of such assets more efficient by avoiding a temporary detour through the bankruptcy proceeding.

CONCLUSION

While an international insolvency treaty may aim for a universal bankruptcy system, such a treaty offers no meaningful improvement over current law. At best, only some courts will grant recognition to the decisions of foreign bankruptcy courts. Recognition will only be reciprocal between treaty signatories. By contrast, courts already give full effect to foreign admiralty decrees. When a vessel inevitably arrives in the port of a nation that does not share an insolvency treaty with the nation adjudicating the bankruptcy, the vessel and maritime lienors participating in the bankruptcy proceeding will soon find themselves back in court pursuant to admiralty law. In the end, the maritime parties have traveled a circuitous and expensive route.

An international insolvency treaty must recognize the primacy of admiralty law over the vessel and maritime lienors. A treaty vesting control over the disposition of the debtor’s maritime assets in the same court as the rest of the debtor’s assets will not successfully preclude a foreign court from arresting ships and adjudicating the maritime claims. A provision for the exclusive application of admiralty law merely recognizes and accepts such a result. The consequences of such a provision for the nonmaritime parties to the bankruptcy proceeding are minor. Yet, such a practical provision will eliminate the risks placed on maritime lienors, the needless expenses arising from the supervision of maritime lienors in the bankruptcy proceeding, and the increased cost of maritime credit that would result from the application of both laws to the same debt. Drafters of an international insolvency treaty should realize that recognizing the primacy of admiralty law over maritime assets steers the most appropriate course.