

SHIPPING INDUSTRY PROBLEMS

Most maritime shipping companies were operating profitably through the summer of 2008 until the "perfect storm" of the credit crisis and the worldwide recession struck, leading to the collapse of both the commodity and freight markets. The resulting upheaval has affected trade credits, shipbuilding deliveries, orders, chartering, and sales-and-purchases, among other things, for shipping companies worldwide. Reports of bankruptcy, insolvency, liquidation and complex debt restructurings of shipping and other maritime industry companies have begun surfacing in the trade press, with more to come.

As a result of the turmoil in the shipping industry, actions seeking attachments under Supplemental Admiralty Rule B of the Federal Rules of Civil Procedure have risen dramatically, further exacerbating the problems facing cash-strapped shipping companies. As the recent U.S. bankruptcy filings of Armada (Singapore) Pte. Ltd. and Atlas Shipping A/S demonstrate, Chapter 15 bankruptcy proceedings under the U.S. Bankruptcy Code may provide struggling shipping companies with a powerful tool for protecting their assets from Rule B Attachments.

Rule B Attachments

Under Rule B, a party may obtain security for a maritime claim that has not yet been reduced to judgment or arbitral award. Rule B Attachments can be issued by the court where the action on the merits is pending or by any court where the defendant has assets so long as the defendant itself is *not* located or otherwise found in that jurisdiction. Thus, while the type of claim must be within that court's admiralty jurisdiction (i.e., arising from a maritime tort or contract), the underlying dispute need not have any connection to the particular court's geographical district or even the United States. In addition, a claimant can obtain a Rule B Attachment on an *ex parte* basis, without notifying its opponent in advance. In fact, many shipping companies only learn their funds have been attached when a puzzled business partner inquires about a payment not received.

Rule B Attachments are popular because they are effective. In *Winter Storm Shipping, Ltd. v. TPI*, the Court of Appeals for the Second Circuit held a Rule B Attachment can intercept and attach an electronic funds transfer (EFT) in the hands of an intermediary bank, including the New York Clearing House banks in Manhattan that process virtually all transfers of U.S. currency (or USD transfers) made worldwide. Because shipping industry transactions are generally in U.S. currency and usually pass through one of the New York Clearing House banks, Rule B Attachment proceedings have become exceptionally popular in the Southern District of New York (which includes Manhattan) where they now comprise approximately 30% of all new cases filed.

Relief under U.S. Bankruptcy Law

Foreign shipping companies facing financial difficulties or the threat of Rule B Attachment can protect themselves through the United States bankruptcy laws. When a company files for bankruptcy certain automatic protections are triggered. First, in most cases, the filing will act to suspend a debtor's past, pending and current liabilities and obligations, providing the debtor with opportunity and time to reorganize its business operations and financial arrangements, while allowing the debtor to continue to manage its business and maintain control of its assets and corporate governance, subject only to certain restrictions and the supervision of the bankruptcy court. Second, upon a bankruptcy filing, the law

imposes an automatic, statutory stay, which suspends the continuation or commencement of any action, proceeding or any other formal or informal attempt to recover claims against the debtor or its assets – anywhere in the world. There are certain exceptions to the automatic stay and a creditor can request the court to grant relief from the stay. Generally though, the protections of the automatic stay under the U.S. Bankruptcy Code will provide a debtor with breathing room and the ability to protect its assets during the proceeding, giving it time to catch its breath and, perhaps, chart a new course.

Foreign companies can protect themselves through Chapter 15 of the Bankruptcy Code. Although Chapter 15 does not commence a full-blown bankruptcy case within the United States, it can provide a foreign debtor in an insolvency proceeding outside of the United States with certain protections, including the automatic stay, to protect assets in the United States. Specifically, a foreign shipping company that has commenced an insolvency proceeding abroad, may be able to stay all actions against it, including pending Rule B Attachments, by filing a Chapter 15 case soon after the commencement of its foreign proceedings. The Board of Directors of Armada (Singapore) Pte. Ltd. recently filed a chapter 15 petition in the Bankruptcy Court for the Southern District of New York for recognition of the company's insolvency proceeding in Singapore, for exactly that reason – to protect its assets against potential Rule B Attachments.

To qualify for protection under Chapter 15 of the Bankruptcy Code, a foreign debtor's authorized foreign representative must file a petition for recognition of the foreign insolvency proceeding, meet certain statutory requirements, notify all relevant parties and attend a hearing for approval of such recognition. A foreign representative can also seek provisionally to stay any execution or action against the debtor's assets from the time it files a petition for recognition through the time when the Bankruptcy Court makes its decision whether or not to approve the recognition of the foreign proceeding. If approved, the Bankruptcy Court will enter an order recognizing the foreign proceeding either as a "foreign main proceeding," if the foreign proceeding is pending in the country where the debtor has its main interests, or as a "foreign non-main proceeding," if the foreign proceeding is pending in a country where the debtor has a place of operations to carry out non-transitory economic activity. The scope of protections afforded to a foreign debtor will differ depending on whether the court determines the foreign proceeding to be a main or non-main proceeding. Specifically, the automatic stay against all proceedings applies only upon the recognition of a foreign main proceeding. Alternatively, while the recognition of a foreign non-main proceeding does not trigger the general automatic stay, it does grant the Bankruptcy Court the power to stay the commencement or continuation of individual or specific actions against the debtor's assets, and to suspend the right to transfer, encumber or otherwise dispose of the debtor's property and assets within the United States.

No one is yet certain where the shipping industry is headed or the extent of the damage that has been done. In the midst of this uncertainty, United States bankruptcy law may provide some needed relief to enable shipping companies to reorganize.

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