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Shipping Chapter 11s: Safe Harbor or Rough Seas? (Continued)

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Shipping Chapter 11s: Safe Harbor or Rough Seas? (Continued)

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Acknowledgement

INSOL International is very pleased to present the 30th Technical Paper under its Technical Papers Series titled “Shipping Chapter 11s: Safe Harbor or Rough Seas? (Continued)” by Mark E. Dendinger and Evan D. Flaschen of Bracewell & Giuliani LLP.

Many distressed international shipping companies continue to face operational and financial challenges and the number of major shipping insolvencies have not slowed. With time charter earnings on the decline, and under performing charterparty agreements in place, for many major shipping companies it is fairly easy for a company’s economic performance to spiral quickly downward leading the company to trigger one or more defaults under its operative ship finance documents.

The capital markets remain somewhat closed to the possibility of rescue financing for troubled shipping companies. Thus, a distressed shipping company’s first, and perhaps best, restructuring option remains an out-of-court solution with its existing lenders. If however a consensual solution with its lenders is unavailable to a distressed shipping company, then the company must turn to a court-process to solve its operational and financial difficulties.

This paper focuses on the continued challenges faced by the current shipping industry and the available restructuring solutions, with the use by international shipping companies of US chapter 11 proceedings as a key example.

INSOL International sincerely thanks Mark E. Dendinger and Evan D. Flaschen for writing this excellent paper.

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Shipping Chapter 11s: Safe Harbor or Rough Seas? (Continued)

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Nine months ago, we published our first INSOL article[3] regarding the wave of international shipping companies that have crashed onto US Chapter 11 shores. In it, we addressed the fairly limited Chapter 11 debtor eligibility requirements and the tackle box of tools available to foreign shipping company debtors once they are docked in Chapter 11 courts of call. In this next installment, we dive headfirst into the international shipping market in greater detail, including why many foreign shipping companies might still choose to file for Chapter 11 over competing insolvency regimes. Next we take a close look at the myriad of shipping Chapter 11s that have been filed in the last three years, starting with two landmark cases filed in July 2011 that established Chapter 11 jurisdiction for international shipping companies, moving on to examine some cases where companies stretched the initial Chapter 11 safe harbor into successful reorganisations, and finishing up with some cases where the outcome is unknown. We conclude with lessons learned from these filings.

A Troubled Market

From 2000 to 2007, the international shipping market was flooded by rising consumer demand and record-setting charter hire rates. In order to keep pace with demand, many shipping company owners borrowed money to build new vessels. In 2008, the worldwide global recession grounded consumer demand. With excess capacity in the market and demand continuing to soften, vessel charter rates plummeted to decade-low levels. At bottom, shipping companies were running their vessels at losses just to keep them operating. Under the weight of extremely low charter rates, shipping company owners were missing the vital cash needed to fund daily vessel operating expenses, meet their newbuild contract obligations or service their existing debt. It wasn't long before owners were regularly defaulting on their loans.

In the face of a loan default, a shipping owner's best course of action is to try to work something out with its lenders out-of-court. This can be in the form of a forbearance agreement or an amendment to a loan agreement to offer the company a life vest. Unfortunately, after the shipping market crashed on a worldwide scale, many vessel lenders were scared and many began to exercise more aggressive remedies by arresting vessels and freezing an owner's access to cash reserves, or sweeping the balances altogether. These scorched earth tactics forced many shipping company owners to want to open "pandora's box" and commence insolvency proceedings.

I Need Help, But I'm Not Sure Where to Look

A shipping company owner may have a choice where to commence insolvency proceedings. The company's operations and employees may lie outside the US. The company's primary assets - the vessels - may constantly move from one jurisdiction to another. The company's creditors may be located all over the world. The company may be organized under the laws of one country but subject to loan documentation governed by the laws of another. The company may have a peppercorn of US property to its name that is sufficient to make it Chapter 11 eligible.

The underlying business decision - a desire to reorganise - will guide many shipping company owners on their maiden voyage through Chapter 11. It certainly is what motivated Marco Polo Seatrade to consider a Chapter 11 filing. The company's operations and headquarters were located in Amsterdam, The Netherlands. It operated six vessels built in Chinese and Japanese shipyards that sailed under the Liberian flag. Its loan documents were governed by UK law. It had property in the US in the form of a prepetition retainer paid to its professionals on behalf of the company and certain affiliates, and an interest in a vessel pool account located in New York. After Marco Polo defaulted on

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* The views expressed in this paper are the views of the authors and not of INSOL International, London.

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3 This article is a continuation of an article published in the *INSOL International Electronic Newsletter for October 2013*.

its loan obligations, one of its lenders took aggressive tactics by arresting vessels and sweeping the cash that secured the loan obligations.

Marco Polo had considered filing insolvency proceedings in The Netherlands. There are two types of insolvency proceedings under the Dutch Bankruptcy Code (*Faillissementswet*): (i) bankruptcy (*faillissement*), where the debtor's assets are liquidated and the proceeds are distributed to creditors, ("Bankruptcy"), and (ii) a legal moratorium or suspension of payments (*surseance van betaling*), where the debtor is given four months of relief from pressure from its creditors in order to continue operating its business and / or, ultimately, try to satisfy creditors by way of a composition ("Legal Moratorium")[4]. A Dutch Bankruptcy is similar to a US Chapter 7 proceeding: management is displaced and a trustee is appointed to liquidate unencumbered assets and distribute the proceeds to holders of valid claims. Secured creditors are free to exercise their security interests in their collateral[5]. While a Legal Moratorium offers a debtor a short four-month breathing spell, it lacks key Chapter 11 components such as use of a secured lender's cash collateral or true debtor in possession financing. Ultimately, Marco Polo believed that a Legal Moratorium would quickly result in liquidation, and it determined that Chapter 11 offered the only viable chance of reorganisation. The bankruptcy court agreed[6].

TMT also chose Chapter 11 for the chance to reorganise. The company's operations and headquarters were located in Taipei, Taiwan. The company's creditors spanned the globe. The company paid retainers to its US professionals, which were held in US bank accounts on the company's behalf. When it was time for TMT to commence insolvency proceedings, a Taiwanese proceeding was quickly ruled out because reorganisation proceedings in Taiwan are only available for "a company which publicly issues shares or corporate bonds[7]". Taiwan does not have a Chapter 11 reorganisation proceeding for private companies[8] (only companies listed on the Taiwan stock exchange are eligible to pursue a formal reorganisation under Article 282 of the Company Act). Other jurisdictions were ruled out due to a combination of the practical inability to restructure a business with assets that float around the world and the absence of personal jurisdiction over several of the prepetition secured creditors. Rather than give up on the business and surrender the vessels to its lenders, TMT wanted a chance to reorganise its business under the safe harbor of Chapter 11.

Today, non-US shipping companies continue to utilise Chapter 11 in an attempt to reorganise their businesses when other jurisdictions don't offer the same chance[9]. One law firm involved in Chapter 11 shipping cases summed up Chapter 11's attributes this way:

> Foreign shipping companies appear to understand the benefits and opportunities of a Chapter 11 bankruptcy, including, of course, the global scope of the automatic stay. Creditors worldwide should share that understanding, contemplate the risks of a Chapter 11 bankruptcy, and prepare accordingly by proactively evaluating all available options[10].

Rough Seas Initially

Two shipping companies that crashed onto US shores in the summer of 2011 - Marco Polo and Omega - faced aggressive secured lenders immediately post filing. In the case of Marco Polo, the Chapter 11 cases were commenced in the Southern District of New York on July 29, 2011[11]. On September 12, 2011, the debtors' secured lenders moved to dismiss the debtors' Chapter 11 cases[12]

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4 *See* Declaration of Vincent Reyer Vroom in Support of Debtors' Objection to the Motions of the Royal Bank of Scotland PLC Pursuant to 11 U.S.C. §§ 105(a), 362(d), 305(a), and 1112(b) for Entry of Order (i)(A) Suspending Chapter 11 Cases or Granting Relief from the Automatic Stay and (B) Dismissing Chapter 11 Cases, or Alternatively, (II) Dismissing Chapter 11 Cases or Granting Relief from the Automatic Stay and Credit Agricole Corporate and Investment Bank Cross-Motion to Dismiss or, in the Alternative, to Lift the Automatic Stay [Docket No. 159], ¶ 4 in *In re Marco Polo Seatrade B.V., et al.*, Case No. 11-13634 (Bankr. S.D.N.Y. Sept. 27, 2011).

5 *Id.* at ¶ 8.

6 Tr. H'rg. October 21, 2011, 138: 8-10 [Docket No. 222] in *In re Marco Polo Seatrade B.V., et al.*, Case No. 11-13634 (Bankr. S.D.N.Y. Oct. 26, 2011) ("[T]he commencement of a case in the Southern District of New York may have been the only option to save the [debtors'] business").

7 Company Act (Taiwan) art. 282. (English translation available at http://eng.selaw.com.tw/FLAWDAT01.asp?lsid=FL011292, search for Article 282).

8 See "Asia restructuring and insolvency briefing — Taiwan" (available at http://www.nortonrosefulbright.com/knowledge/publications/19380/asiarestructuring-and-insolvency-briefing-taiwan.

9 *See* "Chapter 11: Liberation or suspended sentence" (Available at http://www.hfw.com/Chapter-11-Liberation-or-suspended-sentence) ("The globalised nature of shipping can quite easily present a Liberian ship owning company, a vessel flagged in Greece, a holding company and corporate guarantor incorporated in the Marshall Islands (but listed in the US). Not to mention an affiliated Singaporean management company, a German financing bank lending US Dollars through its London branch all with loan and security documents governed by English law.").

10 Available at http://www.mayerbrown.com/files/Publication/36f606f8-aa3c-4c02-8a42-b7971618043b/Presentation/PublicationAttachment/adb1d8da-d0f2-445a-b708-c427ee750f99/11972.pdf.

11 *See In re Marco Polo Seatrade B.V., et al.*, Case No. 11-13634 (Bankr. S.D.N.Y. July 29, 2011).

12 *See* Motion of the Royal Bank of Scotland PLC Pursuant to 11 U.S.C. §§ 105(a), 362(d), 305(a), and 1112(b) for Entry of Order (I)(A) Suspending Chapter 11 Cases or Granting Relief from the Automatic Stay and (B) Dismissing Chapter 11 Cases, or Alternatively, (II)

pursuant to section 1112(b) of the Bankruptcy Code[13]. The lenders contested the eligibility of the debtors to commence Chapter 11 on the grounds that (i) the debtors lacked assets in, and connections to, the US and the cases more properly belonged in a foreign reorganisation proceeding, (ii) the cases were filed in bad faith,[14] (iii) even if the debtors possessed the requisite jurisdictional ties to the US, the court should abstain from exercising jurisdiction under section 305(a) of the Bankruptcy Code,[15] and (iv) the debtors were incapable of reorganising. Alternatively, the lenders requested that the bankruptcy court modify the automatic stay[16] to allow the lenders to exercise their security interests in their respective collateral - the debtors' vessels and cash held in the debtors' bank accounts.

The bankruptcy court held a two-day evidentiary hearing on the lenders' dismissal motion. On 21 October 2011, and after the conclusion of the oral arguments, the bankruptcy court denied the lenders' motions to dismiss, concluding:

A. The Debtors Had Property in the US When the Chapter 11 Cases Were Filed. The bankruptcy court held that: (1) funds in a pooling account located in the US was sufficient to establish Chapter 11 jurisdiction eligibility for one debtor; and (2) the retainer deposit paid to the debtors' professionals prior to the filing was sufficient to establish jurisdiction eligibility for all of the debtors[17].

B. The Chapter 11 Cases Were Not filed in Bad Faith. The bankruptcy court found no evidence of a bad faith filing from the facts on the record. It noted that the Chapter 11 cases were filed shortly after one of the lenders had arrested a vessel and then swept the debtors' cash accounts. As the debtors' options became limited when the cash accounts were swept, the bankruptcy court noted that the Chapter 11 cases may have been the only option to save the Debtors' business[18].

C. Dismissal or Abstention Was Not in the Best Interests of the Debtors or Creditors. The bankruptcy court found that dismissal or abstention was not in the best interests of the debtors' creditors and the Chapter 11 bankruptcy estates[19].

D. Too Early to Determine that the Debtors were Unable to Reorganise. The bankruptcy court found that it was premature to decide whether the debtors had a legitimate prospect for reorganisation. The bankruptcy court concluded that the debtors may be able to propose a confirmable plan if given the opportunity to "catch their breath" and focus on reorganisation prospects. The bankruptcy court ordered that periodic status conferences would be held before it in order to gauge the debtors' progress in pursuing a viable reorganisation[20].

Dismissing Chapter 11 Cases or Granting Relief from the Automatic Stay [Docket No. 120] in *In re Marco Polo Seatrade B.V., et al.*, Case No. 11-13634 (Bankr. S.D.N.Y. Sept. 12, 2011).

13 *See* 11 U.S.C. § 1112(b). Pursuant to section 1112(b) of the Bankruptcy Code, upon request of a party in interest, a Chapter 11 case will be dismissed converted to a Chapter 7 case if the court determines it is in the best interest of the creditors and the estate and for cause. Cause for conversion or dismissal exists if the debtor commenced the bankruptcy case in bad faith or if there are excessive delays or mismanagement in the case. Following conversion, the debtor loses control of the business to the hands of a Chapter 7 trustee, who is appointed by the court to liquidate the assets and satisfy creditor claims. Following dismissal, a debtor not only loses out on the strategic benefits of Chapter 11, but also loses out on the simple protections (e.g., the automatic stay) that even a Chapter 7 proceeding affords.

14 The Bankruptcy Code does not explicitly impose "good faith" as a prerequisite to filing a Chapter 11 petition for relief or for the continuation of the Chapter 11 proceedings. *See In re Universal Clearing House Co.*, 60 B.R. 985, 993 (D. Utah 1986) ("Although the former Bankruptcy Act explicitly contained a 'good faith' requirement for Chapter 11 filings, the present Bankruptcy Code has no such requirement."); see also 7 COLLIER ON BANKRUPTCY ¶ 1112.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.) (discussing dismissal for lack of good faith and stating that "[n]o provision of the Code expressly authorizes a court to dismiss a case on this ground"). Regardless, "courts have continued to view good faith as an 'implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the Code.'" *Universal*, 60 B.R. at 993 (citations omitted); *see also* COLLIER, ¶ 1112.07 (stating that courts consider good faith to be "an implicit condition to the filing and maintenance of a bankruptcy case").

15 *See generally* 11 U.S.C. § 305(a). Section 305(a) of the Bankruptcy Code provides that a court may dismiss or suspend a Chapter 11 case if "the interests of creditors *and* the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1) (emphasis added); *In re Globo Comunicacoes*, 317 B.R. 235, 255 (Bankr. S.D.N.Y. 2004) (stating test under Section 305(a)(1) is whether both the creditors and the debtor benefit from the dismissal, rather than applying a balancing test to determine whether dismissal is appropriate); *In re Aerovias Nacionalas*, 303 B.R. 1, 11 (Bankr. S.D.N.Y. 2003) (finding no basis to dismiss or suspend proceedings because debtor would not be "better served" and bulk of creditors were well served by bankruptcy proceeding).

16 *See generally* 11 U.S.C. § 362. Pursuant to section 362 of the Bankruptcy Code, upon filing a Chapter 11 petition in bankruptcy an injunction in favor of the debtor immediately and automatically arises by operation of law, regardless of notice. This injunction, called the automatic stay, imposes prohibitions on activity against the debtor, such as requesting payment, initiating a lawsuit, pursuing litigation activities in a pending lawsuit or enforcing a judgment against the debtor, and repossessing collateral that is property of the bankruptcy estate, are all precluded by the automatic stay, and a creditor must obtain court approval before taking any such action. Specific to shipping, while the automatic stay is in effect, it prevents a creditor from arresting a vessel, so charterers feel more confident that their cargo will be delivered as scheduled and not be held up due to an arrest of the vessel by a creditor. Creditors are also protected because the vessel continues in operation and generating income that will ultimately be available to pay claims.

17 Tr. H'rg. October 21, 2011, 488: 11-491:15 [Docket No. 222] in *In re Marco Polo Seatrade B.V., et al.*, Case No. 11-13634 (Bankr. S.D.N.Y. Oct. 26, 2011).

18 *Id.* at 491:20-494:4.

19 *Id.* at 494:5-12.

20 *Id.* at 496:5-497:4.

E. Lifting the Automatic Stay Was Not Warranted. The bankruptcy court found that the lenders' collateral interests in their vessels and cash collateral were being adequately protected, a topic that could be re-evaluated later in the Chapter 11 cases. As such, there was no justification to lift the automatic stay and permit the lenders to exercise their rights in the collateral securing their loan obligations[21].

Meanwhile, a similar story was unfolding in the Omega Navigation Enterprises Chapter 11 cases. On July 8, 2011 Omega and nine affiliates filed Chapter 11 petitions in the Southern District of Texas, Houston[22]. On August 25, 2011, the debtors' senior facilities agent filed a motion to dismiss the debtors' cases or convert them to liquidation Chapter 7 cases[23]. On September 7, 2011, the agent also filed its motion for an order lifting the automatic stay to exercise its rights in the collateral[24]. The motions were tried over five days before the bankruptcy court and, on December 19, 2011, the bankruptcy court issued its order denying the motions[25]. The bankruptcy court also issued, *sua sponte*, an order requiring the senior lenders, the junior lenders and the official creditors' committee to show cause as to why they should not be sanctioned for actions taken by them in prosecution of the motions[26].

A Safe Harbor

The Marco Polo and Omega cases established Chapter 11 as a viable option for global shipping companies. These two cases were watched closely by many in the international shipping industry because, if the bankruptcy courts accepted Marco Polo and Omega's Chapter 11 filings (which they did), it would pave the way for other non-US maritime shipping companies also to seek to utilise Chapter 11 to reorganise their businesses.

In the years that followed, multiple international shipping companies have sought shelter on US Chapter 11 shores as a direct result of these filings. Several foreign shipping debtors have stretched the initial Chapter 11 safe harbor into successful business reorganisations implemented through Chapter 11 plans. Many of the success stories are the direct result of a shipping company owner negotiating the terms of a plan of reorganisation prior to filing Chapter 11. Some examples are:

A. On February 5, 2012, TBS Shipping Services Inc. and certain of its affiliates filed for Chapter 11 in the Southern District of New York[27]. The debtors filed a "prepackaged"[28] Chapter 11 plan of reorganisation on the petition date, which was later modified slightly[29]. Under the plan, TBS restructured amounts it owed to its secured lenders into new postpetition loans and, in certain cases, equity interests in the reorganised company[30]. On March 29, 2012, the bankruptcy court entered an order confirming the plan[31] less than two months after the cases were filed.

B. On November 17, 2011, General Maritime Corporation Inc., a Marshall Islands corporation, and certain affiliates filed for Chapter 11 in the Southern District of New York[32]. The debtors had entered into a restructuring support agreement with their secured lenders prior to filing for Chapter 11. With an agreement in place prepetition, the debtors were able to file a prepackaged Chapter 11 plan of reorganisation on January 31, 2012[33]. The plan provided that the debtors' prepetition senior lenders would receive a significant pay down of their existing prepetition obligations and provide exit financing to the debtors. A US-based private equity manager would receive 98 percent of the equity in the reorganised company in exchange for providing $175 million of new

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[21] *Id.* at 494:13-495:5.
[22] *See In re Baytown Navigation, Inc. et al.*, Case No. 11-35926 (Bankr. S.D. Tex. July 11, 2011).
[23] *See* Motion of HSH Nordbank AG, As Senior Facilities Agent, For An Order Dismissing The Debtors' Cases Or Converting The Debtors' Cases To Chapter 7 Pursuant To 11 U.S.C. § 1112(b) [Docket No. 190] in *In re Baytown Navigation, Inc. et al.*, Case No. 11-35926 (Bankr. S.D. Tex. Aug. 25, 2011).
[24] *See* Motion of HSH Nordbank AG, As Senior Facilities Agent, For An Order Lifting The Automatic Stay Pursuant To 11 U.S.C. § 362(d) [Docket No. 220] in *In re Baytown Navigation, Inc. et al.*, Case No. 11-35926 (Bankr. Aug. 25, 2011).
[25] *See* Order [Docket No. 470] in *In re Baytown Navigation, Inc. et al.*, Case No. 11-35926 (Bankr. Dec. 19, 2011).
[26] *See* Order to Show Cause [Docket No. 465] in *In re Baytown Navigation, Inc. et al.*, Case No. 11-35926 (Bankr. Dec. 19, 2011).
[27] *See In re TBS Shipping Servs. Inc., et al.*, Case No. 12-22224 (Bankr. S.D.N.Y. March 5, 2012).
[28] The term "prepackaged," when used in connection with a Chapter 11 plan, is an industry term of art that refers to the debtor having negotiated the terms of the plan and solicited votes in favor of the plan prior to filing for Chapter 11 bankruptcy protection.
[29] *See* Joint Prepackaged Plan Of Reorganization For The Debtors Under Chapter 11 Of The Bankruptcy Code (With Technical Modifications) [Docket No. 98] in *In re TBS Shipping Servs. Inc., et al.*, Case No. 12-22224 (Bankr. S.D.N.Y. March 5, 2012).
[30] *Id.*
[31] *See* Findings Of Fact, Conclusions Of Law, And Order (I) Approving The Debtors' (A) Disclosure Statement Pursuant To Sections 1125 And 1126(B) Of The Bankruptcy Code, (B) Solicitation Of Votes And Voting Procedures, And (C) Forms Of Ballots; And (II) Confirming The Joint Prepackaged Plan Of Reorganization For The Debtors Under Chapter 11 Of The Bankruptcy Code [Docket No. 140] in *In re TBS Shipping Servs. Inc., et al.*, Case No. 12-22224 (Bankr. S.D.N.Y. March 2, 2012).
[32] *See In re General Maritime Corp., et al.,* Case No. 11-15285 (Bankr. S.D.N.Y. Nov. 11, 2011).
[33] *See* Joint Plan Of Reorganization Of The Debtors Under Chapter 11 Of The Bankruptcy Code [Docket No. 270] in *In re General Maritime Corp., et al.,* Case No. 11-15285 (Bankr. S.D.N.Y. Jan. 31, 2012).

equity capital and converting $175 million of secured claims against the debtors. All prepetition common stock was extinguished under the plan, and holders of such stock did not receive a distribution under the plan[34]. After some plan modifications, the debtors confirmed their Chapter 11 plan of reorganisation on May 7, 2012 with support from all of their creditor classes[35].

C. On July 1, 2013, Excel Maritime Carriers Ltd., a Greek shipping company, along with several affiliates filed for Chapter 11 in the Southern District of New York[36]. The debtors had reached an agreement with their senior lenders prior to filing, and the debtors filed a pre-negotiated[37] Chapter 11 plan consistent with the agreement on the first day of the cases[38]. Following mediation with the debtors' official creditors' committee and other parties, the debtors resolved issues regarding the proposed plan and confirmed a plan of reorganisation in January 2014[39].

D. On November 14, 2012, OSG and 180 affiliates sank into Chapter 11 in Delaware on account of an income tax liability[40]. After exclusivity was extended,[41] on March 7, 2013 OSG submitted a plan of reorganisation that would have given the debtors' prepetition secured lenders a 97 percent stake in the reorganised company through a debt-for-equity swap[42]. Existing shareholders objected, and on May 7, 2014 the debtors filed a new plan of reorganisation backstopped by a $1.5 billion rights offering that gave existing equity holders the right to purchase newly-issued stock in the reorganised company[43]. After further discussions amongst the parties, an order confirming the plan [Docket No. 3683] was entered by the bankruptcy court on July 18, 2014[44].

E. Most recently, on April 21, 2014 Genco Shipping & Trading Ltd. and certain affiliates filed for Chapter 11 in the Southern District of New York[45]. The debtors filed a prepackaged plan of reorganisation the day the cases were commenced[46]. On July 2, 2014, the bankruptcy court entered an order confirming the plan following a four-day trial on the proposed valuation of the reorganised debtors[47]. The plan converted the outstanding senior secured debt into equity in the reorganised debtors, paid general unsecured trade creditors in full and provided a small recovery existing equity holders. The debtors exited Chapter 11 less than three months from when they first embarked on the voyage.

Uncharted Waters

Certain foreign shipping companies are still docked in Chapter 11, including TMT and Nautilus Holdings Ltd., where the eventual outcomes are uncharted.
On June 20, 2013, Taiwan-based TMT and several affiliates entered Chapter 11 in the Southern District of Texas, Houston[48]. Like Marco Polo and Omega before it, TMT came under attack early on facing dismissal of its Chapter 11 cases from day one. After the bankruptcy court, *sua sponte*, raised the issue of TMT's debtor eligibility at the first court hearing, the debtors' various lenders challenged the appropriateness of the debtors' Chapter 11 filings. The primary challenges were, first, that the bankruptcy court did not have subject matter jurisdiction over the debtors given their *de minimis*

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[34] *Id.*
[35] *See* Order Confirming Second Amended Joint Plan of Reorganization of the Debtors Under Chapter 11 of the Bankruptcy Code [Docket No. 794] in *In re General Maritime Corp., et al.,* Case No. 11-15285 (Bankr. S.D.N.Y. May 7, 2012).
[36] *See In re Excel Maritime Carriers Ltd., et al.*, Case No. 13-23060 (Bankr. S.D.N.Y. July 1, 2013).
[37] The term "pre-negotiated," when used in connection with a Chapter 11 plan, is an industry term of art that refers to the debtor having negotiated the terms of the plan prior to filing for Chapter 11 bankruptcy protection, but soliciting votes from its creditors on the plan after the filing.
[38] *See* Joint Pre-Negotiated Chapter 11 Plan Of Reorganization Of Excel Maritime Carriers Ltd. And Certain Of Its Affiliates [Docket No. 19] in *In re Excel Maritime Carriers Ltd.*, et al., Case No. 13-23060 (Bankr. S.D.N.Y. July 2, 2013).
[39] *See* Findings of Fact, Conclusions of Law and Order Confirming the Amended Joint Chapter 11 Plan of Reorganization of Excel Maritime Carriers Ltd. and Certain of its Affiliates [Docket No. 551] in *In re Excel Maritime Carriers Ltd.*, et al., Case No. 13-23060 (Bankr. S.D.N.Y. Jan. 23, 2014).
[40] *See In re Overseas Shipholding Group, Inc.*, Case No. 12-20000 (Bankr. D. Del. Nov. 14, 2012).
[41] *See generally* 11 U.S.C. § 1121(c). Pursuant to section 1121(c)(3), if the debtor files a plan within the first 120 days of the Chapter 11 case, the debtor's exclusivity period is automatically extended through the first 180 days of the case. Accordingly, the debtor has, in effect, an automatic 60-day extension of its exclusivity period to allow the debtor to solicit acceptances from creditors and equity security holders without competition from another party-in-interest's plan.
[42] *See* Joint Plan Of Reorganization Of Overseas Shipholding Group, Inc., et al.., Under Chapter 11 Of The Bankruptcy Code [Docket No. 2593] in *In re Overseas Shipholding Group, Inc.*, Case No. 12-20000 (Bankr. D. Del. Mar. 7, 2014).
[43] *See* First Amended Joint Plan Of Reorganization Of Overseas Shipholding Group, Inc., et al., Under Chapter 11 Of The Bankruptcy Code [Docket No. 3107] in *In re Overseas Shipholding Group, Inc.*, Case No. 12-20000 (Bankr. D. Del. May 2, 2014).
[44] *See* Findings Of Fact, Conclusions Of Law, And Order Confirming First Amended Joint Plan Of Reorganization Of Overseas Shipholding Group, Inc., et al., Under Chapter 11 Of The Bankruptcy Code [Docket No. 3683] in *In re Overseas Shipholding Group, Inc.*, Case No. 12-20000 (Bankr. D. Del. July 18, 2014).
[45] *See In re Genco Shipping & Trading Ltd., et al.*, Case No. 14-11108 (Bankr. S.D.N.Y. April 21, 2014).
[46] *See* Prepackaged Plan Of Reorganization Of The Debtors Pursuant To Chapter 11 Of The Bankruptcy Code [Docket No. 14] in *In re Genco Shipping & Trading Ltd., et al.*, Case No. 14-11108 (Bankr. S.D.N.Y. April 21, 2014).
[47] *See* Order confirming the revised First Amended Prepackaged Plan of Reorganization of the Debtors Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 322] in *In re Genco Shipping & Trading Ltd., et al.*, Case No. 14-11108 (Bankr. S.D.N.Y. July 2, 2014).
[48] *See In re TMT Procurement Corp. et al.*, Case No. 13-33763 (Bankr. S.D. Tex. June 20, 2013).

contacts; second, that the debtors did not commence their Chapter 11 cases in good faith; and third, that the debtors' businesses could not be reorganised.

At a hearing on June 24, 2013, the bankruptcy court concluded that it did, in fact, have subject matter jurisdiction over the debtors' Chapter 11 cases. Specifically, the bankruptcy court found that the debtors were eligible to be debtors under section 109 of the Bankruptcy Code based on prepetition retainers held by the company's US-based financial and legal advisors. The decision was announced from the bench[49]. The bankruptcy court reserved the issue of whether the debtors' Chapter 11 cases should be dismissed as not having been filed in good faith[50].

At a hearing starting on July 16, 2013 and concluding on July 18, 2013, the bankruptcy court concluded both that the debtors commenced their Chapter 11 cases in good faith and that it had not been shown that the debtors were unable to reorganise. The two exceptions to this were that the bankruptcy court dismissed the Chapter 11 case commenced by TMT USA Shipmanagement (no vessel) for lack of good faith, and the Chapter 11 case commenced by F Elephant Corp. (owner of the F Elephant) for inability to reorganise. The bankruptcy court's findings of facts and conclusions of law were stated on the record on July 18, 2013[51]. The bankruptcy court entered a related order several days later[52].

The lenders appealed. The US District Court for the Southern District of Texas denied the appeals as a procedural matter but agreed to reconsider the bankruptcy court's decisions on a "*de novo*" basis. At a hearing on October 8, 2013, the district court issued an order affirming good faith and jurisdiction[53]. The district court's findings of facts and conclusions of law were stated on the record[54]. The lenders did not pursue any further appeals.

Following these initial dismissal efforts, the debtors were able to obtain debtor in possession financing and use of their secured lenders' cash collateral to finance the bankruptcy. Despite these and other achievements, the debtors have been unable to put forward viable plans of reorganisation in the cases with their lenders' consent. The bankruptcy court ultimately granted motions to lift the automatic stay with regard to certain vessels, which have been sold in foreign courts. With respect to others, the court has entered several orders approving sales of their vessels through the bankruptcy court. The case is currently pending, but it is closer to conclusion based on these recent sales.

Most recently, on June 23, 2014 Bemuda-based Nautilus Holdings Ltd. and twenty affiliated companies filed Chapter 11 petitions in the Southern District of New York[55]. In a declaration made in support of the filings, the declarant said the Chapter 11 cases would offer the debtors a "centralized forum for the collective restructuring of the Debtors' various loan obligations" while allowing it "to avoid certain possible precipitous actions by certain lenders, which could have resulted in an ad hoc, piecemeal exercise of remedies that would have jeopardized the enterprise value, including a potential loss of the debtor's significant cash reserves"[56]. In many ways, the international shipping market has not progressed much during the past three years. A combination of factors, including global economic conditions, lingering vessel oversupply and waning consumer demand have left many international shipping companies in the same predicament Marco Polo and Omega faced when the shipping Chapter 11 industry got started three years ago.

Lessons Learned

If you're an owner of a foreign shipping company contemplating filing your company for Chapter 11, you should keep the following in mind:

A. You should pursue out-of-court discussions with your lenders first. It is less expensive than Chapter 11, and lenders are less apt to feel threatened by it than Chapter 11.

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[49] *See* Tr. Hr'g. June 24, 2013, 236:22-240:10 [Docket No. 51] in *In re TMT Procurement Corp. et al.*, Case No. 13-33763 (Bankr. S.D. Tex. June 2, 2013).
[50] *Id.* at 234:14-18.
[51] *See* Tr. Hr'g July 18, 2013, 295:11-296:12 [Docket No. 207] in *In re TMT Procurement Corp.*., Case No. 13-33763 (Bankr. S.D. Tex. Aug. 7, 2013).
[52] *See* Order [Docket 134] in *In re TMT Procurement Corp. et al.*, Case No. 13-33763 (Bankr. S.D. Tex. July 23, 2013).
[53] *See* Order [Docket 543] in *In re TMT Procurement Corp.et al.*, Case No. 13-33763 (Bankr. S.D. Tex. Oct. 8, 2013).
[54] *See* Tr. Hr'g Oct. 8, 2013, 156:18-160:25 in *In re TMT Procurement Corp. et al*., Civ. Action 4:13-CV-2301 (S.D. Tex. Oct. 8, 2013).
[55] *See In re Nautilus Holdings Ltd. et al.*, Case No. 14-22885 (Bankr. S.D.N.Y. June 23, 2014).
[56] Declaration Of James A. Mesterharm Pursuant To Local Bankruptcy Rule 1007-2 And In Support Of The Debtors' Chapter 11 Petitions And First Day Pleadings [Docket No. 13], ¶ 30 in *In re Nautilus Holdings Ltd. et al.*, Case No. 14-22885 (Bankr. S.D.N.Y. June 24, 2014).

B. If your lenders leave you with no other choice but court, Chapter 11 may be the only insolvency regime in the world that can offer your water-logged shipping company with vessels around the globe a chance to reorganise. Owning property in the US, even a retainer paid on behalf of all debtors, and being able to demonstrate the cases were filed in good faith based on the belief a reorganisation is possible, are your tickets to get you started on our Chapter 11 voyage.

C. Chapter 11 sets a relatively brief period for a shipping debtor to be the only one to propose a plan of reorganisation. Once the exclusivity period expires any party in the case, including the debtors' lenders or an official committee of unsecured creditors, can file their own plans of reorganisation or seek other remedies. That's one reason a shipping company is far better off entering Chapter 11 with a plan in place. Ideally, for smoothest sailing this will come in the form of a restructuring support agreement with the debtors' significant counterparties (secured lenders, trade creditors, etc.), perhaps resulting in filing a pre-negotiated or prepackaged plan. Some of the largest success stories in the shipping space have chartered this course in Chapter 11.

D. Like any Chapter 11 case, cash is king. Chapter 11 is a very expensive exercise and a shipping company debtor - like any Chapter 11 debtor - must pay substantially increased professional fees to its own advisory team, any official creditors' committee that gets appointed and potentially even your secured lenders in order to adequately protect them and get a deal accomplished. If you don't enter Chapter 11 with sufficient balance sheet cash, it is imperative a shipping debtor arrange debtor in possession financing and seek to use its secured lender's cash collateral in order to fund a Chapter 11 reorganisation. Without cash, a Chapter 11 debtor will likely face liquidation or other ill fates.

E. Here's the take home message. For a distressed company with a viable business, Chapter 11 provides a chance to return to health - at a price. But for a shipping debtor whose business is unsustainable or where an owner has waited too long to seek Chapter 11 protection, chances are the ships will sink on the open Chapter 11 sea post-filing. If you're seriously considering Chapter 11 as an option, the sooner you engage restructuring professionals and get them involved in discussions with your lenders, the better, and the more restructuring options you'll have.

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal LLC
Baker & McKenzie LLP
Begbies Traynor
BDO LLP
Bingham McCutchen LLP
Cadwalader Wickersham & Taft LLP
Chadbourne & Parke LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance
Davis Polk & Wardwell
De Brauw Blackstone Westbroek
Deloitte LLP
DLA Piper
EY
Ferrier Hodgson
Freshfields Bruckhaus Deringer
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Hogan Lovells
Huron Consulting Group
Jones Day
Kaye Scholer LLP
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Norton Rose Fulbright
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