

Maritime Liens in Bankruptcy proceedings

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I Introduction

- ▶ Maritime liens - „unique security devices which serve the dual purpose of keeping ships moving in commerce while not allowing them to escape their debts by sailing away.“
- ▶ Long survival in general maritime law - due to their supremacy over other security rights guaranteed under rules of national or international law.
- ▶ But what when the shipowner is insolvent? The bankruptcy will subject all its assets to the bankruptcy estate and therefore subject to judicial sale and distribution to bankruptcy creditors. It could be claimed that bankruptcy court should be able to sell a vessel free of liens, without having to refer such a sale to an admiralty court.
- ▶ Different courts, procedures and two categories of secured creditors - maritime and bankruptcy creditors, who often compete with each other
- ▶ Relation between the 2 regimes not regulated in Montenegrin law and practice.

II Maritime Liens in a Nutshell

- ▶ Commonly defined as privileged claims or charges upon maritime property for service rendered to it or damage done by it, accruing from the moment of the events out of which the cause of action arises and travelling with the property secretly and unconditionally.
- ▶ Enforceability as their main feature
- ▶ International conventions governing maritime liens
 - The 1926 and 1967 International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (both Conventions done by CMI) and
 - The 1993 International Convention on Maritime Liens and Mortgages (jointly done by CMI, IMO and UNCTAD).
 - The Arrest Conventions (1952 and 1999), designed to unify various rules on the detention of a ship by judicial process for securing a maritime claim - provide *in rem* enforcement of maritime liens

Maritime Liens in Montenegro (1)

- ▶ *Maritime privileges*, governed by the 2019 Law on Registration of Ships, Floating Facilities and Installations for Hydrocarbon Production.
- ▶ The New Law basically implements the 1993 MLM Convention, despite the fact that the previous one (The Law on Maritime and Inland Navigation of Montenegro of 2008 as amended in 2011 and 2013) was following the 1926 MLM Convention.
- ▶ Pursuant to Article 166 of the 2019 Law, following claims are secured with maritime privilege:
 - (a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation;
 - (b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;
 - (c) claims for reward for the salvage of the vessel;
 - (d) claims for port, canal, and other waterway dues and pilotage dues and
 - (e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.
- ▶ Maritime privileges attach to ship and its appurtenances.

Maritime Liens in Montenegro (2)

- ▶ Ranking of maritime privileges: in the order listed in Article 166
- ▶ Maritime privilege for the salvage reward - priority over all other maritime liens which have attached to the vessel prior to the time when the salvage operations were performed.
- ▶ Maritime privileges from the same line shall rank *pari passu* as between themselves.
- ▶ Settlement order in case of judicial sale of the vessel (Article 983 The Law on Maritime and Inland Navigation)
 - 1) creditors with maritime privileges,
 - 2) creditors with contractual security rights and
 - 3) other creditors.

III Overview of bankruptcy law (1)

- ▶ Bankruptcy procedure in Montenegro is regulated by the Law on Bankruptcy of 2011 as amended in 2016 (LOB).
- ▶ The purpose of the procedure (Article 2 of the Law) :
“The bankruptcy procedure is conducted for the purpose of collective settlement of the creditors of the bankruptcy debtor, in case when he has the assets, by the sale of this property and the distribution of funds collected to the creditors.”
- ▶ The bankruptcy estate is managed solely by bankruptcy administrator;
- ▶ All litigations and administrative procedures against the debtor stay upon the commencement of the bankruptcy proceedings and
- ▶ No more security rights can be attached or enforced against the property of the debtor.

Overview of bankruptcy law (2)

Two types of bankruptcy creditors, depending on the nature of the claim they have against the debtor at the moment of declaration of bankruptcy:

► Secured creditors

Creditors with security or enforcement right over the debtor's property which is subject to prior registration (e.g. real estates, ships, shares, etc.)

► Non-secured creditors (ordinary, bankruptcy creditors)

If there is no such security or enforcement right, i.e. if a creditor has not secured his claim by virtue of a contract or specific law. Such claims are diverse by their nature, and according to priority, they are divided into three descending categories - payment orders.

IV - Position of maritime liens under bankruptcy proceedings

1. Shipowner from Montenegro goes bankrupt with its ships located in Montenegrin waters

Montenegrin maritime law vs. Montenegrin bankruptcy law

2. Shipowner from Montenegro goes bankrupt with its ships located in foreign waters

Montenegrin bankruptcy law vs. Foreign/Montenegrin maritime law?

3. Foreign shipowner goes bankrupt with its ships located in Montenegrin waters

Montenegrin bankruptcy law (recognition of foreign procedure) / Foreign bankruptcy law vs. Montenegrin/Foreign maritime law?

Position of maritime liens under bankruptcy proceedings - Conflicting points

- ▶ 1. Identification of maritime lienees as secured creditors in bankruptcy proceeding (ships non subject to registration?)
- ▶ 2. Competing with other secured rights
- ▶ 3. Maritime property (difference between 1926 and 1993 MLM Convention)
- ▶ 4. Business activities of a bankruptcy debtor in ongoing bankruptcy proceeding
- ▶ 5. Procedural sale of ship
- ▶ 6. Position of secured creditors who are not bankruptcy creditors

V - Conclusions and recommendations (1)

- Even though both established for the purpose of securing creditors, two different legal regimes in their interaction can actually result in the deprivation of maritime creditors' rights, rather than their protection.
- Maritime liens are substantive, vested rights, and as such shall be neither subject to the recognition of bankruptcy administration, nor exposed to the variability of ranking rules.
- Difficult to contemplate prevalence of maritime law under the current regime. One of the main consequences of the bankruptcy - stay of all proceedings against the bankruptcy debtor and his assets, which means that no provision of the maritime law can prevent ships and other maritime property to become a part of bankruptcy assets and therefore be completely subjected to the jurisdiction of the bankruptcy court and rules applicable.
- Legislative action required.

Conclusions and recommendations (2)

- ▶ Extraction of maritime property from bankruptcy regime:
amending the Law on Maritime and Inland Navigation by adding the *overriding provision* - making ships ring-fenced assets.
- ▶ Article 37(C)(1) of the Merchant Shipping Act of Malta should serve as a good model for drafting such provision:
- ▶ „All registered mortgages, any special privileges and all actions and claims to which a ship may be subject shall not be affected by the bankruptcy of the mortgagor or shipowner happening after the date on which the mortgage was created or the special privilege, action or claim arose, notwithstanding that the owner at the commencement of the bankruptcy had the ship in his possession, order or disposition, or was the reputed owner thereof, and such mortgage, privilege, action or claim shall have preference, on the said ship, over all other debts, claims or interests of any other creditor of the bankrupt or of any curator, trustee or receiver, acting on behalf of any other creditors. (2) Any judicial sale proceedings instituted by any registered mortgagee or privileged creditor shall not be interrupted or in any way hindered by any curator in bankruptcy, whether voluntary or compulsory, or any liquidator or receiver of the shipowner for any cause other than a cause that could be set up by the owner.”

Conclusions and recommendations (3)

- ▶ Implementation of UNCITRAL Model Law with reference to maritime liens: Montenegro would secure by its Laws that the opening of insolvency proceedings over a debtor located in another State shall not affect security rights of creditors or third parties in respect of ships belonging to the debtor. (to be carried out through the amendments of the LOB)
- ▶ Any surplus on the sale of maritime property upon satisfaction of maritime claimants shall be transferred to the bankruptcy administrator to take part into bankruptcy assets.
- ▶ When only maritime property is found it should be left to the discretion of the bankruptcy judge shall decide whether the procedure shall temporary stay (until the ship is sold in separate procedure and secured creditor's claims satisfied), or it shall be concluded in shortened procedure, on the grounds that there are no bankruptcy assets found for the satisfaction of the bankruptcy creditors (to be decided on a case by case basis).
- ▶ Encouraging mutual cooperation between bankruptcy and admiralty judges and other participants of described procedures.

Thank you for your attention!!!