Cover Page

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CROSS-BORDER INSOLVENCY OF SHIPPING COMPANIES: TIME FOR NIGERIA TO ADOPT THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

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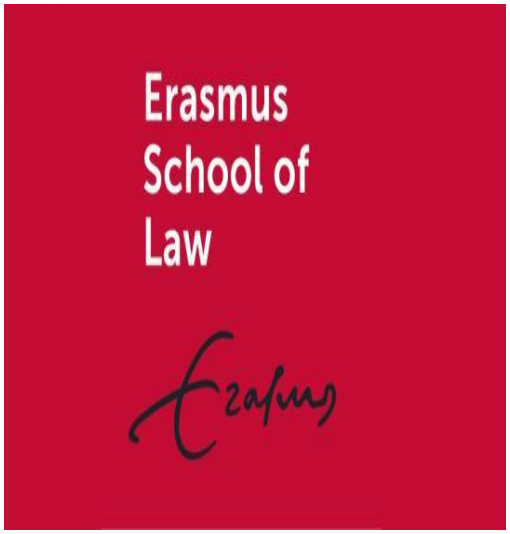

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List of Abbreviations and Acronyms

AJA	Admiralty Jurisdiction Act
CAMA	Companies and Allied Matters Act
CBI	Cross-Border Insolvency
CMI	Comité Maritime Internationale
COMI	Centre of Main Interest
FHC	Federal High Court of Nigeria
FMP	Foreign Main Proceeding
FNMP	Foreign Non-Main Proceeding
ML	UNCITRAL Model Law on Cross-Border Insolvency 1997
MSA	Merchant Shipping Act
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development

Abstract

Although shipping and the shipping industry continues to dominate world trade, some shipping companies especially ones with assets across various jurisdictions have gone bankrupt, thereby triggering a wave of cross-border insolvencies. Consequently, there have been mechanisms put in place by various legal systems and the international community if possible, to absolutely curtail the difficulties encountered during cross-border insolvency proceedings. Despite this state of affair, Nigeria seems not to be alive to the realities of the legal difficulties posed by cross-border insolvency especially when a shipping company is bankrupt. This is because Nigeria has no substantive cross-border insolvency regime presently. Thus, this research attempts to fill in the knowledge gap which hitherto appears to be lacking in terms of legal scholarship and theory in Nigeria with respect to maritime cross-border insolvency. It argues further that by means of the UNCITRAL Model Law, Nigeria can craft a robust insolvency framework that achieves a more optimal regulation of maritime cross-border insolvencies while at the same time striking a balance between the local insolvency regime and the current international benchmark on cross-border insolvency.

CHAPTER 1 - GENERAL INTRODUCTION

1.1 Background

The quest to access new markets all round the world has made it that many companies are becoming multinational. Increase in international trade coupled with the wave of globalization[1] could be said to be some of the driving forces. The shipping industry is no exception.[2] According to UNCTAD,[3] more than four-fifth of world trade is transported through the sea. Thus, over the years, shipping companies continue to look for avenues to expand their activities. Sometimes however, a company may experience financial difficulties and go bankrupt. When a business like shipping company fails, its creditors may be domiciled in foreign jurisdictions or the assets of the company may be in various jurisdictions culminating in cross-border insolvency[4] (CBI).

Due to the corporate nature of shipping companies, maritime law and insolvency law interact during maritime CBI although they are distinct bodies of law regulating different legal situations. Maritime law deals with issues of maritime claims and the commonly used property in form of assets are the ships owned or chartered by the debtor. Insolvency law on the other hand is mostly interested in the realization of the assets of the debtor and using these assets to satisfy the claims of creditors.[5] Shipping being a global business which is capital intensive,[6] there is a need to have proper legal mechanism in place to deal with maritime CBI.

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[1] Jan Bielawski, 'Influence of Globalization on Multilateral Economy' (2000) 9 Pol Q Int'l Aff 31

[2] Edgar Gold, 'World Shipping: A Global Industry in Transition' (2001) 15 Ocean YB 267

[3] United Nations Conference on Trade and Development, *Review of Maritime Transport* (United Nations 2019) 23

[4] Aniruddha Rajput, 'Cross-Border Insolvency and Public International Law' (2018) 19 Romanian J Int'l L 7

[5] Steven Chong, 'When worlds collide: The interaction between insolvency and maritime law' Keynote address at the 2nd meeting of the judicial insolvency network New York 22 September 2018 paragraph 16 <http://jin-global.org/content/jin/pdf/2018-sept-jin-keynote-address-new-york.pdf> accessed 22 February 2020

[6] Kashimana-Tsumba, 'Resolving Maritime Disputes in Nigeria' (2013) 1 NIALS Maritime Law Journal 167

1.2 Statement of Problem

A problem facing Nigeria now in terms of cross-border trade is the non-availability of legislation on CBI. This creates problems for foreign creditors who may want to levy execution on an asset located within jurisdiction during CBI. Also, there is the uncertainty as to the status of liquidators appointed by foreign courts to administer assets of a debtor found within Nigeria.[7] Furthermore, the provisions of statutes regulating corporate insolvency in Nigeria apply to insolvency of companies registered in Nigeria. These statutes are the Companies and Allied Matters Act[8] (CAMA) supplemented by the Companies Winding up Rules.[9] Also, there are statutes for the possible reciprocal enforcement of final judgments emanating from foreign jurisdictions subject to meeting certain requirements and on conditions of reciprocity.[10] However, they do not deal specifically with CBI. Thus, there is a lack of substantive CBI regime for judicial cross-border assistance during insolvency in Nigeria. Against this backdrop, it may be difficult administering assets when a foreign shipping company having assets in Nigeria becomes bankrupt.

Also, a problem peculiar to the shipping industry is that when a shipping company with assets in different jurisdictions is insolvent, assets such as ships may be subject to arrest by creditors wherever they may find them[11] including in Nigeria. In such situations, certain established rules of maritime law may conflict with insolvency proceedings. The potential conflicts between these competing claims and rules which may present problems during maritime CBI proceedings will constitute part of this research. This is with a view to determining the need to have a system that creates certainty for creditors and debtors, a system where outcomes will largely be predictable. It should be emphasized that during CBI, it may well be the case that while the debtor may try to

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[7] Chidiebere Ejiofor and Adewale Ateke, 'Cross-Border Judicial Assistance under Nigerian Law' (*Templars*,14 November 2019) <www.templars-law.com/cross-border-judicial-assistance-under-nigerian-law/templars-thought-leadership-cross-border-judicial-assistance/> accessed 08 March 2020; *West African Ventures v The Liquidators of Sea Truck Group Limited* (unreported) FHC/L/CS/656/18

[8] Companies and Allied Matters Act 1990 Cap C20 Laws of the Federation of Nigeria 2004

[9] Companies Winding up Rules 2001

[10] Foreign Judgement (Reciprocal Enforcement) Act Cap F35 LFN 2004; Reciprocal Enforcement of Judgments Ordinance 1958 Cap 175 Laws of the Federation of Nigeria and Lagos 1958

[11] Phoebe Hathorn, 'Cross-Border Insolvency in the Maritime Context: The United States' Universalism vs. Singapore's Territorialism' (2013) 38 Tulane Maritime Law Journal 240

seek ways to protect his assets in the best ways possible, a creditor's concern is whether he can commence proceedings against the debtor or levy execution against the asset of such debtor in various jurisdictions.

Against these problems, I have chosen the UNCITRAL Model Law (ML) which serves as an international benchmark for CBI of several countries for this Thesis. This is because it was enacted with the aim of enhancing cooperation between the institutions and parties involved in CBI, promoting legal certainty in trade and investment, ensuring fair and efficient administration of CBI, protecting the debtor's assets and business rescue.[12]

1.3 Purpose of Study and Research Questions

With maritime CBI in view, the purpose of this thesis is to add to the field of scholarly research and opinion, insight into the ML with a view to further the understanding of how its adoption in Nigeria may aid in CBI practice focusing on shipping companies. Hence, for a more optimal regulation of maritime insolvency and keeping in mind the claims of secured creditors, the core research question of this thesis is: Should Nigeria adopt the UNCITRAL Model Law on cross-border insolvency? To answer this, some other questions will be examined such as:

1. What impact does the ML have on secured creditors during maritime CBI?
2. What potential effects will adoption of the ML have on existing maritime laws in Nigeria and on secured creditors?

1.4 Scope of Study

In order to make an informed and thorough research on the topic, this research will examine the ML by analyzing its main features. The judicial decisions on maritime CBI would also be examined and their effect on maritime debtors and creditors. Since Nigeria has no CBI legislation, this thesis will specifically analyze three other commonwealth jurisdictions namely the USA, Singapore and Kenya to determine how their CBI regime based on the ML may aid Nigeria if the latter decides to adopt it.

[12] UNCITRAL, UNCITRAL Model Law on Cross-Border Insolvency 1997

1.5 Significance of Study

A significance of this research is that it would contribute to literature on how a robust CBI regime will address inadequacies in Nigeria's current legal framework. Also, the research findings would fill in the knowledge gap with respect to procedural mechanisms on CBI practice which hitherto appear to be lacking in Nigeria. A thorough analysis of the ML and its workability during maritime CBI in some jurisdictions that have adopted it would provide useful options on how Nigeria may enact the ML if the country decides to. This thesis will further contribute to legal scholarship for anyone interested in conducting further research on maritime CBI in Nigeria.

1.6 Methodology

In attempting to answer the research question, the first approach to be used in this thesis is the doctrinal theory of law. Under this theory, primary and secondary sources of law are used for analysis. In this regard, primary sources will include but are not limited to the UNCITRAL ML, the USA Bankruptcy Code particularly chapter 15, insolvency laws of Singapore[13] and Kenya.[14] Nigerian legislations like the Constitution of the Federal Republic of Nigeria,[15] Companies and Allied Matters Act,[16] Federal High Court (FHC) Act,[17] Merchant Shipping Act (MSA),[18] Admiralty Jurisdiction Act,[19] will be used. The secondary sources will include textbooks, legal journals, and other relevant publications. These sources were gotten mainly from library and online databases.

The second approach to be used is the comparative research methodology. Using this approach, three countries will be analyzed namely the USA, Singapore and Kenya. These countries have been chosen because for the USA being a major maritime nation, their CBI regime based on the ML is worth examining. Singapore is also a major

[13] Companies (Amendment Act) 2017 No 15 Tenth Schedule (Singapore)
[14] Insolvency Act 2015 No 18 5th Schedule (Kenya)
[15] Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 Laws of the Federation of Nigeria 2004
[16] Companies and Allied Matters Act 1990 Cap C20 Laws of the Federation of Nigeria 2004
[17] Federal High Court Act 1973 (as amended) Laws of the Federation of Nigeria 2004
[18] Merchant Shipping Act 2007 No 27 (Nigeria)
[19] Admiralty Jurisdiction Act 1991 No 59 Cap A5 Laws of the Federation of Nigeria 2004

maritime nation with a relatively new CBI regime. Therefore, it would be interesting to examine their regime to determine why they adopted the ML and how their experience may be utilized by Nigeria. Although Kenya may not be a major maritime nation, but being in Sub-Saharan Africa, examination of their recent CBI regime based on the ML may serve as stimulus for Nigeria to consider adopting the ML. The comparative research method will also examine the interplay between maritime CBI practice based on the ML and how the ML's adoption into the Nigerian body of laws may enhance judicial certainty and predictability on maritime CBI proceedings with attention focusing on the shipping industry.

Further to the above, rules of statutory interpretation and reasoning methods like deductive and inductive reasoning will be applied when necessary.

1.7 Organizational Layout

This thesis is divided into five chapters. This chapter has introduced this research. Chapter two defines CBI, discusses the various theories on CBI and gives an overview of the ML. Chapter three makes a comparative analysis of how the ML impacts maritime CBI and secured creditors in some jurisdictions that have adopted. Chapter four extrapolates the findings in chapter three to Nigeria in order to determine how the ML may impact Nigeria's maritime law and practice. It also explores alternatives to achieving the aim of the ML besides adopting it. The last chapter concludes with research findings and recommendations.

CHAPTER 2 - CROSS-BORDER INSOLVENCY THEORIES AND OVERVIEW OF THE ML

2.1 What is cross-border insolvency?

Neither the ML nor the Guide to the Enactment[20] gives a definition of what CBI is. Instead, the Guide gives a rather descriptive suggestion. The Guide suggests the meaning of CBI to include circumstances where a "debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place."[21] This would mean for CBI that either the assets of the debtor or its creditors are located in various jurisdictions.

2.2 Theories on CBI

Overtime, there have been arguments regarding which CBI theory is the best. The argument seems to revolve around "issues of predictability, certainty, national sovereignty, fairness and efficiency".[22] In handling CBI, historical analysis suggests that various legal systems of the world have adopted two perspectives or theories.[23] The first theory on the one hand suggests that there is a strict adherence to territorialism,[24] while the second theory on the other hand is anchored on absolute universalism.[25] It may be suggested that many legal systems fall within these two divergent theories. However, due to some perceived problems with these two theories as will be demonstrated later, a third theory has emerged, which falls in-between these two theories, called the theory

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[20] United Nations Commission on International Trade Law, *Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency*, UN Doc A/CN.9/442 (19 December 1997) as approved by GA Res A/RES/52/158 (1997) (30 January 1998) and amended by GA Res A/RES/68/107 (2013) (16 December 2013) [188]

[21] UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations Publication 2014) [revised] paragraph 1

[22] Emilio Ghio, 'Cross-Border Insolvency and Rescue Law Theory: Moving Away From The Traditional Debate on Universalism And Territorialism' (2018) 29 International Company and Commercial Law Review 714

[23] Bob Wessels, *International Insolvency Law* (3rd edition, Kluwer 2012) 7

[24] Jay Lawrence Westbrook, 'Universalism and Choice of Law' (2005) 23 Penn St Int'l L Rev 625

[25] ibid

of modified universalism.[26] Modified universalism appears to be the current trend among States especially since the coming into operation of the ML. Each of these theories are examined next.

2.2.1 Territorialism

The territorialism approach is based on the doctrine of sovereignty of State.[27] Sovereignty of State demands that decisions of courts are limited within the territorial boundaries of that State. Consequently, insolvency proceeding commenced in a state where the debtor has assets will be governed by laws of the local court.[28] Territorialism may be said to be the default mode used in most countries that have no formal legislation on CBI or a comprehensive CBI regime. Especially as it relates to corporate insolvencies, these jurisdictions are often ready to take care of locally located assets of the debtor and using them to satisfy claims of local creditors. Thus, they may not be readily willing to aid foreign creditors in CBI. To illustrate, corporate insolvencies in Nigeria are regulated by the CAMA provisions and settlement of creditors leans towards satisfaction of local creditors first.[29] This is unlike universalism under which all assets of the debtor are administered under a single insolvency proceeding while accommodating claims of both local and foreign creditors.

The theory of territorialism has been described as "grab rule".[30] This is because, due to the connection to local assets, local court will use whatever asset of the debtor found within its jurisdiction to settle local creditors. Thus, under this theory, the consequence is that local creditors would be given priority over other creditors that are not within jurisdiction. While territorialism favors local creditors by granting them priority in the distribution of the insolvency estate, the reverse seems to be the case for creditors outside jurisdiction. This is because for this latter category of creditors, the consequence could be the likelihood that the insolvency estate would be insufficient to satisfy their

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[26] Eugene Y C Wong and Jacky C K Yeung and Linsey Chen, 'Modified Universalism and the Proposed Adoption of the UNCITRAL Model Law on Cross-Border Insolvency in Hong Kong – From Hanjin Shipping Bankruptcy Case' (2019) 50 Journal of Maritime Law & Commerce 25

[27] Irit Moverach, 'Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge (2014) 9 Brooklyn Journal of Corporate, Financial and Commercial Law 228

[28] Neil Hannan, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017) 3

[29] Companies and Allied Matters Act 1990 Chapter 2

[30] Westbrook (n 24) 625

claims. Clearly, this theory has a drawback which is that it defies the principle of treating creditors equally.[31] Thus, it has been suggested by McCormack that it is discriminatory in nature.[32]

2.2.2 Universalism

Universalism is the direct opposite of territorialism. Unlike territorialism, universalism is premised on the practice that where one bankruptcy proceeding is commenced in the country of the debtor,[33] then all the debtor's assets would be consolidated in the jurisdiction where the main insolvency proceeding is taking place. The effect is that one State would have jurisdiction over the totality of the insolvency estate.[34] This means that all creditors will be required to make out their claims there. Proponents of universalism regard it as the most convenient of the approaches because it ensures judicial economy as fewer different proceedings will be needed in CBI proceedings.[35] Besides that, creditors are expected to be treated equally.[36] This also ensures that outcomes are predictable.[37]

However, a criticism of universalism in its pure form is that it involves acceding to the sovereignty of a foreign jurisdiction as local creditors are made to go to another State to assert their claims. In most cases, some courts may be unwilling to accede to the jurisdiction of a foreign counterpart.[38]

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[31] Ian Fletcher, "'L'enfer, C'est Les Autres": Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency' (2011) 46 Texas International Law Journal 496

[32] Gerard McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32 Oxford Journal of Legal Studies 328

[33] Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am Bankr LJ 461

[34] Warren de Waegh, 'Hanjin's Insolvency in the EU and the United States' (2019) 25 Journal of International Maritime Law 22

[35] ibid

[36] John Townsend, 'International Co-Operation in Cross-Border Insolvency: HIH Insurance' (2008) 71 Mod L Rev 816

[37] Erik Göretzlehner, *Maritime Cross-Border Insolvency: An Analysis for Germany, England & Wales and the USA* (Springer 2019) 45

[38] T M Gaa, 'Harmonization of Bankruptcy Law and Practice: Is it Necessary? Is it Possible?' (1993) 27 The International Lawyer 887

2.2.3 Modified Universalism

The theory of modified universalism adopts some elements of territorialism and universalism. In line with universalism, it recognizes the opening of a single insolvency proceeding in the debtor's home country which will administer the insolvency estate. However, it subjects the main insolvency proceeding to some territorialist exceptions in order to take care of interests of local creditors or secured creditors. In order to protect these creditors, courts have the discretion to issue orders after undertaking a review of the proceedings going on in other jurisdiction.[39] There is this recognition that concentrating the administration of the estate of the insolvent in a single court may affect the interests of local creditors. Thus, modified universalism would allow the foreign court the discretion to evaluate the main insolvency proceeding to know how to protect interest of local creditors. If, however, the interests of local creditors are likely to be jeopardized, the foreign court may refuse cooperation.[40]

Modified universalism also permits for secondary proceeding to be opened if necessary, to better cater for the interest of local creditors.[41] This may be fitting where the company's presence in the jurisdiction is quite significant.[42] Where secondary proceeding is commenced, modified universalism calls for cooperation among the various jurisdictions handling the insolvency proceedings in order to actualize an efficient administration and settlement of creditors.[43] The opening of secondary proceeding allows the local court to apply its own laws to such proceeding. Thus, while recognizing the main insolvency proceeding in the debtor's home state, the administration of the debtor's assets will be limited to the country where the secondary proceeding is on-going.

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[39] Kent Anderson, 'The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience' (2000) 21 Penn J Int'l Law 681
[40] Moverach (n 27) 231
[41] ibid
[42] ibid
[43] Jay Lawrence Westbrook, 'A Global Solution to a Multinational Default' (2000) 98 Michigan Law Review 2302

2.3 The Model Law

The UNCITRAL ML came into operation in 1997 through the resolution of the United Nations General Assembly.[44] In order to assist States in the enactment and interpretation of the ML, the UNCITRAL adopted the Guide to Enactment of the UNCITRAL ML on Cross-Border Insolvency (UNCITRAL Guide)[45] which continues to be amended and updated.

As a model law, States are at liberty to incorporate it into their legal systems while varying or modifying some of its provisions. The ML aims to render assistance to States so that their insolvency laws are up-to-date and in line with modern realities during CBI.[46] To ensure harmony and cooperation among States, States are enjoined to make few changes.[47]

2.3.1 The ML as an instrument of modified universalism

The ML's provisions as an instrument of achieving modified universalism appears to be apparent from the preamble and some other provisions. According to the preamble, the ML seeks to achieve the objectives of:

(a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
(d) protection and maximization of the value of the debtor's assets; and
(e) facilitation of the rescue of financially troubled businesses, thereby protecting

[44] Model Law on Cross-Border Insolvency of the United Nations Commission on Trade Law GA Res 52/158 UN GAOR 6th Comm 52nd session Agenda Item 148 UN Doc A/RES/52/158 (30 January 1998)
[45] United Nations Commission on International Trade Law, Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency, UN Doc A/CN.9/442 (19 December 1997) as approved by GA Res A/RES/52/158 (1997) (30 January 1998) and amended by GA Res A/RES/68/107 (2013) (16 December 2013)
[46] ibid para 1
[47] ibid

investment and preserving employment.[48]

In order to achieve these objectives, the ML relies on four main tools which are; access to justice, recognition of foreign proceedings, relief upon recognition, and cooperation and coordination.[49] These tools are examined below.

2.3.1.1 Access to local court

The first tool dealing with access to local court recognizes two aspects of CBI, that is, "inbound and outbound CBI".[50] For the first, the person administering a reorganization or liquidation under the law of the enacting State is authorized to act in a foreign State[51] on behalf of local proceedings. For the second, a foreign representative applying for recognition in a foreign State has some rights such as: direct access to courts in the enacting State,[52] commencing a local proceeding in the enacting State if he meets the conditions for such commencement.[53] He can also apply for recognition of the foreign proceedings in which he has been appointed.[54]

As an instrument of modified universalism, once recognized, a foreign representative has the right to participate in proceedings regarding the debtor conducted in the foreign State.[55] He is also allowed to commence action in the foreign jurisdiction.[56] Giving this latitude to a foreign representative means that appointment of a local liquidator may no longer be necessary. This limits cost and saves time.[57]

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[48] UNCITRAL Model Law preamble (a) – (e)
[49] Wong and Yang and Cheng (n 25) 26
[50] UNCITRAL, *UNCITRAL Model Law on cross-border Insolvency with Guide to Enactment and Interpretation* paragraph 27
[51] UNCITRAL Model Law article 5
[52] UNCITRAL Model Law article 9
[53] UNCITRAL Model Law article 11
[54] UNCITRAL Model Law article 15
[55] UNCITRAL Model Law article 12
[56] UNCITRAL Model Law article 23
[57] Rachel Morrison, 'Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer' (1999) 15 Queensland U Tech LJ 121

2.3.1.2 Recognition of foreign proceedings

In line with modified universalism, the ML recognizes that the debtor must have a home state which controls the insolvency proceedings and that courts in other jurisdictions should recognize the insolvency proceeding in the debtor's home state. They should also allow such proceeding to have effects within their jurisdiction. Thus, the ML streamlined this procedure.[58] In order to obtain recognition, the foreign representative must file a local application in the court of the foreign State.[59] The application has to be decided upon timeously[60] so that the debtor's assets within the jurisdiction are not dissipated nor concealed.[61] The foreign court can recognize the proceeding either as a foreign main proceeding (FMP) or a foreign non-main proceeding[62] (FNMP). The FMP's scope covers all the insolvent's estate and is governed by the laws of the debtor's home country. The FNMP is restricted to the assets within jurisdiction where the debtor has an establishment or ancillary place of business and is governed by the laws of the local court.

While the FMP is one taking place in the country where the debtor's centre of main interest (COMI) is, the FNMP is one taking place where the debtor has an establishment.[63] Although the ML did not provide for the definition of COMI, Article 16(3) provides the presumption that the COMI is the debtor's registered office, or habitual residence in the case of an individual. UNCITRAL also made two proposals to aid the presumption of the COMI which are: (a) "where the central administration of the debtor takes place; and (b) which is readily ascertainable by creditors".[64] Additional factors are also provided such as where the debtor's assets can be located, its primary bank, where books and records of the debtor are kept, where the employees are located, the law regulating audit of the company, etc.[65]

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[58] Adrian Walters, 'Modified Universalism & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 Am Bankr LJ 69
[59] UNCITRAL Model Law article 15(1)
[60] UNCITRAL Model Law article 17(3)
[61] Felicity Deane and Rosalind Mason, 'The UNCITRAL Model Law on Cross-Border Insolvency and The Rule of Law' (2016) 25 Int'l Insolvency Rev 152
[62] UNCITRAL Model Law article 17(2)(a) & (b)
[63] ibid
[64] UNCITRAL, *UNCITRAL Model Law on cross-border Insolvency with Guide to Enactment and Interpretation* para 145
[65] ibid paragraph 147

2.3.1.3 Reliefs

The benefit of the relief provisions lies in the assistance it offers the debtor with regards to the assets located in the foreign state. Once application has been filed for the recognition of a foreign proceeding, interim relief is available if required until the application is determined.[66] Once recognized, it has automatic suspensory effect on the debtor's properties. Recognition of a FMP has three effects: first, there is a stay regarding commencement or continuation of individual actions or individual against the debtor's assets; second, execution against the debtor's assets is stayed; and third, there is a suspension of the right to transfer, encumber or dispose of any assets of the debtor.[67] The stay is important to enable organized and orderly CBI proceeding.[68]

Also, whether a foreign proceeding is recognized as FMP or FNM, the court is given the power to entrust the distribution of all assets of the debtor within jurisdiction to the foreign representative. This is as far as the creditors' interests in that State are well protected.[69] These articles suggest that it is the proceeding in the debtor's home state that should administer the distribution of the insolvent's estate. Thus, the ML as an instrument of modified universalism addresses the concerns of both local and foreign creditors.

2.3.1.4 Cooperation and Coordination

Proper and effective cooperation vis-à-vis court of the main proceeding and foreign representative is a crucial tool that contributes to modified universalism. The ML enjoins them to cooperate and communicate to the "maximum extent" possible in matters within its scope.[70] The court can also communicate directly with, or to request information or assistance directly from foreign courts or foreign representative.[71] Provision is also made for cooperation and direct communication between persons

[66] UNCITRAL Model Law article 19(1) (a) & (b)
[67] UNCITRAL Model Law article 20(1)(a)-(c)
[68] Andre J Berends, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tul J Int'l & Comp L 363
[69] UNCITRAL Model Law article 21(2)
[70] UNCITRAL Model Law article 25(1)
[71] ibid article 25(2)

appointed to administer assets of the insolvent.[72] Possible forms of cooperation between the courts and foreign representatives are well encapsulated.[73] Articles 28-30 set out the way a local court would cooperate with its foreign counterpart and foreign representative if there is concurrent proceeding.[74] These provisions enable insolvency proceedings to be conducted in a manner that accommodates interests of all creditors.[75] They also allow judges to exchange correspondences with their foreign counterparts without any sort of diplomatic or consular involvement.[76]

2.4 Summary

The above analysis highlights inter alia the competing theories in the field of CBI. While territorialism focuses on protection of local creditors by according them priority, universalism recognizes a worldwide administration of the insolvent's estate under a single system. Modified universalism goes beyond universalism by ensuring that before acceding to foreign jurisdiction, interests of local creditors are taken into perspective. The court may even refuse such deference if it will be detrimental to their interest. The ML tries to achieve modified universalism by providing in principle for a single insolvency proceeding to administer the insolvent's estate subject to some territorialist exceptions. Thus, a foreign liquidator is allowed access to a foreign court, seek for recognition and relief, but the ML also allows for the commencement of local insolvency proceeding even when the FMP has been recognized in order to take care of local creditors. It also provides for cooperation so that the insolvency proceedings will be effectively handled. These provisions make the ML appealing, at least on the surface.

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[72] UNCITRAL Model Law article 26
[73] UNCITRAL Model Law article 27(1) (a) – (e)
[74] UNCITRAL Model Law articles 28-30
[75] UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (United Nations Publication 2013) paragraph 187
[76] UNCITRAL, *UNCITRAL Model Law on cross-border Insolvency with Guide to Enactment and Interpretation* paragraph 218

CHAPTER 3 - MARITIME CROSS-BORDER INSOLVENCY UNDER THE MODEL LAW

3.1 Maritime cross-border security mechanisms

When a shipping company becomes insolvent, there may be implications for the company and its creditors in various jurisdictions. This is because stevedores, suppliers of bunkers, seafarers, mortgagees, repair yards and ports of various jurisdictions serve as basis for maritime CBI. For example, an unpaid bunker supplier in the USA to a Nigerian flagged vessel would constitute an oversea creditor for purposes of maritime CBI. Similarly, an oversea mortgagee may want to enforce mortgage created over a ship due to the debtor's insolvency. Further consequence may also arise with respect to the ship, since she moves from one jurisdiction to another. Thus, during maritime CBI, she may become subject to arrest. Consequently, it entails that proceedings may be commenced in those jurisdictions where the ship has been arrested.

The claims of these maritime actors constitute them as automatic creditors. In order to protect these creditors, admiralty law has given them some security mechanisms. A form of security mechanism is in the form of maritime lien which may give rise to ship arrest. Another is enforcement of a mortgage created over a ship. These security mechanisms are examined.

3.1.1 Maritime Lien

A lien is the right to retain possession of a property of a debtor which comes into the creditor's possession lawfully until the claim is settled or otherwise extinguished. It gives the lienee a proprietary interest over an asset as security for a claim.[77] Maritime lien is a different form of security. It has been defined in *The Bold Buccleugh*[78] as a "… a claim or privilege upon a thing to be carried into effect by legal process ... that process to be a proceeding in rem, ... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches,

[77] Göretzlehner (n 37) 74
[78] *Harmer v Bell (The Bold Buccleugh)* (1861) Moore PC 267

and, when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached."[79]

Put differently, maritime lien is a form of security against a ship which attaches immediately situation giving rise to it occurs. It continues to attach until the claim is satisfied or the vessel is judicially sold,[80] or is caught by time bar.[81] A maritime lien does not necessarily arise out of agreement between the parties.[82] An example would be when a ship commits a tort by way of collision.[83] Also, a creditor need not necessarily have possession of the ship in order to enforce his lien.[84] By virtue of the lien, the lienee can proceed against the vessel by way of an action *in rem*[85] at common law. Further, maritime lien enables arrest of the ship. By arresting the ship, it serves as an effective mechanism to enforce maritime liens in admiralty law.[86] Maritime liens have been recognized as a "a sophisticated and generally harmonious system for dealing with cross-border insolvencies."[87] This is with reference to maritime lien being one of the security mechanisms available to maritime creditors against a debtor, irrespective of where the debtor is located or the jurisdiction where the vessel is located at the time of her arrest

In many jurisdictions, the traditional maritime liens are salvage, damage done by a ship, crew wages, master's wages and disbursements. By statutory enactment, jurisdictions may add further claims which may give rise to maritime liens commonly referred to as statutory lien. Examples of such are claims arising out of ship repairs, charter parties, pilotage, etc.[88] Traditional maritime lienholders are usually secured creditors in cases of insolvency. For statutory lienholders, they may become secured creditors immediately a writ is issued for a maritime claim against the vessel depending on the jurisdiction.

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[79] ibid at 284–285
[80] *The Two Ellens* (1872) PC 161
[81] Merchant Shipping Act 2007 No 27 (Nigeria) section 72
[82] Frank G Harmon, 'Discharge and Waiver of Maritime Liens' (1972-1973) 47 Tul L Rev 787
[83] Paul Macarius Hebert, 'Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 384
[84] William Tetley, *Maritime Liens and Claims* (2nd edition, Blais Inc 1998) 58
[85] *Harmer v Bell (The Bold Buccleugh)* (1861) Moore PC 267
[86] Alfred J Falzone III, '"Two Households, Both Alike in Dignity": The International Feud Between Admiralty and Bankruptcy' (2014) 39 Brooklyn Journal of International Law 1191
[87] Steven Rares, 'Ship Arrests, Maritime Liens and Cross-Border Insolvency' Address at the 6th Annual World Congress of Ocean 2017 (*Federal Court of Australia,* 3 November 2017) <www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171103> accessed 22 February 2020 paragraph 3
[88] Chong (n 5) paragraph 13

3.1.2 Ship Mortgage

Ship mortgage is another form of security mechanism for maritime creditors. It has been defined as "a form of security created by a contract that confers a property interest, not a property transfer, to the mortgagee and it comes to an end upon the performance of agreed obligations by the mortgagor."[89] Put simply, a ship mortgage is a conditional creation of an interest in a ship as security for a loan transaction. Some countries require that a mortgage created over a ship need to be registered.[90] In practice, the mortgagee can bring an action *in rem* against the ship or a part of it over which the mortgage was executed to secure payment of the principal sum advanced as well as interest. Usually, for such action to be sustained, there must be a certain due and payable sum to the mortgagee which has not been paid.[91] The mortgagee may also dispose of the vessel by private sale.

These security mechanisms discussed above which give rise to enforcement against a vessel and available to a maritime creditor may be impacted by the operation of the ML during maritime CBI. The extent to which the ML may impact maritime CBI is analyzed in the next section.

3.2 Comparative analysis of the ML's impact on maritime CBI

Under the ML, when the FMP is recognized during CBI, it would lead to the suspension of any form of execution against the assets of a debtor. A provision of the ML that guarantees this effect is article 20(1). Under this article, the commencement of action against the assets of the debtor is suspended. Similarly, any execution on assets of the debtor would be stayed. Article 20(1) also has the effect of suspending the transfer or encumbrance of the debtor's assets. The effect of this on maritime claims is that their enforcement may be suspended immediately the FMP is recognized. However, in seeking to protect the debtor's assets during CBI, the ML also seeks to protect the interests of creditors. It does this by giving freedom to States to choose the scope of the automatic stay provisions. Thus, States may modify the effect of the mandatory stay

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[89] Aleka Mandraka-Sheppard, *Modern Maritime Law Vol 2: Managing Risks and Liabilities* (3rd edition, Informa Law from Routledge 2013) 173

[90] Companies and Allied Matters Act 1990 ss 191 and 197

[91] *Banque gevevoise e commerce et de credit v Compania maritime de isola spetsai limitida* (1979) 1 NSC 68

in article 20(1) by means of article 20(2). The purpose of article 20(2) is to act as a clog in the wheel of article 20(1) so that its effect is made subject to the limitations and exception in the insolvency laws of an enacting state.[92] This would mean that the way States adopt and apply the stay provisions may have consequences on maritime CBI and secured creditors within their jurisdiction.

In this section, the effect of the ML during maritime CBI would be determined. The section uses the comparative approach to analyze the effect of the ML on maritime CBI in States that have adopted it. Being a major shipping nation, the USA's position will be discussed to set the pace. The focus will be on Singapore and Kenya, also maritime nations as their MLs are quite recent compared to that of USA. The aim will be to compare how the ML works during maritime CBI and how this may be useful to Nigeria should the latter decide to adopt it. I have deliberately left out the UK mainly because they have four different legislations under which they deal with CBI,[93] the European Insolvency Regulation[94] and the ML inclusive as these will be too broad for the purpose of this thesis.

3.2.1 The USA

3.2.1.1 Overview of U.S Model Law

The ML was enacted as Chapter 15 of the USA Bankruptcy Code.[95] In order to initiate a proceeding under Chapter 15, the foreign representative is required to apply for recognition. Under chapter 15, a court will grant an application for recognition when three requirements are met. Firstly, "the proceeding must qualify as a foreign main or foreign non-main proceeding. Secondly, the foreign representative must be a person or body corporate. Thirdly, the petition must meet the requirements of section 1515"[96] (dealing with documentary requirements). This follows directly from the ML.

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[92] UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* paragraph 183

[93] *Rubin & Anor v Eurofinance SA & Ors* [2012] UKSC 27

[94] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) [2015] OJ L 141/19 ('Insolvency Regulation')

[95] Title 11 United States Code Chapter 15 section 1501(a)

[96] Title 11 United States Code Chapter 15 section 1517(a)

3.2.1.2 Impact of Article 20 on maritime CBI in USA

Article 20(1) of the ML was enacted as section 1520(a)(1) of the U.S Bankruptcy code. Section 1520(a)(1) provides that when the FMP is recognized, "sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States".[97] These sections which are contained in chapter 11 of the Bankruptcy code and in particular section 362 provides for an automatic stay on all assets of the debtor in the U.S.[98] Its scope extends to all creditors whether in liquidation or rehabilitation proceedings. Thus, chapter 15 complements chapter 11 of the U.S bankruptcy code which is substantive bankruptcy law. While chapter 11 protection takes immediate effect upon filing for bankruptcy in the U.S, chapter 15 protection is automatic when a foreign representative of the debtor files for recognition and the U.S court recognizes the FMP.[99] The U.S Courts are always willing to recognize a foreign insolvency proceeding as FMP under chapter 15.[100] As such, the U.S CBI system has been described as a "safe harbor"[101] for shipping companies in financial distress. Furthermore, the U.S made no exception for any form of claims of secured creditors like maritime lienholders from the effect of the automatic stay. As such, the scope of chapter 15 stay is very broad as maritime lienholders are affected by the automatic stay. Assets covered by the recognition of the FMP are then handed over to the foreign representative for distribution in the debtor's COMI. It may be said that Chapter 15 is not well suited for modified universalism as local creditors are made to go to a foreign jurisdiction to join in the insolvency proceedings.

The stay of proceedings affects all maritime assets of the debtor in the U.S whether under arrest or yet to be arrested. Some examples can be found in case laws. In *re Daebo International Shipping Co*[102] the debtor's vessel was arrested prior to the recognition of FMP in the USA. However, the Court lifted attachments on the vessel of the debtor

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[97] Title 11 United States Code Chapter 15 section 1520(a) (1)
[98] Title 11 United States Code section 362(a)
[99] Andre P DeNatale and Curtis C Mechling, 'Shipping companies find a safe harbor in U.S. bankruptcy courts. (*New York Law Journal*, 03 March 2013) <https://2hljrm13wpep1y93sv1m25vn-wpengine.netdna-ssl.com/wp-content/uploads/2019/03/Pub1311.pdf> accessed 08 March 2020
[100] Erik (n 37) 115
[101] Andre P DeNatale and Curtis C Mechling (n 99)
[102] 543 BR47 2016 AMC 187 (Bankr. SDNY 2015)

upon the recognition of a rehabilitation proceeding going on in Korea. In another case, *Evridiki Navigation Inc. v Sanko Steamship Co,*[103] the debtor's vessel was already under arrest before the foreign representative filed for recognition. While still under attachment, Sanko entered into formal insolvency proceedings in Japan being its head office and the foreign representative subsequently filed for Chapter 15 bankruptcy protection. By filing for Chapter 15 protection, a stay automatically follows from recognition of the FMP. The court was thus given the opportunity to determine if the continued attachment of the vessel was still necessary. The Court held that the detention of the vessel will no longer guarantee the aim of arrest because there is the likelihood that the Bankruptcy Court in New York will recognize Sanko's petition as the FMP and then the stay of actions against Sanko and its assets in the U.S. will become mandatory.[104] And if that happens the vessel can no longer provide security for the claims of the creditors as the Court no longer has the power and will not have the power to order a judicial sale of the vessel, or to convey any interest in her to the creditors.[105] Thus, the vessel was released from arrest.

Further to releasing arrested vessels and granting automatic stay, the court's order may also mean that local creditors will have to go to the foreign jurisdiction where the main insolvency is taking place in order to participate in the proceedings as in *Re Hanjin Shipping Co.*[106] In that case, although maritime lienholders contended any automatic stay from being issued by the court in order to obtain security for their claims,[107] however, the court still made an order against arrest regarding all the debtor's assets in the USA. The court's order was such that maritime creditors had to seek for relief in Korea.[108] This is because, this logically follows from the automatic stay in article 20(1).

These case laws demonstrate that the effect of the ML during maritime CBI in the USA is that enforcement of the security mechanisms available to a maritime creditor against the debtor is suspended upon recognition of the FMP. This extends to maritime lienholders who have arrested or may want to arrest a vessel within the territory of the USA. This also extend to mortgagees as they are not allowed to enforce a mortgage via

[103] 880 F Supp 2d 666 668 2012 AMC 1817 1818 (D Md 2012)
[104] ibid 672-75 AMC 1827-29
[105] ibid
[106] 2016 AMC 2113 2114 (US Bankr DNJ 2016)
[107] ibid 2115-16
[108] ibid 2122

arrest against the vessel being the subject of the loan agreement.[109] The court's order may also mean that local creditors may have to go to a foreign jurisdiction in order to participate in the insolvency proceedings. Thus, the USA approach to maritime CBI exemplifies the universalist spirit of the ML.

3.2.2 Singapore

Prior to the adoption of the ML, Singapore had no legislation for judicial cross-border assistance. Although there is a legislation for the possible reciprocal enforcement of foreign judgments[110] which is still in force, its provisions do not address CBI.[111] This left Singaporean courts with the option to 'exercise discretion' on judicial cross-border assistance under the common law.[112] The exercise of discretion means that the court decides whether or not to recognize a foreign representative during CBI and the extent of any assistance to be rendered. The exercise of discretion under the common law did not add to the certainty and predictability of CBI in Singapore. This is because a foreign representative would not be sure of recognition and what the nature of the reliefs might be. These challenges consisted in Singapore's adoption of the ML.

Singapore's ML forms part of the Companies (Amendment) Act.[113] With the adoption of the ML, the old regime of "ring-fencing"[114] which was applicable under the old Companies Act before the adoption of the ML may be said to have been abandoned. Ring-fencing practice was a system under the Companies Act wherein, upon the satisfaction of debts incurred in Singapore, local creditors were paid first, and any proceeds left was remitted to the foreign debtor. However, since the adoption of the ML, creditors both local and foreign would now expect equal treatment in any CBI proceedings in Singapore based on the ML.[115] This is in sharp contrast with the ideals of territorialism which prioritizes local creditors over foreign creditors. It also enforces the universalist spirit of the ML under which a single jurisdiction takes care of the

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[109] Lia Athanassiou, *Maritime Cross-Border Insolvency* (Informa Law from Routledge 2018) 210
[110] Reciprocal Enforcement of Foreign Judgments Act 2001 (Singapore)
[111] Lee Kiat Seng, 'Cross-Border Insolvency Issues' (*Law Gazette*) <https://v1.lawgazette.com.sg/2009-4/feature2.htm> accessed 06 April 2020
[112] ibid
[113] Companies (Amendment Act) 2017 No 15 Tenth Schedule
[114] Sek Keong Chan, 'Cross-Border Insolvency Issues Affecting Singapore' (2011) 23 SAcLJ 417
[115] Companies (Amendment Act) 2017 No 15 Tenth Schedule article 13(2)

distribution of the entire insolvency estate while maintaining the principle of equal treatment of creditors. It further ensures modified universalism in that interests of all creditors wherever located are taken into consideration in order to achieve effective distribution of the debtor's estate. These add to the certainty and predictability of CBI in Singapore.

3.2.2.1 Singapore's article 20

It may seem that having a CBI legislation means that Singaporean courts are now ready to aid foreign representatives during CBI and thus, the recognition of FMP should come with its reliefs under article 20(1). In adopting the ML, Singapore limited the application of article 20(1) by filling in the blank space in article 20(2) and confining its effect as though the debtor had been made the subject of a winding up order under the Companies (Amendment) Act.[116] Also, Singapore went further to make exception for claims of secured creditors from the scope of the automatic stay by providing that the stay provisions do not affect the right to enforce any security against the debtor's property.[117] Thus, even when a winding up is made, a secured creditor may utilize section 262(3) of the Companies (Amendment) Act where such leeway is granted to seek leave to enforce his security. The section provides that "when a winding up order is made, no action may be proceeded with or commenced against the company except with the leave of court and in accordance with any terms as the court might impose".[118] A secured creditor's claim serves as basis for leave in order to enforce a security as article 20(3)(a) of Singapore's ML expressly makes enforcement of security claims permissible. This differs from the position in the U.S which makes no such exception.

During their adoption of the ML and consequent amendment of the Companies Act, maritime stakeholders in Singapore proposed that *in rem* proceedings under the Admiralty Act be specifically carved out from article 20 of the ML.[119] The Ministry of Law responded by stating that the stay in the ML cross-refers to that in the Companies

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[116] Companies (Amendment Act) 2017 No 15 Tenth Schedule article 20(2)
[117] Companies (Amendment Act) 2017 No 15 Tenth Schedule article 20(3)(a)
[118] Companies (Amendment Act) 2017 No 15 section 262(3)
[119] 'Supplementary Response to Feedback Received on Companies (Amendment) Act 2017 to Strengthen Singapore as an International Centre for Debt Restructuring' (*Ministry of Law Singapore*, 21 October 2016) <www.mlaw.gov.sg/news/public-consultations/supplementary-response-to-feedback-received-on-companies--amendm/> accessed 23 May 2020

Act during insolvency[120] and that similar principles for granting leave under the Act would be applicable during CBI. Also, that there are case laws dealing with when leave would be granted under the local insolvency regime,[121] so it is not necessary to carve out *in rem* proceedings. One of such case laws is *Lim Bok Lai v Selco*[122] which will be discussed shortly. A contributory factor to this proposal by the Ministry of Law is that Singapore distinguishes between traditional maritime liens and statutory maritime liens as examined next.

3.2.2.1.1 Traditional Maritime Lien

The traditional maritime liens recognized in Singapore are salvage claims, damage done by a ship, wages of the master, master's disbursements and wages of the crew.[123] These claims attach to the ship immediately as they arise and constitute those bringing them as secured creditors. Arguably, unless a winding up order has been made by a Singaporean court, the lienholder may not be affected by a stay of proceedings.[124] Even when a winding up order has been made, the lienholder being a secured creditor can still apply for leave pursuant to section 262(3) of the Companies (Amendment) Act and section 20(3)(a) of Singapore's ML in order to proceed against an asset of the company. This is because, traditional maritime lienholders are regarded as secured creditors in Singapore.

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[120] ibid
[121] ibid
[122] (1987) SLR 423
[123] 'Ch 25 Shipping Law' (*Singapore Law Watch*) <www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-25-shipping-law> accessed 11 April 2020
[124] *Lim Bok Lai v Selco* (Singapore) Pte Ltd (1987) SLR 423

3.2.2.1.2 Statutory Lien

Singaporean law recognizes the concept of statutory lien. This arises when a claimant invokes the admiralty jurisdiction of Singaporean court in order to litigate a maritime claim. Claims like pilotage, cargo damage claims, general average, etc fall within this category.[125] Unlike the traditional maritime lien which constitutes the claimant as secured creditor immediately the cause of action arose, a statutory lienholder becomes a secured creditor upon issuance of a writ *in rem* and the court making an arrest order.[126]

The effect is that where the claimant has proceeded to enforce his claim via a writ *in rem* before commencement of winding-up, he falls within the status of a secured creditor. The court may thus grant him leave to proceed to arrest the debtor's vessel. This was the position of the creditor in *Lim Bok Lai v Selco.*[127] The creditor was an unpaid bunker supplier and had issued an *in rem* writ against the vessel of the debtor before commencement of winding-up proceedings. The application for leave pursuant to section 262(3) of the Companies Act was granted. Had the writ been issued after winding-up commenced, the action is likely to be stayed as he won't be regarded as a secured creditor. This contrasts with traditional maritime lienholder whose security attaches the moment the cause of action arose.

Although Singapore's CBI is quite new, the country being a major shipping nation had prior to the adoption of the ML accorded recognition to a foreign representative of a company undergoing rehabilitation proceedings. Thus, in *re Taishoo Suk*[128] the foreign representative of Hanjin had by originating summons sought the assistance of the High Court of Singapore to grant recognition and the consequential reliefs. Since the ML was not yet operational, the foreign representative based his application under the common law[129] and relied on a 2014 precedent of the Court of Appeal in *Beluga.*[130] After analyzing the Korean proceedings and finding out that it was a rehabilitation proceeding, the Court relying under common law and the decision in *Beluga* exercised its 'inherent

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[125] High Court (Admiralty Jurisdiction Act) 1962 Cap 123 (Singapore) section 3

[126] *Owners of Cargo Laden on Ship Monica Smith v Owners of Ship Formerly "Monica Smith" Now "Monica S" (The Monica S)* (1967) 2 Lloyd's Report 113

[127] (1987) SLR 423

[128] (2016) SGHC 195

[129] ibid paragraph 14

[130] *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815

powers' and granted the reliefs sought. However, the court's decision did not extend to the arrest of *Hanjin Rome*, one of the debtor's assets already seized before the application was made. The decision arose out of a concession made by the foreign representative.[131] There were concerns by some admiralty claimants whose claims would be affected by a stay order, however, this did not restrain the court from making the order. A factor that influenced the court's decision was that Singapore was at that time about to adopt the ML.[132] The court thereby utilized its inherent powers under the common law and granted the reliefs sought.[133]

Until now, there seems to be no judicial application of article 20 of the ML yet in the maritime context in Singapore. Nevertheless, from the way Singapore enacted the stay provisions, it may be argued that Singapore embraced modified universalism due to the territorial exceptions for secured creditors. As regards maritime CBI, traditional maritime lienholders who have commenced proceedings before commencement of insolvency by the debtor may not be caught by the recognition of the FMP. Even when they do, being secured creditors alone entitles them to be granted leave by the court in line with article 20(3)(a) of Singapore's ML which expressly permits such leave in line with section 262(3) of the Companies (Amendment) Act. Statutory lienholders who issued *in rem* writ against a vessel before the debtor commenced insolvency proceeding retains the status of secured creditors and can continue with their claim. For others yet to do so, they are caught by the automatic stay.

3.2.3 Kenya

Prior to adopting the ML, Kenya had no legislative framework for cross-border judicial assistance for corporate insolvency. Just like Singapore, this meant that Kenyan court had to rely on the common law of England to deal with CBI cases.[134] This was made possible by the Judicature Act[135] which provides for the application of the common law of England in Kenya. Despite the applicability of the common law, the scope and

[131] *re Taishoo Suk* (2016) SGHC 195 paragraph 35
[132] (2016) SGHC 195 para 14
[133] ibid
[134] Benhajj Shaaban Masoud, 'Towards Adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border insolvency in Kenya' (2013) 22 Int'l Insolvency Rev 212
[135] Judicature Act 1967 Cap 8 Laws of Kenya s 3(1)

manner of utilizing it during CBI proceedings was not predictable and certain[136] because the extent and form of the court's assistance were not clearly defined.

In 2015, Kenya enacted the Insolvency Act.[137] The Insolvency Act is an amendment and consolidation of the existing legislations regarding insolvency of private persons and artificial entities including unincorporated bodies.[138] Kenya's CBI law is modeled in line with the UNCITRAL ML. Section 720 of the Insolvency Act gives the force of law to the UNCITRAL ML.[139]

3.2.3.1 Article 20 of Kenyan Model Law

A notable provision in the Kenyan ML is how article 20 of the ML was enacted. As noted previously, article 20(1) provides for a stay on assets of a debtor upon recognition of the FMP. The Kenyan ML guarantees this relief. The difference however with the USA and Singapore's disposition is how Kenya enacted article 20(2) of the ML which creates an avenue for modification of the stay effects. Kenya filled in the blank space in article 20(2) of the ML via section 22(2) of its ML.[140] In enacting it, Kenyan ML gives Kenyan Court the discretion to make "an order subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets."[141] Thus, instead of subjecting the stay provisions to the provisions of the local legislation dealing with insolvency, Kenya decided to leave the scope of the stay to the Court's discretion. Admittedly, this provision is very broad and seems to be open-ended.[142] In this regard, it may be submitted that the way a court would exercise discretion regarding the scope of the stay may not guarantee certainty of outcomes in maritime CBI proceedings. When statutory provisions are clear, it becomes easier to predict outcomes. The efficiency of the proceeding may also not be assured.

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[136] Masoud (n 132) 212
[137] Insolvency Act 2015 No 18 Schedule 5 section 720
[138] Insolvency Act 2015 No 18 Long Title
[139] Insolvency Act 2015 No 18 Schedule 5 section 720
[140] Insolvency Act 2015 No 18 5th schedule s 22(2)
[141] Insolvency Act 2015 No 18 5th schedule s 22(2)
[142] Martin Davies, 'Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' (2018) 66 Am J Comp L 108

The legal certainty of the solution provided in section 22(2) of Kenya's ML in maritime CBI is yet to be tested. However, what may be argued is that the effect of the mandatory stay in Kenyan Insolvency Act would differ from that of the U.S and Singapore. This may have some consequences with respect to secured maritime creditors when examined in the context of maritime lien under Kenyan law. Maritime liens under Kenyan law are the same as in Singapore, both borrowing the same concept from England. Moreover, the admiralty jurisdiction of the Kenyan High Court is tied to that of England.[143] As such, claims for salvage, damage done by a ship, crew wages, master's wages and disbursements are all traditional maritime liens in Kenya. Thus, the enforcement of these claims during maritime CBI may therefore depend on how the court exercises its discretion. In this regard, it may be argued that this provision may afford the Court opportunity to apply English law that best suits the given situation since the Court is permitted to apply English law.

The effect on admiralty proceeding like ship arrest as suggested is that, where a country does not make the exception in article 20(1) of the ML via article 20(2) for claims of secured creditors and a vessel is arrested before the debtor's insolvency, admiralty proceedings with possible exception of maritime lien claims will have to be stayed.[144] Furthermore, any security given will have to be released.[145] While this is a suggestion and is tentative, it may be argued that until section 22(2) of Kenyan ML is argued in Kenyan court, no one may say for sure what admiralty creditors would expect from the court. Unlike the position in the U.S and Singapore where there is certainty of outcome in terms of recognition of the FMP, a foreign representative applying for recognition in Kenya may have to convince the court to exercise its discretion in his favor.

3.3 Conclusion

So far, the legal excursions undertaken in this chapter established that admiralty law has given maritime creditors some security mechanisms. These security mechanisms are usually enforced against the ship or other property of the debtor. Sometimes, enforcement of these securities coincides with insolvency of the debtor. While the ML seeks to protect interests of all parties during CBI, it also allows States to regulate the scope of the stay of actions against the estate of the debtor within its jurisdiction. While

[143] Judicature Act 1967 Cap 8 Laws of Kenya s 4(2)
[144] Davies (n 142) 110
[145] ibid

the USA took a broad approach to this by allowing a stay on all assets of the debtor, Singapore has taken an approach that excludes the claims of secured creditors from the automatic stay. Kenya has left the scope of the stay at the discretion of the judge. These examinations established that there is no consistency and uniformity regarding the stay of domestic proceedings and the exceptions that apply during maritime CBI. Thus, it has been argued that territorial considerations appear to have defeated the universalist spirt of the ML.[146] In all, what may be concluded is that a foreign representative may have to acquaint himself with the law of each country to determine what to expect when applying for recognition. In the next chapter, these different approaches will be extrapolated to Nigeria in order to determine the possible approach to be taken if the ML is to be adopted.

[146] Hannan (n 28) 129

CHAPTER 4 - POTENTIAL INTERACTIONS BETWEEN NIGERIAN MARITIME LAWS AND THE UNCITRAL MODEL LAW UPON ITS ADOPTION

4.1 Introduction

Some of the challenges noted in the previous chapter with respect to Singapore and Kenya prior to their adoption of the ML are akin to Nigeria's present situation. It was earlier mentioned that Nigeria has no substantive CBI regime. Furthermore, unlike the positions in Singapore and Kenya prior to their adoption of the ML, the idea of reliance on the common law, despite its uncertainty, is yet to be legally tested during CBI in Nigeria. These situations limit the certainty and predictability of outcomes in any potential CBI proceedings in Nigeria. Against this backdrop, several commercial and insolvency law practitioners have voiced their opinions on the need for Nigeria to adopt the ML.[147] However, in attempting to adopt the ML, admiralty law practitioners may express reservations due to its potential impact on admiralty law and practice in Nigeria.[148]

This chapter will examine how the adoption of the ML in Nigeria may potentially conflict with Nigerian maritime laws. In this regard, the discussion will attempt to juxtapose the different approaches of the jurisdictions discussed in the preceding chapter with Nigeria to determine the best approach that may likely be adopted by Nigeria.

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[147] Anthony Idigbe, 'Nigeria: Overview of Insolvency and Restructuring in Nigeria' (*Mondaq*, 5 June 2019) <www.mondaq.com/Nigeria/x/812246/Insolvency+Bankruptcy/Overview+Of+Insolvency+And+Restructuring+In+Nigeria> accessed 08 March 2020; Olanipekun Orewale and Perenami Momodu and Oluwasemiloore Atewologun and Odinaka Okoye, 'Insolvency Law Reforms in Nigeria – Where are we Going' (*Aelex*, 2018) <www.aelex.com/wp-content/uploads/2018/12/INSOL-WORLD-4TH-QUARTER-2018-Aelex-Contribution.pdf> accessed 08 March 2020

[148] Afun and Ofili, 'Recognition and Enforcement of Cross-Border Insolvency: Nigeria in Perspective' (*Bloomfield Law Practice*, 2019) <http://bloomfieldlaw.com/Publications/Recognition_and_Enforcement_of_Cross_Border_Insolvency.pdf> accessed 20 April 2020

4.2 Potential areas of conflict

4.2.1 Maritime Lien

In Nigeria, maritime liens are codified under the Admiralty Jurisdiction Act[149] (AJA). Under the Act, the categories of claims giving rise to the traditional maritime liens and statutory liens are recognized. Section 2(3) of the AJA contains claims which may be brought against a ship which will form the basis of a statutory lien. For example, claims arising out of charterparties, pilotage, general average, towage, cargo claims, etc are recognized to fall within this category. The traditional maritime liens under the AJA are limited in number and they are listed in section 5(3) as: (a) salvage; (b) damage done by a ship; (c) wages of the master or of a member of the crew of a ship; (d) master's disbursements. These claims are complemented by the provisions of section 66 of the Merchant Shipping Act[150] (MSA) which adds two more claims as maritime liens. These additions include, 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 ship; and claims for ports, canal and other waterways dues and pilotage dues.[151]

The potential conflict the ML may present upon its adoption in Nigeria would be whether maritime lien as a security mechanism available to a creditor may still be enforced during maritime CBI. This is because of the ML's suspensory effect upon the recognition of the FMP as provided in article 20(1). However, the scope of this suspensory effect will depend on how States make provision for it[152] by means of article 20(2). In order to determine how the stay under the ML may operate in Nigeria and its potential impact on admiralty law and practice, reference would be made to the various jurisdictions earlier examined in line with any similar provision in Nigeria law.

So, assume that Nigeria adopts the ML, it may not be desirable to leave the automatic stay without modifications as did the USA. It would be recalled that the effect of the automatic stay in the USA covers all assets of the debtor located within the country during CBI. Also, the USA did not make the article 20(2) exception. Although the rationale for the stay is to avoid dissipation of the debtor's assets during the insolvency

[149] Admiralty Jurisdiction Act Cap A5 Laws of the Federation of Nigeria 2004
[150] Merchant Shipping Act 2007 No 27
[151] Merchant Shipping Act 2007 No 27 section 66(c) & (e)
[152] Athanassiou (n 109) 111

proceeding, States are permitted by article 20(2) to make exception for claims of secured creditors or to commence actions after recognition of the FMP.[153] Therefore, it may not be in the best interest of secured maritime creditors in Nigeria to suspend all proceedings as this will disrupt enforcement of their security.

With respect to Singapore's position, there seems to be similarity of approach. This is because Singapore subjected the automatic stay provisions of article 20(2) of the ML as though the company had been made the subject of a winding up order. So, if Nigeria in adopting the ML decides to confine the stay provisions as though the company had been made the subject of a winding up order like the approach in Singapore, the effect will depend on CAMA's position, being the local insolvency law. Under the CAMA, winding up involves the process where a company's assets are liquidated, dissolved and then distributed. When a company is being wound up by the court, a creditor or the company may petition any other court where proceeding is going on for an order staying proceeding and the court may stay proceeding in favor of the of the court handling the winding up proceeding.[154] Furthermore, there is a stay on the assets of the debtor. Section 414 of the CAMA guarantees this by providing that "where a company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void."[155] When a winding up order is subsequently made, no action can be commenced against the debtor unless by leave of court given on such terms as the court may impose.[156] This is similar to Singapore's position under the Companies (Amendment) Act. The slight difference however is that Singapore has by means of their CBI regime explicitly excluded claims of secured creditors thereby allowing them to apply for such leave.

Thus, upon commencement of winding up in Nigeria, section 414 of the CAMA takes immediate effect. It becomes important therefore to determine when a winding up under the CAMA has commenced to know exactly when the provision of section 414 of the CAMA becomes operational. When a company files for insolvency, winding up is deemed to have commenced when a special resolution has been passed for a

[153] UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* paragraph 183
[154] Companies and Allied Matters Act 1990 section 412
[155] Companies and Allied Matters Act 1990 section 414
[156] Companies and Allied Matters Act 1990 section 417

voluntary winding up unless there is proof of fraud.[157] In any other case, where the petition for winding up of the company has been presented to the court.[158] In this regard, when a company is being wound up by the court due to insolvency, the relevant moment would be when the winding up petition is filed at the FHC of Nigeria.[159]

It may seem that if article 20(2) of the ML is subjected to winding up order under the CAMA, maritime lienholders who have commenced in rem actions against any asset of the company may not be caught by the stay in article 20(1) of the ML. This is because the provision of section 414 applies after commencement of winding up. The implication of this provision vis-à-vis the ML may be that once an application for recognition of the FMP is filed in court by a foreign representative, preexisting claims of maritime lienholders who have commenced actions against the assets of the company are preserved. The express use of the word "after" by the lawmaker could be construed to recognize that prior to winding-up process there may have been attachments, execution or sequestration against the assets of the debtor. Therefore, by using the word "after", prior executions, attachments or sequestrations may not be affected by any subsequently opened insolvency proceeding of the debtor.

This may also mean that before the court recognizes the FMP, it would be necessary to determine when the winding up commenced in the debtor's COMI. If the commencement of winding up predates any attachment or enforcement by a lienholder on any asset of the debtor within Nigeria, the court will have to make an order for the release of such asset as the lienholder's act has no legal effect. This is because of the use of the word 'void'. A void action in law is an action that has no legal effect and is unenforceable.[160] Conversely, if the attachment commenced before winding up in the debtor's COMI, the creditor's claim succeeds, and he may continue with his claim.

With respect to Kenya, the legislators may adopt the Kenyan approach and fill in article 20(2) of the ML in such a manner that discretion is given to the court. This would mean that when a creditor makes an application to enforce a lien during insolvency proceedings, the stay provisions in article 20(1) shall only be effective upon whichever conditions the court thinks is necessary.[161] Arguably, this approach may not bring

[157] Companies and Allied Matters Act 1990 section 415
[158] ibid
[159] Companies and Allied Matters Act 1990 section 610
[160] *Oyeneyin v Akinkugbe* (2010) 4 NWLR part 1184 page 265 at 285
[161] Insolvency Act 2015 No 18 (Kenya) 5th schedule s 22(2)

certainty to the proceedings. Even though the FHC of Nigeria has jurisdiction in both insolvency and admiralty cases,[162] it may be difficult reconciling any potential difficulties that may arise from such order. Unless one of the proceedings is stayed, there might be the possibility of conflicting orders by different judges of the court especially when different judges are handling admiralty and insolvency cases respectively. Moreover, the certainty of outcome of such proceeding may not be assured. This is because no one may determine beforehand how the mind of the court would work in exercising such discretion.

Also, a foreign representative who applies for recognition of the FMP might be surprised to realize that although his application is granted, this might not fully translate into the automatic stay provided for in article 20(1) of the ML because of the way the court exercises its discretion. The effect might be that the universalist spirit of the ML may be defeated if the court should make any order allowing such *in rem* actions. The debtor's assets may thereby not be fully realized by the foreign representative. The further effect is that equally of creditors may no longer be guaranteed. In order to reconcile any discrepancies that may arise from such order, the suggestion would be the probability of reverting to English law in order to persuade the court to stay any enforcement. Perhaps, following the decision of the English Court of Appeal *Re Aro Co Ltd,*[163] maritime lienholders whose claims arose before the insolvency proceeding and have commenced action against the vessel may be protected and will not be caught by the automatic stay provision. Also, claims of statutory lienholders who have issued writ in rem before commencement of winding up may also be preserved. Again, it depends on the court's discretion.

4.2.2 Ship Arrest and the potential impact of the ML

One way of enforcing maritime liens is through ship arrest. Ship arrest is "the detention of a ship by judicial process to secure a maritime claim…"[164] It is an effective mechanism to assert claims in admiralty law.[165] Ship arrest serves two purposes in admiralty proceeding. Firstly, it compels the owner of the vessel (in this context the insolvent) to appear and identify with the vessel. Secondly, it is a means of securing any

[162] Federal High Court Act 1973 (as amended) Laws of the Federation of Nigeria 2004 section 7
[163] (1980) 2 WLR 453
[164] International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships Brussels 1952 article 1(2)
[165] Falzone III (n 165) 1191

judgment sum.[166] In this regard, ship arrest is not a maritime security but a mechanism by which maritime securities are enforced.[167]

Ship arrest in Nigerian law is considered as an action in rem. An action *in rem* is "an action against a *res* (thing) which is usually a ship or cargo or freight and may be filed against the proceeds of sale of the *res."*[168] The effect of an action in rem is that the claimant could proceed against the vessel before judicial sale and also, against the proceeds of judicial sale. As earlier noted, the traditional maritime liens and statutory liens under the AJA and MSA can trigger arrest of a ship.[169]

During maritime CBI, it may be that a ship owned by the foreign debtor which forms part of the company's estate is subject to arrest over a maritime claim in Nigeria. However, due to the suspensory effect of article 20(1) of the ML, it appears that the right available to the claimant via arrest may be encroached upon during maritime CBI. As such, the potential difficulty between ship arrest and the ML is that ship arrest is territorial[170] in nature, thus governed by the territorialism principles. To illustrate the territorialism principles underlying ship arrest, in Nigeria for example, the vessel sort to be arrested must be in Nigerian territorial waters[171] or is expected to be within the territorial waters in 3 days.[172] The ML though adopts modified universalism[173] in that it seeks for cooperating and coordination between the arresting jurisdiction and the jurisdiction of the main insolvency proceeding.[174]

Having seen the rationale for the automatic stay, the U.S line of cases[175] and the positions in Singapore and Kenya, a viable option may be to subject article 20(2) of the

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[166] *Chief Registrar High Court Lagos State v Vamos Navigation Limited* (1976)1 SC 40/42
[167] Jessica Ajonumah and Edward Ebenezer Pepple, 'Ship Mortgage in Nigeria: An analysis of Contemporary Issues' (2019) 18 South East Asia Journal of Contemporary Business, Economics and Law 121
[168] *Mercantile Bank of Nigeria Ltd v Tucker & Ors (The Bosnia)* 1 NSC 428 at 430
[169] Admiralty Jurisdiction Act 1991 ss 2(3) (a-u) & 5(3)
[170] Admiralty Jurisdiction Procedure Rules 2011 Order 7
[171] Territorial Waters Act 1967 Cap T5 Laws of the Federation of Nigeria 2004 section 1(1)
[172] Admiralty Jurisdiction Procedure Rules Order 7 rule 1
[173] UNCITRAL Model Law preamble paragraph (a)
[174] UNCITRAL Model Law articles 25-27
[175] *re Daebo International Shipping Co* 543 BR47 2016 AMC 187 (Bankr. SDNY 2015); *Evridiki Navigation Inc. v Sanko Steamship Co* 880 F Supp 2d 666 668 2012 AMC 1817 1818 (D Md 2012); *Re Hanjin Shipping Co* 2016 AMC 2113 2114 (US Bankr DNJ 2016)

ML to the provisions of the CAMA as though the company is subject of a winding up order. This is because CAMA has made exception for executions, sequestration and attachments carried out prior to winding up, of which ship arrest falls within if made before commencement of winding up. It will thus preserve arrests made before a company files for insolvency. This will align with the CAMA provisions because even in local insolvency proceeding, a creditor cannot bypass the statutory stay imposed by CAMA upon commencement of winding up. Another alternative may be to make exception for claims of secured creditors like maritime lienholders as will be discussed later in this chapter.

4.2.3 Ship mortgage

A Nigerian shipowner that wants to borrow money may create a mortgage over his ship to secure the loan.[176] The MSA gives this statutory backing when it provides that "a ship registered in Nigeria, or a share in the ship may be made a security for a loan or other valuable consideration, and there shall be a proper written instrument creating the security".[177] Mortgage created over a Nigerian flagged vessel requires registration.[178] Registration accords the mortgagee the status of a secured creditor. In Nigeria, a registered mortgage is easier to enforce. This is because, one of the statutory rights available to the mortgagee is the right of sale without recourse to court in case of default of payment by the mortgagor.[179] Also, the mortgagee could bring an action *in rem* against the ship or a part of it over which the mortgage was executed to secure payment of the principal sum advanced as well as interest. Being a maritime claim, the mortgagee may also apply for the arrest of the ship to enforce the mortgage.[180]

Where a mortgaged vessel is owned by a foreign debtor and the creditor is domiciled in Nigeria, there may be the possibility that the vessel calls at Nigerian ports. The potential impact of the ML on ship mortgage as a security mechanism during maritime CBI in Nigeria relates to the enforcement of the mortgage deed when the mortgagor defaults

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[176] Chidi Ilogu, *Essays on Maritime Law and Practice* (Elcam Integrated Services Ltd 2006) 33
[177] Merchant Shipping Act 2007 No 27 s 53(1)
[178] Companies and Allied Matters Act 1990 ss 191 and 197
[179] Merchant Shipping Act 2007 No 27 s 57(2); *National Bank of Nigeria Ltd v Okafor Lines Ltd (No 3)* (1967) 1 NSC 110
[180] Admiralty Jurisdiction Act 1991 No 59 Cap A5 Laws of the Federation of Nigeria 2004 section 2(2)(a)

in payment. The ship being the collateral is also subject to distribution in the debtor's COMI upon the debtor being wound up. It does not seem to be in doubt that article 20(1) of the ML covers all properties of the debtor during CBI, the mortgaged vessel as well. The extent to which enforcement of ship mortgage in Nigeria during maritime CBI would be impacted seems to depend on the legislation dealing with ship mortgages in Nigeria and not necessarily the ML if adopted as demonstrated below.

Athanassiou has argued that in some jurisdictions, ship mortgage by default may not be affected by the automatic stay under the ML and that mortgagees can pursue *in rem* actions against a vessel as may be found in some local legislations.[181] To substantiate her argument, she cited section 70 of the Canadian Shipping Act which provides that "the mortgage of a vessel or a share in a vessel is not affected by the bankruptcy of the mortgagor after the date of the registration of the mortgage…"[182] In essence, her argument is that a ship that is the subject of a mortgage transaction under this provision is by default outside of the insolvency estate. To further buttress her argument, she referred to the writings of Li[183] who argues the same in respect of ship mortgage under Chinese law. If these arguments are correct, it follows that a registered ship mortgage under any similar provision in Nigerian law is an exception to the stay provisions of the ML by default. This is because, a similar provision of the Canadian Shipping Act appears to be found in the MSA.[184] Section 56(2) of the MSA provides that "a registered mortgage of a ship or share in the ship shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage…"[185] Undoubtedly, this provision seems to clearly remove a mortgaged ship that is registered from the insolvent's estate during bankruptcy in Nigerian law.

From a cursory look at section 56(2) of the MSA, the requirement for its application would be that the mortgage must be registered prior to the bankruptcy of the mortgagor. Thus, it becomes important to evaluate this section vis-à-vis the provision of section 414 of the CAMA which bars execution on the assets of the debtor once insolvency proceeding has commenced. In this respect, it is submitted that the position

[181] Athanassiou (n 109) footnote 50
[182] Canadian Shipping Act 2001 C26 section 70
[183] L Li, 'Maritime Liens and Mortgages in Bankruptcy: A Comparison of Recent Canadian, Chinese and US Law' (2010) 16 JIML 133-135
[184] Merchant Shipping Act 2007 No 27 section 56(2)
[185] ibid

of the CAMA would not apply provided the mortgage was registered prior to the commencement of bankruptcy proceedings. CAMA will only come in to render the enforcement by the mortgagee invalid if the mortgage was unregistered at the time of commencement of winding up by the court. What section 56(2) of the MSA has done is to effectively protect the registered mortgagee from any bankruptcy of the mortgagor and to neutralize the effect of section 414 of the CAMA. As such, a foreign mortgagor may not expect protection during maritime CBI in Nigeria provided the mortgage is registered prior to insolvency. It may well be that due to the peculiar nature of ship mortgage as a finance mechanism in the shipping industry, the lawmakers did not intend the mortgagee's security right to be encumbered by the mortgagor's bankruptcy. Besides these legislations, the ML has also made an *in rem* exception under article 32 for claims such as that of the registered mortgagee as long it is consistent with local legislation, such as in the MSA. Thus, the registered mortgagee's right to take possession or to sell the mortgaged vessel ought not to be affected by the bankruptcy proceedings of the mortgagor as this accord with the MSA.

From this discussion, what may be concluded is that the stay provisions of the ML will not affect the enforcement of a ship mortgage by the mortgagee during maritime CBI in Nigeria provided the mortgage was registered prior to the bankruptcy of the mortgagor. Thus, Nigerian law firmly preserved the security right of the registered mortgagee by means of legislation. It follows that the ML would affect only unregistered ship mortgage during maritime CBI in Nigeria.

4.3 Alternative solution to cross-border judicial assistance in Nigeria

Having seen the potential impact of the ML on maritime liens and ship arrest in Nigeria if adopted, it may be worth analyzing if there is alternative Nigeria may utilize to render cross-border judicial assistance without necessarily adopting the ML while still achieving some of its ideals.

Although the ML aids in achieving modified universalism, it has been argued that adopting the ML may not be the only way of achieving same.[186] Modified universalism is said to be modified because local court is given the discretion to evaluate the impact that deference to a foreign jurisdiction will have on domestic creditors before deciding

[186] Wong and Yeung and Chen (n 26) 32

whether to cooperate or not.[187] The Privy Council alluded to this when it held in *Singularis Holdings Ltd v PricewaterhouseCoopers*[188] that by virtue of the inherent powers of common law courts and subject to limitations set out in legislation, English courts have the power to render assistance to a court outside of the UK.[189] Indeed, common law courts have inherent powers to assist in CBI[190] and backed by statute. As a matter of English law, one such power is codified in section 426 of the Insolvency Act[191] which provides that "the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."[192]

From the statute and judicial interpretation above, a deduction may be made: the inherent power of English Courts to render assistance in CBI is derived from common law and backed by statute. By analogy, Nigeria is a common law jurisdiction and where there is a lacuna in Nigerian Law, the courts are enjoined to apply the common law. Thus, the FHC being the court with jurisdiction in bankruptcy cases[193] is also enjoined to do so. Arguably, for this power to be fully utilized in CBI cases, it ought to be backed by statute. Without such statutory backup, its exercise in CBI cases may amount to a 'naked usurpation of legislative functions under the thin guise of [judicial] interpretation'.[194] In this regard, the statutory backup may be an amendment of substantive insolvency frameworks as is currently being done in Nigeria.

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[187] Jesse Zhihe Ji, 'Cross-Border Rehabilitation: An Impediment to Ship Arrest in Singapore?' (2017) NUS Law Working Paper 003/2017, 15 <https://law.nus.edu.sg/cml/pdfs/wps/CML-WPS-1704.pdf> accessed 23 April 2020

[188] (2014) UKPC 36

[189] ibid para 51-60

[190] Andrew Godwin and Timothy Howse and Ian Ramsay, 'The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity' (2017) 26 Int'l Insolvency Rev 6

[191] Insolvency Act 1986 (UK)

[192] Insolvency Act 1986 section 426(4)

[193] Constitution of the Federal Republic of Nigeria 1999 (as amended) section 251; Federal High Court Act section 7

[194] *Magor and St Mellons RDC v Newport Corp* (1951) 2 All ER 839 at 841

One such amendment is the on-going amendment of the Bankruptcy and Insolvency Act[195] via the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill.[196] Unlike the substantive legislation that is only for insolvency of private persons and partnerships, the Bill seeks to provide for both personal and corporate insolvencies.[197] Until the Bill receives Presidential assent, it may be submitted that addition of a section equivalent to that of section 426 of the Insolvency Act of the UK to the Bill would provide basis for judicial cross-border assistance and aid in achieving modified universalism. Similar provision will serve as legislative basis upon which the FHC will cooperate with their foreign counterparts. Furthermore, modified universalism is not without limits. As Lord Sumption alluded in the *Singularis*, its practice must be consistent with the local court's substantive law.[198] Therefore, Nigerian courts will render assistance while at the same time keeping within the bounds of the local insolvency regime as envisaged by the ML.

Despite this prospect, it may be submitted further that even with a section equivalent to section 426 of the Insolvency Act of the UK, it is still necessary to define the scope of any assistance that may be rendered to a foreign representative during CBI. Also, the forms of cooperation between Nigerian court and foreign courts. Further, whether claims of maritime lienholders would be excluded from the automatic stay or not needs to be clearly spelt out too. Although the CAMA is undergoing amendment currently,[199] there is no indication of a provision for CBI[200] that will take care of these. In this regard, adoption of the ML will set clear parameters regarding the extent Nigeran Courts will cooperate with their foreign counterparts and assist foreign representatives during CBI. Also, the question of whether a liquidator appointed by a foreign court could administer assets located in Nigeria would be have been solved. The maximization of the debtor's assets and equal treatment of creditors whether foreign or local will also be assured in line with the ML. These will bring certainty to any CBI proceedings.

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[195] Bankruptcy and Insolvency Act 1979 No 16 Cap B2 Laws of the Federation of Nigeria 2004
[196] Etigwe Uwa, 'Restructuring and Insolvency in Nigeria' (*WWL*, 02 August 2018) <https://whoswholegal.com/analysis/restructuring--insolvency-in-nigeria> accessed 24 April 2020; Bankruptcy and Insolvency (Repeal and Re-enactment) Bill 2016
[197] Halliday E Chidi, 'Harmonization of the Laws on Bankruptcy and Corporate Insolvency in Nigeria: A Desideratum' (2018) 4 Port Harcourt Journal of Business Law 151
[198] *Singularis Holdings Ltd v PricewaterhouseCoopers* (2014) UKPC 36
[199] Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2018
[200] 'Reforming the Business Climate in Nigeria: Critical Changes Introduced by the Companies and Allied Matters Bill' (*Banwo & Ighodalo*, 29 January 2019) <https://banwo-ighodalo.com/grey-matter/reforming-business-climate-nigeria-critical-changes-introduced-companies-allied-matters-bill-2018?> accessed 28 April 2020

4.4 Should Nigeria make an exception for secured creditors?

Due to the friction between the ML and admiralty law during maritime CBI, some jurisdictions like Singapore have made an exception for secured creditors like maritime lienholders when a company is undergoing insolvency proceedings.[201] Australia also adopted the same position in their Corporations Act[202] and excluded claims of secured creditors from the effect of article 20(1) of the ML during insolvency. This has been given credence in some Australian case laws.[203] Thus, maritime lienholders who want to sue in such jurisdictions will be able to go after the ship.

The underlying cause of the friction between the ML and admiralty law during CBI of shipping companies as observed by Soars[204] is that, at the time the ML was being developed, admiralty law practitioners were not consulted.[205] In this regard, *Comité Maritime Internationale* recently considered the option of developing a separate protocol to deal with the issue but later abandoned it.[206] As such, the answer to the question whether Nigeria should make exception for claims of secured creditors like maritime lienholders would be approached from two perspectives.

The first is based on the nature of ships as captured in the English Court of Appeal's reasoning in *Re Aro*.[207] There, the court reasoned that "ships are owned and trade internationally, and unless a claimant can gain immediate security for a claim (i.e via arrest) he may never have the opportunity effectively to pursue it."[208] The nature of ships is that they are in a particular jurisdiction today and tomorrow they are gone.

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[201] Companies (Amendment Act) 2017 No 15 Tenth Schedule article 20(3)(a)
[202] Corporations Act 2001 (Cth) No 50 section 471C
[203] *Kim v Daebo Int'l Shipping Co* (2015) 232 FCR 275; *Hur v Samsun Logix Corporation* (2015) 238 FCR 483
[204] Julia Soars, 'Cross-Border Insolvency and Shipping – A practical guide' Revision of a paper delivered by Angus Stewart SC of New Chambers, Sydney and the writer to an Admiralty and Maritime seminar hosted by the Federal Court of Australia on 23 April 2015 and updated following delivery of a further paper by the writer to the MLAANZ NSW mini-conference on 17 February 2016 (*Comité Maritime Internationale*) <https://comitemaritime.org/wp-content/uploads/2018/05/2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf> accessed 25 April 2020 para 9 and 13
[205] ibid paragraphs 9 and 13
[206] CMI News Letter No 1 January 2018 (*Comité Maritime Internationale*) <https://comitemaritime.org/wp-content/uploads/2018/05/N%C2%B01-January-2018.pdf> accessed 25 April 2020 page 5
[207] (1980) 2 WLR 453
[208] ibid 260

Taking this into perspective, without such exception, maritime lienholders may be deprived of their security. Secondly, and closely related to the first is the public policy that has historically underlined treating maritime liens differently. As suggested by Justice Chong, if maritime law rules are ignored, the shipping industry is going to collapse.[209] For instance, if the security right of salvors are stayed because of insolvency, salvors may not feel encouraged to perform salvage operations anymore. Again, where a seafarer loses his life and his dependents' claim is stayed because of the debtor's insolvency, such may not be well received by seafarers.

This argument ought not to be construed as narrow minded. As aptly captured in *Forbes*, "shipping is globalization's lifeblood".[210] Indeed, the world relies on the shipping industry for economic survival. In order to sustain the industry, the continued security mechanisms afforded by maritime law ought to be made the subject of such exception if Nigeria decides to adopt the ML.

[209] Chong (n 5) para 30
[210] Barry Glassman, 'Shipping: Globalization's Lifeblood' (*Forbes,* 2 January 2013) <https://www.forbes.com/sites/advisor/2013/01/02/shipping-globalizations-lifeblood/#3a233427296e> accessed 30 April 2020

CHAPTER 5 - CONCLUSION

Although increase in international trade has prompted companies to expand beyond the frontiers of their place of incorporation, economic uncertainties inherent in business has led to bankruptcy of some companies. When a corporation like shipping company goes bankrupt, it has severe economic implications in several jurisdictions due to the location of its assets or creditors. Due to the difficulties encountered in administering assets of a debtor during CBI, the ML was enacted with the objectives of enhancing cooperation between the institutions and parties involved in CBI, promoting legal certainty in trade and investment, among others.

While conducting this research, the findings revealed that the status of foreign liquidators appointed by a foreign court to administer assets in Nigeria during CBI remains obscure. Also, there is at present no legislative basis on which Nigerian Court can cooperate with foreign courts during CBI. But, through the instrumentality of the ML, there is a structure for a foreign insolvency representative to access the court of a foreign jurisdiction, apply for recognition and available reliefs. Cooperation and coordination between courts of different jurisdictions are also assured, thus removing the above problems.

Despite the noble provisions of the ML, a consideration of the various jurisdictions that have adopted it reveals that the ML has not really achieved uniformity in maritime CBI cases. Beyond the lack of uniformity also lies the distinct body of maritime law which clashes with general insolvency laws during maritime CBI. Using comparative research methodology, three jurisdictions were analyzed in order to determine the impact of the ML on secured maritime creditors. The analysis revealed that the USA system offers a safe harbor for shipping companies in financial distress in that their assets in the USA are well protected during maritime CBI and that enforcement of maritime lien is stayed upon the recognition of the FMP. While Singapore seeks to stay proceedings on the debtor's assets during insolvency, it also made an exception for enforcement of security rights. Kenya on the other hand left the stay at the Court's discretion.

Due to the foregoing, effort was expended on the potential effects that adoption of the ML might have on existing rules in Nigerian maritime law and practice especially on the security rights of lienholders and mortgagees. When the analysis in the different jurisdictions was extrapolated to Nigeria, it seems that Singapore's approach would best

fit within the framework of the local insolvency regime being the CAMA with claims of secured creditors in mind. Also, that the MSA has by default excluded registered ship mortgage from the insolvency estate. Attempt was made to determine if there are alternative ways of achieving cross-border judicial assistance via legislative amendment. The attempt revealed that even with such amendment, there is still a need to define the scope of any judicial cross-border assistance to be rendered to a foreign liquidator and how courts should cooperate. Justification was also made on why claims of secured creditors like maritime lienholders should be exempted from the stay provisions. Firstly, due to the mobile nature of ships being the major assets of shipping companies. Secondly, due to the public policy underlying certain maritime claims.

Taking these findings into perspective especially the fact that this research focused on maritime CBI and claims of secured maritime creditors, Nigeria should adopt the ML for the following reasons:

Firstly, due to absence of substantive CBI regime. A robust CBI regime based on the ML would provide legal basis for cross-border judicial assistance between Nigerian Court and foreign courts during CBI while also setting out clear parameters regarding the assistance that may be rendered to a foreign liquidator. Thus, the uncertainty surrounding the status of a liquidator appointed by foreign court to administer assets in Nigeria during CBI would be a settled issued. Also, the knowledge gap existing presently in CBI practice in Nigeria would be filled.

Secondly, due to the peculiar nature of maritime CBI. Although the ML was drafted without considering its impact on claims of secured maritime creditors, adopting the ML in Nigeria would not necessarily affect their claims if maritime liens are exempted from the automatic stay of the ML. Modifying the effect of the stay provisions by making exception for security rights just like Singapore and Australia would preserve the age-long security mechanisms in the maritime industry. In Nigeria presently, ship mortgage is an exception by default if registered before the mortgagor's insolvency.

Thirdly, adoption of the ML would further attract credit lenders to invest in the shipping industry as they can invest with some degree of certainty in case of bankruptcy. Also, treatment of creditors whether foreign or local would be clearly spelt out. When foreign investors have the confidence that they will be treated equally as locals, it may serve as stimulus to invest in the industry.

Fourthly, despite the clash between the ML and admiralty law, some major maritime nations such as the USA, Singapore and Australia have CBI regimes based on the ML.

Bibliography

Model Law and Supplementary Publications

1997 Model Law on Cross-Border Insolvency of the United Nations Commission on Trade Law GA Res 52/158 UN GAOR 6th Comm 52nd Session Agenda Item 148 UN Doc A/RES/52/158 (30 January 1998)

1998 United Nations Commission on International Trade Law, Guide to Enactment of The UNCITRAL Model Law on Cross-Border Insolvency, UN Doc A/CN.9/442 (19 December 1997) as approved by GA Res A/RES/52/158 (1997) (30 January 1998) and amended by GA Res A/RES/68/107 (2013) (16 December 2013) [Original]

2011 *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (United Nations Publication 2013)

2013 *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (United Nations Publication 2013) [Revised]

International Convention

1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships Brussels 1952

Statutes

Australia Corporations Act (Australia) 2001 (Cth) No 50

Canada Canadian Shipping Act 2001 C26

Kenya Insolvency Act 2015 No 18 5th Schedule

Judicature Act 1967 Cap 8 Laws of Kenya

Nigeria Admiralty Jurisdiction Act Cap A5 Laws of the Federation of Nigeria 2004

Admiralty Jurisdiction Procedure Rules 2011

Bankruptcy and Insolvency Act 1979 No 16 Cap B2 Laws of the Federation of Nigeria 2004

Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria 2004

Companies Winding up Rules 2001 (Nigeria)

Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C23 Laws of the Federation of Nigeria 2004

Federal High Court Act Federal High Court Act 1973 (as amended) Laws of the Federation of Nigeria 2004

Foreign Judgement (Reciprocal Enforcement) Act Cap F35 LFN 2004

Merchant Shipping Act 2007 No 27

Reciprocal Enforcement of Judgments Ordinance 1958

Territorial Waters Act 1967 Cap T5 Laws of the Federation of Nigeria 2004

Bills

Bankruptcy and Insolvency (Repeal and Re-enactment) Bill 2016

Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2018

Singapore Companies (Amendment Act) 2017 No 15

High Court (Admiralty Jurisdiction Act) 1962 Cap 123

Reciprocal Enforcement of Foreign Judgments Act 2001

UK Insolvency Act 1986

USA Title 11 United States Code Bankruptcy Code Chapter 15

CASES

Australia

Hur v Samsun Logix Corporation (2015) 238 FCR 483

Kim v Daebo Int'l Shipping Co (2015) 232 FCR 275

Nigeria

Banque gevevoise e commerce et de credit v Compania maritime de isola spetsai limitida (1979) 1 NSC 68

C*hief Registrar High Court Lagos State v Vamos Navigation Limited* (1976)1 SC 40/42

Oyeneyin v Akinkugbe (2010) 4 NWLR part 1184 265

Mercantile Bank of Nigeria Ltd v Tucker & Ors, (The Bosnia) 1 NSC 428

National Bank of Nigeria v Okafor Lines Ltd (1907-1979) 1 NSC 84

West African Ventures v The Liquidators of Sea Truck Group Limited (unreported) FHC/L/CS/656/18

Singapore

Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party) [2014] 2 SLR 815

Lim Bok Lai v Selco (Singapore) Pte Ltd (1987) SLR 423

Re Taishoo Suk (2016) SGHC 195

UK

Harmer v Bell (Bold Buccleugh) (1861) Moore PC 267

Magor and St Mellons RDC v Newport Corp (1951) 2 All ER 839

Owners of Cargo Laden on Ship Monica Smith v Owners of Ship Formerly "Monica Smith" Now "Monica S" (The Monica S) (1967) 2 Lloyd's Report 11

Re Aro (1980) 2 WLR 453

Rubin & Anor v Eurofinance SA & Ors (2012) UKSC 27

Singularis Holdings Ltd v PricewaterhouseCoopers (2014) UKPC 36

The Two Ellens (1872) PC 161

USA *Evridiki Navigation, Inc. v. Sanko Steamship Co* 880 F Supp 2d 666 668 2012 AMC 1817 1818 (D Md 2012)

Re Chembulk New York 12-11007 (SMB) (Bankr SDNY 2012)

Re Daebo International Shipping Co 543 BR 47 2016 AMC 187 (Bankr SDNY 2015)

Re Hanjin Shipping C 2016 AMC 2113, 2114 (US Bankr DNJ 2016)

UN Publications

United Nations Conference on Trade and Development, *Review of Maritime Transport* 2019

Books

Athanassiou L, *Maritime Cross-Border Insolvency* (Informa Law from Routledge 2018)

Göretzlehner E, *Maritime Cross-Border Insolvency: An Analysis for Germany, England & Wales and the USA* (Springer 2019)

Hannan N, *Cross-Border Insolvency: The Enactment and Interpretation of the UNCITRAL Model Law* (Springer 2017)

Ilogu C, *Essays on Maritime Law and Practice* (Elcam Integrated Services Ltd 2006)

Sheppard A M, *Modern Maritime Law Vol 2: Managing Risks and Liabilities* (3rd edition, Informa Law from Routledge 2013)

Tetley W, *Maritime Liens and Claims* (2nd edition, Blais Inc 1998)

Wessels B, *International Insolvency Law Vol X* (3rd edition, Kluwer 2012)

Journal Articles

Ajonumah J and Pepple E E, 'Ship Mortgage in Nigeria: An analysis of Contemporary Issues' (2019) 18 South East Asia Journal of Contemporary Business, Economics and Law 114

Anderson K, 'The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience' (2000) 21 U Pa J Int'l Econ Law 679

Berends A J, 'The UNCITRAL Model Law on Cross-Border Insolvency: A Comprehensive Overview' (1998) 6 Tul J Int'l & Comp L 309

Bielawski J, 'Influence of Globalization on Multilateral Economy' (2000) 9 Pol Q Int'l Aff 31

Chan S K, 'Cross-Border Insolvency Issues Affecting Singapore' (2011) 23 SAcLJ 413

Chidi H E, 'Harmonization of the Laws on Bankruptcy and Corporate Insolvency in Nigeria: A Desideratum' (2018) 4 Port Harcourt Journal of Business Law 151

Davies M, 'Cross-Border Insolvency and Admiralty: A Middle Path of Reciprocal Comity' (2018) 66 Am J Comp L 101

de Waegh E W, 'Hanjin's Insolvency in the EU and the United States' (2019) 25 Journal of International Maritime Law 21

Deane F and Mason R, 'The UNCITRAL Model Law on Cross-Border Insolvency and The Rule of Law' (2016) 25 Int'l Insolvency Rev 138

Falzone III A J, '"Two Households, Both Alike in Dignity": The International Feud Between Admiralty and Bankruptcy' (2014) 39 Brooklyn Journal of International Law 1175

Fletcher I, '"L'enfer, C'est Les Autres": Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency' (2011) 46 Texas International Law Journal 489

Gaa T M, 'Harmonization of Bankruptcy Law and Practice: Is it Necessary? Is it Possible?' (1993) 27 The International Lawyer 881

Ghio E, 'Cross-Border Insolvency and Rescue Law Theory: Moving Away From The Traditional Debate on Universalism And Territorialism' (2018) 29 International Company and Commercial Law Review 713

Godwin A and Howse T and Ramsay I, 'The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity' (2017) 26 Int'l Insolvency Rev 5

Gold E, 'World shipping: A Global Industry in Transition' (2001) 15 Ocean YB 267

Harmon F G, 'Discharge and Waiver of Maritime Liens' (1972-1973) 47 Tul L Rev 786

Hathorn P, 'Cross-Border Insolvency in the Maritime Context: The United States' Universalism vs. Singapore's Territorialism' (2013) 38 Tulane Maritime Law Journal 239

Hebert P M, 'Origin and Nature of Maritime Liens' (1929-1930) 4 Tul L Rev 381

Li L, 'Maritime Liens and Mortgages in Bankruptcy: A Comparison of Recent Canadian, Chinese and US Law' (2010) 16 JIML 132

Masoud B S, 'Towards Adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border insolvency in Kenya' (2013) 22 Int'l Insolvency Rev 211

McCormack G, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32 Oxford Journal of Legal Studies 325

Morrison R, 'Avoiding Inherent Uncertainties in Cross-Border Insolvency: Is the UNCITRAL Model Law the Answer' (1999) 15 Queensland U Tech LJ 103

Moverach I, 'Cross-Border Insolvency of Enterprise Groups: The Choice of Law Challenge (2014) 9 Brooklyn Journal of Corporate Financial and Commercial Law 226

Myers T P, 'Hug up on Hanjin: Universalism and Bareboat Charter Hire Purchase Agreements Leave Maritime Lienholders Adrift' (2017) 42 Tul Mar LJ 196

Rajput A, 'Cross-Border Insolvency and Public International Law' (2018) 19 Romanian J Int'l L 7

Townsend J, 'International Co-Operation in Cross-Border Insolvency: HIH Insurance' (2008) 71 Mod L Rev 811

Tsumba K, 'Resolving Maritime Disputes in Nigeria' (2013) 1 NIALS Maritime Law Journal 166

Walters A, 'Modified Universalisms & the Role of Local Legal Culture in the Making of Cross-Border Insolvency Law' (2019) 93 Am Bankr LJ 47

Westbrook J L, 'A Global Solution to a Multinational Default' (2000) 98 Michigan Law Review 2276

Westbrook J L, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am Bankr LJ 457

Westbrook J L, 'Universalism and Choice of Law' (2005) 23 Penn St Int'l L Rev 625

Wong E Y C and Yeung J C K and Chen L, 'Modified Universalism and the Proposed Adoption of the UNCITRAL Model Law on Cross-Border Insolvency in Hong Kong – From Hanjin Shipping Bankruptcy Case' (2019) 50 Journal of Maritime Law & Commerce 21

Working Paper

Ji J Z, 'Cross-Border Rehabilitation: An Impediment to Ship Arrest in Singapore?' (2017) NUS Law Working Paper 003/2017

Newsletter

CMI News Letter No 1 January 2018 (*Comité Maritime Internationale*) <https://comitemaritime.org/wp-content/uploads/2018/05/N%C2%B01-January-2018.pdf> accessed 25 April 2020

Website Articles

'Ch 25 Shipping Law' (*Singapore Law Watch*) <www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-25-shipping-law> accessed 11 April 2020

'Reforming the Business Climate in Nigeria: Critical Changes Introduced by the Companies and Allied Matters Bill' (*Banwo & Ighodalo*, 29 January 2019)

<https://banwo-ighodalo.com/grey-matter/reforming-business-climate-nigeria-critical-changes-introduced-companies-allied-matters-bill-2018?> accessed 28 April 2020

Afun A and Ofili C, 'Recognition and Enforcement of Cross-Border Insolvency: Nigeria in Perspective' *BLP* (2019) <http://bloomfieldlaw.com/Publications/Recognition_and_Enforcement_of_Cross_Border_Insolvency.pdf> accessed 20 April 2020

Chidiebere Ejiofor and Adewale Ateke, 'Cross-Border Judicial Assistance under Nigerian Law' (*Templars*,14 November 2019) <www.templars-law.com/cross-border-judicial-assistance-under-nigerian-law/templars-thought-leadership-cross-border-judicial-assistance/> accessed 08 March 2020

Chong S, 'When worlds collide: The Interaction Between Insolvency and Maritime Law' Keynote address at the 2nd meeting of the judicial insolvency network New York 22 September 2018 <http://jin-global.org/content/jin/pdf/2018-sept-jin-keynote-address-new-york.pdf> 22 February 2020

DeNatale A P and Mechling C C, 'Shipping companies find a safe harbor in U.S. bankruptcy courts. (*NYLJ,* 03 March 2013) <https://2hljrm13wpep1y93sv1m25vn-wpengine.netdna-ssl.com/wp-content/uploads/2019/03/Pub1311.pdf>

Glassman B, 'Shipping: Globalization's Lifeblood' (*Forbes,* 2 January 2013) <https://www.forbes.com/sites/advisor/2013/01/02/shipping-globalizations-lifeblood/#3a233427296e> accessed 30 April 2020

Idigbe A, 'Nigeria: Overview of Insolvency and Restructuring in Nigeria' (*Mondaq*, 5 June 2019) <www.mondaq.com/Nigeria/x/812246/Insolvency+Bankruptcy/Overview+Of+Insolvency+And+Restructuring+In+Nigeria> accessed 08 March 2020

Orewale O and Momodu P and Atewologun O and Okoye O, 'Insolvency Law Reforms in Nigeria – Where are we Going' (*Aelex*, 2018) <www.aelex.com/wp-content/uploads/2018/12/INSOL-WORLD-4TH-QUARTER-2018-Aelex-Contribution.pdf> accessed 08 March 2020

Rares S, 'Ship Arrests, Maritime Liens and Cross-Border Insolvency' Address at the 6th Annual World Congress of Ocean 2017 (*Federal Court Australia*, 3 November 2017) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171103> accessed 22 February 2020

Seng L K, 'Cross-Border Insolvency Issues' (*Law Gazette*) <https://v1.lawgazette.com.sg/2009-4/feature2.htm> accessed 06 April 2020

Soars J, 'Cross-Border Insolvency and Shipping – A practical guide' Revision of a paper delivered by Angus Stewart SC of New Chambers, Sydney and the writer to an Admiralty and Maritime seminar hosted by the Federal Court of Australia on 23 April 2015 and updated following delivery of a further paper by the writer to the MLAANZ NSW mini-conference on 17 February 2016 (*Comite Maritime Internationale*) <https://comitemaritime.org/wp-content/uploads/2018/05/2016-04-11-CBI-and-Shipping-paper-Julie-Soars-.pdf> accessed 25 April 2020

'Supplementary Response to Feedback Received on Companies (Amendment) Act 2017 to Strengthen Singapore as an International Centre for Debt Restructuring' (*Ministry of Law Singapore*, 21 October 2016) <www.mlaw.gov.sg/news/public-consultations/supplementary-response-to-feedback-received-on-companies--amendm/> accessed 23 May 2020

Uwa E, 'Restructuring and Insolvency in Nigeria' (*WWL*, 02 August 2018) <https://whoswholegal.com/analysis/restructuring--insolvency-in-nigeria> accessed 24 April 2020