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# On the Rocks: Current Issues in Shipping Industry Restructurings

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# Presenters



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# US Bankruptcy Law: Presentation Overview

- The US Bankruptcy Code & Chapter 11
  - Debtor Eligibility, 11 U.S.C. § 109
  - Automatic Stay, *id.* § 362
  - Executory Contracts and Unexpired Leases, *id.* § 365
- Chapter 15
  - Policy Objectives, *id.* § 1501(a)
  - Distinguish from Chapter 11

# Chapter 11 of the US Bankruptcy Code

- Chapter 11 Policy Objectives
  - Promote fairness between all relevant parties
  - Provide equality of distribution
  - Preserve going-concern value of business
  - “[C]orporate reorganization must strike a balance between the need of a corporate debtor in financial hardship to be made economically sound and the desire to preserve creditors’ and stockholders’ existing legal rights to the greatest extent possible.” 7 *Collier on Bankruptcy*, 1100.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)

# The US Bankruptcy Code

- Debtor Eligibility, § 109

- A debtor must either

- Reside or have a domicile in the US;
    - Have a place of business in the US; **or**
    - Have property located in the US

- *Marco Polo*: \$250,000.00 retainer held by US bankruptcy counsel and other negligible US property

- *In re Marco Polo Seatrade B.V.*, Case No. 11-13634 (Bankr. S.D.N.Y. Oct. 21, 2011)

# The US Bankruptcy Code

- Automatic Stay, § 362
  - Broad statutory injunction that protects the debtor and its property from any
    - Attempt to collect a prepetition debt
    - Continuing lawsuit to collect a debt
    - Repossession of the debtor's assets
    - Attempt to exercise control over property of the estate
    - Attempt to perfect or enforce a security interest
    - Anything else that would allow a creditor to improve its own position against the debtor compared to other creditors

# Chapter 11 of the US Bankruptcy Code

- Exception to the Automatic Stay
  - Section 1110 of the US Bankruptcy Code
    - Allows secured creditors and lessors to exercise rights against certain “vessels,” unless debtor agrees to cure defaults and continue performance; **but**
      - Applicable only in Chapter 11 proceedings
      - Essentially limited to domestically owned and documented US vessels
      - Narrowly construed



# The US Bankruptcy Code

- Executory Contracts and Unexpired Leases, § 365
  - Debtor may assume or reject according to its business judgment
  - Counterparties may not terminate or modify these contracts or leases due to insolvency of debtor
  - Counterparties generally *must* continue to perform until debtor assumes or rejects
  - Before assumption, debtor must cure any default, compensate for loss resulting from default, and provide adequate assurance of future performance

# The US Bankruptcy Code

- Relief from the Automatic Stay, § 362(d)
  - Creditors may move to “lift” the automatic stay
    - For “cause,” including lack of adequate protection
    - With respect to stay of act against debtor’s property if
      - Debtor has no equity in the property
      - The property is not necessary to an effective reorganization
- Convert or Dismiss, § 1112(b)
  - Creditors may move to convert or dismiss, whichever is in the best interests of creditors and the estate, for “cause” unless the Bankruptcy Court determines that the appointment of a trustee or examiner is in the best interests of creditors and the estate

# Chapter 15 of the US Bankruptcy Code

- Policy Objectives, § 1501(a)
  - To facilitate cooperation between US authorities and foreign authorities
  - To provide greater legal certainty for trade and investment;
  - To facilitate the fair and efficient administration of cross-border insolvencies
  - To protect and maximize the value of the foreign debtor's assets
  - To facilitate the rescue of financially troubled businesses, and to protect and preserve employment

# Chapter 15 of the US Bankruptcy Code

- Distinguish from Chapter 11
  - Stay of Creditor Action
    - **NO AUTOMATIC STAY** upon filing of Chapter 15 petition
    - Stay generally imposed upon “recognition” of debtor’s foreign proceeding
    - **However**, debtor may seek immediate stay of creditor action via temporary injunction or other provisional relief
      - *See, e.g., In re Chembulk N.Y. Pte. Ltd.*, Case No. 12-11007 (Bankr. S.D.N.Y.)
    - Chapter 15 stay has **limited extraterritorial reach**—stay of action against debtor’s property within the territorial jurisdiction of the US
      - *See* 11 U.S.C. §§ 1502(8), 1520; *see also In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010)

# English Cross-Border Insolvency Aspects

- Where have Chapter 11 proceedings in US but valuable assets in England, can lender circumvent Chapter 11 and enforce in England?
  - Consider extra-territorial reach of US Bankruptcy Court
  - Debtor may apply for recognition and stay under the Cross-Border Insolvency Regulations 2006 (“CBIR”)
  - Protection for insolvency proceedings taking place where shipping company in Chapter 11 has
    - Its “centre of main interests” (“COMI”); or
    - An “establishment”
- Tenuous connection with US may rule out recognition

# English Cross-Border Insolvency Aspects

- What is the effect of a stay under CBIR?
  - Territorial
  - Usual stay only on legal process (e.g. court proceedings, arbitration), execution of judgments and disposals of property by the debtor **not** enforcement of security without court involvement
  - **But** common for debtors to ask for wider “administration-style” moratorium
  - *Samsun Logix* case
  - Wide stay granted to Korean charter hire company
  - English court would not lift stay to allow Danish ship owner to enforce lien while application Korean court to set aside lien pending

# English Cross-Border Insolvency Aspects

- When can a foreign company go into administration?
  - Jurisdiction of English court limited to English companies, companies with their COMI in England, EEA companies, EC companies with an establishment in England or under a letter of request from the courts of insolvency certain countries (not US, but offshore and former colonies)

# English Cross-Border Insolvency Aspects

- When can a foreign shipping company restructure its debts using an English scheme or arrangement?
  - Wide jurisdiction – “sufficient connection” test
  - *Rodenstock, Primacom* – English law finance documents plus jurisdiction of English courts may suffice, even if no English creditors submission
  - Recognition elsewhere?



## Local shelters - how effective are they in weathering the storm?

- Reorganizations of shipping companies in Asia may occur under the local bankruptcy regime
- Limits to restructurings under local bankruptcy laws - no recognition of discharge of liabilities in UK
- Discharge under foreign rehabilitation processes do not constitute effective discharge of English law governed liabilities - *Global Distressed Alpha Fund v PT Bakrie Investindo*

# Global Distressed Alpha Fund v PT Bakrie Investindo

- Bakrie was the guarantor of a series of notes, which were not paid on maturity.
- Its liabilities had been compromised under a debt reorganization composition plan under Indonesian law, duly approved by Bakrie's creditors and ratified by the Indonesian Court.
- The Fund acquired some of the notes and sued Bakrie in the UK Courts for recovery.

The UK Courts held that as the guarantee was governed by English law, only a discharge under English law was sufficient to discharge Bakrie's liabilities.

Discharge under Indonesian law by the composition plan was NOT sufficient.

## PT Arpeni Pratama Ocean Line Tbk

- Arpeni, an Indonesian shipping company, also had a Debt Reorganization Composition plan ratified by Indonesia.
- Unlike the UK Courts in Bakrie, a US Bankruptcy Court recognized Arpeni's plan, which Arpeni argued was necessary to bind US holders of its notes. The US has long recognised the principle of modified universalism.

# Observations

- Bakrie does not accord with the principle of modified universalism.
- Creates inconsistencies in the law - the debtor can apply for recognition of the local insolvency and reorganization proceedings under English law but discharge not recognized?

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# Questions

If you have any questions related to today's presentation please email them to the speakers or to:

[mmoulton@mayerbrown.com](mailto:mmoulton@mayerbrown.com)

All questions will be promptly answered.

# Presenter Profiles

# Presenter Profiles



**Bill W.P. Amos**  
Consultant – Hong Kong  
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## **Bill W.P. Amos**

Bill Amos is a consultant of Mayer Brown JSM. Bill focuses on all aspects of commercial dispute resolution, including international trade, banking, shipping, aviation and insurance. He is experienced in shareholder disputes, as well as company and trust litigation. He conducts Hong Kong, London, Singapore and China-based arbitrations.

Bill also advises banks, insurers and trading companies on matters concerning asset finance, trade finance and international sale of goods. He is ranked as a leading lawyer for Dispute Resolution in Chambers Asia 2012.

## **Admitted**

Hong Kong, 1995

England & Wales, 1991



# Presenter Profiles



**Rick Hyman**  
**Partner – New York**  
**+1 212 506 2664**

## **Rick Hyman**

Rick Hyman focuses his practice on bankruptcies and reorganizations. He primarily represents institutional creditors and lending groups in connection with their exposure in large and middle-market credit facilities. Rick has represented clients such as Bank of America, Bank of New York, CIBC and other large banks and finance companies in many complex Chapter 11 reorganizations, out-of-court restructurings and recapitalizations, and debtor-in-possession and exit financings. Rick has extensive experience representing creditors in complex Chapter 11 bankruptcies, in matters such as the recent Chapter 11 cases of Lehman Brothers, Inc. and its affiliated debtors, Parking Company of America, Sentinel Management Group, Inc., Sea Containers Ltd. and Custom Foods, Inc.

Rick also has experience representing debtors and recently represented True Temper in its successful pre-packaged bankruptcy case. He leads Mayer Brown’s distressed debt trading practice and often represents secondary market purchasers in connection with legal and documentary due diligence. He frequently represents stalking-horse and other bidders in connection with the acquisition of distressed assets, both in and out of bankruptcy proceedings. Rick also has experience representing various debtors-in-possession and Chapter 11 trustees.

## **Admitted**

US District Court for the Northern District of New York, 1996

US District Court for the Southern District of New York, 1993

New York, 1993

# Presenter Profiles



**John Marsden**  
Partner – Hong Kong  
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## **John Matthew Marsden**

John Marsden is a partner of Mayer Brown JSM. He represents clients in a wide range of matters in the commercial and corporate context. His assignments have included financing transactions, non-performing loan disposals and corporate restructurings.

John has provided advice in such large-scale restructurings or insolvencies as Asia Pulp and Paper, the Benpres Group, Forefront International Limited and the Moulin Group, all of which are multi-jurisdictional transactions. John was placed into the Shanghai office for three years during which time he was involved with a number of substantial property acquisition and financing transactions. He is currently involved in the Vinashin Shipping restructuring and as lender's counsel in the Sanko restructuring.

John has been named a Leading Restructuring and Insolvency Lawyer by Chambers Asia (2010) and IFLR1000 (2011) and a Leading Insolvency and Restructuring Lawyer by Expert Guides - Guide to the World's Leading Insolvency and Restructuring Lawyers 2007. Chambers Asia Pacific 2011 described John as "one of the top restructuring lawyers in Hong Kong" and "looks at complex problems and finds easy solutions". He is also "praised by his clients for his commercial advice: 'he knows when to cut a deal'" (Asia Pacific Legal 500 2002/03).

## **Admitted**

Hong Kong, 2001

Australia (South Australia), 1987

# Presenter Profiles



**Devi Shah**  
Partner – London  
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## **Devi Shah**

Devi Shah is joint head of Mayer Brown's Restructuring, Banking and Insolvency group in London. She focuses on all aspects of restructuring and insolvency and has a particular interest in international and cross-border insolvency and restructuring matters, as well as pensions aspects of restructurings.

Devi has extensive experience in insurance insolvency and restructuring matters, including advising on provisional liquidation, schemes of arrangement (including international recognition and enforcement issues), proof issues and set-off, including set-off across jurisdictions. She also has experience in handling financial disputes, with particular experience in acting on guarantee claims and on restitution issues, as well as advising on fraud and other breach of duty allegations against professional trustees.

Ranked as a key individual, Devi is highly popular with clients, who say she "is really approachable and really knows her stuff" notes Chambers UK 2012. She has a good standing in the market and "engenders confidence and trust" (Legal 500, 2010). She has a flexible approach and provides "exceptional client service" (Chambers UK 2010). She was recognised as a rising star in the insurance insolvency area, "she's warm, friendly and knows her stuff." (Chambers & Partners UK Directory 2009 ).

## **Admitted**

England and Wales, 1995

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