# Omega Navigation Provides Further Test of a Foreign Debtor's Access to the Protection of the US Bankruptcy Courts

In the course of the next few weeks, Omega Navigation Enterprises, Inc. and its affiliates (collectively, "**Omega**"), an international shipping enterprise, will find out if motions by certain of their lenders to, among other things, dismiss Omega's chapter 11 bankruptcy proceedings have been granted by the U.S. Bankruptcy Court for the Southern District of Texas.[1] If not, then Omega may be permitted to continue its attempt to reorganize its business under chapter 11 of the Bankruptcy Code.

The Omega bankruptcy proceeding is another high-profile example of the relative ease with which foreign shipping companies may file for bankruptcy protection in the U.S. and thereafter remain under the protection of a U.S. Bankruptcy Court despite minimal U.S. connections and vigorous creditor opposition.

## Background

Omega, organized in the Marshall Islands and headquartered in Greece, focuses on the marine transportation of refined petroleum products. Omega generates its revenues by employing its vessels on time charter and in the spot market. Omega's most valuable assets are eight vessels, five of which operate under the flag of the Marshall Islands, and three of which operate under the flag of Liberia. Omega's employees, other than its CFO, are located outside of the U.S. and its principal loan documents are governed by English law and designate the courts of England as the exclusive forum to resolve disputes.

Citing a down market and an extended period of failed negotiations with its senior lenders, Omega commenced voluntary cases under chapter 11 on July 8, 2011. HSH Nordbank AG, in its capacity as senior facilities agent on behalf of the senior lenders (the "**Senior Lenders**") has argued that the company does not belong in a chapter 11 reorganization given, among other things, its minimal contacts with the U.S. Other junior lenders[2] have sought to dismiss the bankruptcy case as well.

## Eligibility for Bankruptcy Protection

Section 109(a) of the Bankruptcy Code provides that a corporation may be a debtor in bankruptcy if it has, among other things, "a place of business[] or property in the United States."[3] The bankruptcy proceeding of Marco Polo Seatrade B.V. (together with its affiliates in bankruptcy, "**Marco Polo**") in the U.S. Bankruptcy Court for the Southern District of New York demonstrates that a negligible property interest in the United States is sufficient for bankruptcy eligibility.[4]

Marco Polo, similar to Omega, involves the bankruptcy of an international shipping enterprise. Marco Polo has hundreds of millions of dollars of assets and liabilities, is headquartered in The Netherlands, and operates its vessels, registered in Liberia, primarily in foreign waters. In response to an eligibility challenge made by its lenders, Marco Polo pointed to, among other things, an economic interest in a New York pool account and the unearned portion of a $250,000.00 retainer held by Marco Polo's bankruptcy counsel in a separate New York account. Marco Polo argued that such property is sufficient for debtor eligibility under § 109(a). The Bankruptcy Court agreed, finding that the retainer was not paid to manufacture eligibility and that the retainer and pool account interest satisfied the relatively low bar of § 109(a).[5]

1 The bankruptcy court jointly administers the bankruptcy proceedings of the following debtors under the caption of *In re Baytown Navigation Inc.*, Case No. 11-35926 (Bankr. S.D. Tex.): Omega Navigation Enterprises, Inc.; Galveston Navigation, Inc.; Beaumont Navigation Inc.; Carrollton Navigation Inc.; Decatur Navigation Inc.; Elgin Navigation Inc.; Fulton Navigation Inc.; Orange Navigation Inc.; Baytown Navigation Inc.; and Omega Navigation (USA) LLC.

2 BTMU Capital Corporation and NIBC Bank N.V., as Junior Facilities Lenders.

3 11 U.S.C. § 109(a).

4 In re Marco Polo Seatrade B.V., Case No. 11-13634 (Bankr. S.D.N.Y.) (Peck, J.).

5 Transcript of Record at 487–91, In re Marco Polo Seatrade B.V., Case No. 11-13634 (Bankr. S.D.N.Y. Oct. 21, 2011), ECF No. 222.

## Dismissal, Conversion, or Relief from the Automatic Stay

Even if a debtor is otherwise "eligible," the Bankruptcy Code recognizes that not all debtors are worthy of chapter 11 protection, and, therefore, provides creditors with the opportunity to move for the conversion of a chapter 11 reorganization to a chapter 7 liquidation or for the dismissal of the bankruptcy case in its entirety.

Seemingly acknowledging the result in Marco Polo, the Senior Lenders in Omega chose not to raise the issue of the debtors' eligibility to commence the proceedings in the U.S.[6] Instead, they moved for conversion or, alternatively, dismissal of the case under § 1112(b) of the Bankruptcy Code. Section 1112(b) provides that a Bankruptcy Court "shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of creditors and the estate, if the movant establishes cause."[7] The Senior Lenders argued that "cause" exists for conversion or dismissal, in part, because Omega did not file its case in good faith, as demonstrated by Omega's minimal contacts with the U.S., and because the bankruptcy estates are suffering substantial and continuing loss in a hopeless reorganization proceeding.

As an alternative to conversion or dismissal, the Senior Lenders moved for relief from the automatic stay under § 362(d)(1) and (d)(2) of the Bankruptcy Code to allow them to exercise remedies with respect to their collateral. Subsection (d)(1) provides relief from the automatic stay upon a showing of "cause."[8] Subsection (d)(2) provides for relief from the automatic stay with respect to acts against property of the bankruptcy estate upon a showing that "the debtor does not have any equity in such property" and "such property is not necessary to an effective reorganization."[9] In support of each, the Senior Lenders raised similar arguments to those advanced in support in their motion to dismiss or convert.

Omega argued that it filed its petition with the Bankruptcy Court in good faith. Omega further argued that the bankruptcy filing was necessary to preserve its going concern value and that the liquidation of its fleet, or the lifting of the automatic stay to allow the lenders to exercise their remedies, surely would wipe out any such value.

Following a five-day trial ending on December 2nd, the parties were asked to submit proposed findings of fact and conclusions of law. Omega, the Senior Lenders and the Junior Lenders have so filed. The decision of the Bankruptcy Court is expected no later than December 19th.

## Conclusion

It is well known that shipping companies are facing a period of great financial distress, as evidenced by the bankruptcy filings of Marco Polo, Omega, and, more recently, New York-based General Maritime Corporation.[10] Marco Polo and Omega demonstrate the relative ease with which *foreign* shipping companies are able to commence chapter 11 cases in the United States. Foreign shipping companies appear to understand the benefits and opportunities of a chapter 11 bankruptcy, including, of course, the global scope of the automatic stay. Creditors worldwide should share that understanding, contemplate the risks of a chapter 11 bankruptcy, and prepare accordingly by proactively evaluating all available options. Pre-emptive action may be possible but, in any case, creditors must be aware of the possible complications which can arise and the steps which may be taken to protect its interests, should the debtor commence a chapter 11 bankruptcy proceeding.

Mayer Brown has established a multi-jurisdictional task force to help our clients manage their exposure to these situations. With a deep bench of expertise in the United States, Europe and Asia, our shipping and insolvency teams offer a wealth of experience in dealing with distress situations in the international maritime sector.

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6 Omega has pointed to certain U.S. accounts receivable owed by Houston companies, its interest in the unearned portion of a retainer held by its bankruptcy counsel, and the operation of its CFO from leased office space in New Jersey to evidence its eligibility to file in the U.S.

7 11 U.S.C. § 1112(b)(1).

8 Id. § 362(d)(1).

9 Id. § 362(d)(2).

10 In re General Maritime Corporation, Case No. 11-15285 (Bankr. S.D.N.Y.) (Glenn, J.).

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